

TaxHelpline Case No. 195 of 2013

[INLAND REVENUE APPELLATE TRIBUNAL]

C.A. No.603/LB of 2009, decided on 24th March, 2010. Date of hearing: 10th March. 2010

Before Mher Muhammad Ary Sargana, Judicial Member and Khalid Naseem, Technical Member

Malik Muhammad Arshad for Appellant. Muhammad Sarwar, SIO for Respondent

Kh. MUHAMMAD WASEEM

Vs

SUPERINTENDENT, INTELLIGENCE AND INVESTIGATION and 2 others

JUDGMENT

KHALID NASEEM (TECHNICAL MEMBER).---This appeal has been directed against Order-in-Appeals Nos.156-158 of 2009 dated 20-5-2009, through which the learned Collector (Appeals), had rejected the Order-in-Original No.10 of 2008, dated 30-8-2008.

2. The facts, giving rise to this appeal, are that the staff of Directorate of Intelligence and Investigation, FBR, Lahore intercepted a Mazda Mini Truck, which was found loaded with foreign origin printed aluminum foil film. On demand the driver of the truck could not produce any documentary evidence regarding lawful possession and transportation of the same. He however, disclosed that he loaded the said consignment from godown of Messrs Khawaja Enterprises/Gohar Traders, Shadbagh, Lahore. The staff of Intelligence visited the godown. After obtaining search warrant, the lock of the godown was broken and the goods were examined, which led to the recovery of foreign origin printed/plain plastic/polyester

foil films reels of different width, size assorted varieties colors and brands made of polyethylene/polypropylene and others including job lots and factory rejects. Representative samples or the consignment were also sent for lab which reported that the consignments were mostly plastic/polyester/polypropylene polyethylene films. As a result of adjudication proceedings the seized goods were ordered outright confiscation. Besides a penalty of Rs.25,000 was also imposed on the clearing agent. Aggrieved by the said order, the appellant filed an appeal before the learned Collector (Appeals), who vide impugned Order-in-Appeals Nos.156-158/2009 dated 20-5-2009 dismissed the appeal and upheld the order in original. Hence, this appeal.

Arguments were heard. The learned counsel for the appellant contended:--

(a) That the learned adjudicating officer, while deciding the case, has travelled beyond the scope of the show cause notice and the goods were confiscated on the charges which were not mentioned/confronted in the show caused notice. This act of the learned adjudicating officer was illegal, void and without lawful authority as held by the Hon'ble Supreme Court of Pakistan (1987 SCMR 18).

(b) That once the goods have been examined, assessed and cleared by the competent authority, the seizing agency had a authority under the law to seize the goods as held by the Hon'ble High Court Sindh at Karachi in the case reported as 2004 PTD 2994 and 2005 PTD 23. The department assailed these two judgments in the Hon'ble Supreme Court of Pakistan by filing Civil Petitions Nos. 2550 and 2069 of 2004 and only remarks against the seizing officer in the said judgments were expunged by the Hon'ble Supreme Court of Pakistan meaning thereby that the view taken by the Hon'ble High Court Sindh at Karachi was upheld.

(c) That the similar consignments of the same importer were seized on the charges by the authorities at Multan Dry Port and finally on the report of the committee constituted by the learned Collector

(Appeals), the consignment was found plastic waste and scrap and was released by the learned Collector (Appeals) vide Order-in-Appeals Nos.760-761/2008 dated 21-7-2008. So, the order of the learned Collector (Appeals) is also applicable on this case.

(d) That in the show cause notice it was charged that the appellant by mis-declaring, the description of the goods got the consignment cleared and violated the provisions of section 32A of the Customs Act, 1969. The staff of the Customs Intelligence had no authority to seize the goods for violation of section 32 or the case may be S.32A of the Customs Act, 1969. The Intelligence Officers have been given powers to act as a Customs Officer vide S.R.O. 486(I)/2007 dated 9-6-2007 wherein no powers under section 32 or 32A of the Customs Act, 1969 have been given to the Intelligence Officer.

(c) That in the show cause notice, it has been alleged that job lot/stock lot goods have been imported while in the decision the issue of importability of plastic and waste scrap has been considered and it was held that it is only importable by the industrial consumers in terms of S.No.48 of the Import Policy Order 2007-2008 whereas there was no such charge in the show cause notice.

4. The respondent defended the impugned orders and submitted written reply as under:--

(i) It may be submitted that it is cordial principle of law as held by the superior courts of Pakistan that question of law and fact which needs no further investigation can be raised at any stage during the proceedings. Since in the show cause notice the appellant had already been charged that the goods were not importable as such mention of the fact that the goods were not importable as per Appendix-B of the Import Policy Order neither created any new ground nor any cause of action which needed further investigation as such it did not render the show cause notice as invalid. Attention in this behalf is invited to commentary Notes to section 100 of the Civil Procedure Code by Mr. Aamer Raza.

(ii) That as per description of the goods as recorded in recovery

memo. the goods were in rolls, different sizes, different lengths and widths as such it did not qualify as waste and scrap which as per H.S. Code 3915 are in torn and worn condition as such benefit under S.No.47 of the Import Policy Order is not admissible. Even otherwise scrap is importable by industrial sectors only and not by commercial importers as per S.No.48 of the Import Policy Order.

(iii) That Hon'ble Sindh High Court's judgment wherein it was held that the Directorate of Intelligence and Investigation have no powers to seize goods already examined and assessed is no longer in field in view of the decision of the Hon'ble Supreme Court of Pakistan in Civil Petitions Nos.2069 and 2550 of 2004, wherein all remarks against the Directorate were expunged.

(iv) The provisions of section 32 of the Customs Act, 1969 were invoked in order to highlight the fact that the goods, which otherwise serviceable were got cleared by declaring them as scrap. Such goods cleared through mis-declaration under section 32 of the Customs Act, 1969 are liable to confiscation under section 156(1)14 ibid. The goods liable to confiscation can be seized by an officer of Customs Intelligence under section 168 of the Customs Act, 1969 which powers are available to the Directorate in terms of S.R.O. 486(I)/2007 dated 9-6-2007.

5. We have heard both the parties and perused the record carefully. The basic issue of importability, as per the detecting agency, is that the subject goods fall under Serial No.48 of Appendix-B of the Import Policy Order, 2007-2008, whereas the learned counsel for the appellant stated that these are importable under Sr. No.47, except Polypropylene. He further stated that only Polypropylene is not importable and for others all requirements laid down in the import Policy Order have been complied with. The items in the test report at S. Nos.2(b), 3(b) and 4(a) of the test report have been tested to be of Polypropylene, hence not importable, whereas the rest of the items from S.Nos.1 to 7 of the test report are importable, since they do not contain Polypropylene, except at S.Nos.6(b) and (d), which as per chemical test report, is plain paper of bleached wood pulp on back side coated with fine coating of plastic based

hotmelt adhesive and on the top side it is laminated with a fine layer of printed BOPP, therefore, the Polypropylene is a minor constituent, hence cannot be termed as fully made up of Polypropylene and is found importable. Item at S.No.7 is importable since it has been imported in prime quality and cleared through G.D. No. XE 161603, therefore, it is found that the only items not importable are at S. Nos.2(b), 3(b) and 4(a) of the test report, while others are found importable.

6. The learned counsel for the appellant further stated that the seizure of the goods, which are liable to confiscation, can be made under section 168 of the Customs Act, 1969 but for that the seizing agency should have powers of the charging clause which most appropriately is section 32 of the Customs Act, 1969 for which the Intelligence Department has no powers. The representative of the department stated that they have powers under section 168 of the Customs Act and by virtue of that they can invoke section 32 of the Act *ibid*. The goods, as discussed above, have been found to be mostly importable except in 3 items i.e. 2(b), 3(b) and 4(a) of the test report and the fact that the powers under section 32 of the Act have not been vested with the Intelligence Department and section 168 of the Act only authorizes seizure of the goods which are liable to confiscation and for this some charging clause which is section 32 of the Act has to be invoked, but unfortunately they do not enjoy the powers of this section, therefore, the seizure etc., is found to be illegal and without jurisdiction. Resultantly, the appeal is accepted and the impugned order-in-appeal as well as order-in-original is set aside and the confiscated goods are ordered to be returned to the owner.

Appeal accepted

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