

2016 P T D 2866**[Sindh High Court]****Before Irfan Saadat Khan and Zafar Ahmed Rajput, JJ****Messrs SHOGAN INTERNATIONAL (PVT.) LTD.****Versus****CENTRAL BOARD OF REVENUE through Chairman and 3 others**

C.P. No.D-2368 of 1993, decided on 13th April, 2016.

Customs Act (IV of 1969)---

---S. 25(5)(b)---Method of assessment---Notes/recommendations---Guidelines---Petitioner was exporter of goods to foreign countries and its grievance was about calculation of export value assessed by authorities on the basis of notes and recommendations instead of under S. 25(5)(b) of Customs Act, 1969---Validity---Provisions of law and not notes or recommendations, if any should be adhered to---Such notes or recommendations could only be considered as guidelines, where no proper method of valuation/assessment was available before customs officials---When basis of valuation or assessment was provided, such provisions of law had to be complied with in letter and spirit---Authorities were swayed away U.O. Note and they ignored provisions of S. 25 of Customs Act, 1969 while making valuation/assessment which could not be done---Customs authorities had to make assessment/ valuation on the basis of provisions of S. 25 of Customs Act, 1969, which was missing---High Court directed customs authorities to make a fresh assessment/valuation of exported goods as per provisions of S.25 of Customs Act, 1969 as the same was prevalent at the time of assessment/valuation and the same should be based on cogent reasons after giving proper opportunity of hearing to petitioner---Constitutional petition was allowed in circumstances.

Phassco Harware Co. v. The Government of Pakistan and 3 others PLD 1989 Kar. 621; Messrs Abdul Aziz Ayoob v. Assistant Collector of Customs and 3 others PLD 1990 Kar. 378; Collector of Customs (Valuation) and another v. Karachi Bulk Storage and Terminal Ltd. 2007 SCMR 1357; Khalid Mehmood v. Collector of Customs, Customs House, Lahore 1999 SCMR 1881; Securities and Exchange Commission of Pakistan v. Mian Nisar Elahi and others 2009 SCMR 1392; Mst. Kaniz Fatima through Legal Heirs v. Muhammad Salim and 27 others 2001 SCMR 1493; Messrs Al Amna International through Proprietor and others v. Federation of Pakistan through Secretary Chairman, Federal Board of Revenue and others 2014 PTD 370; Messrs Associated Industries Ltd. v. Federation of Pakistan and 2 others 2014 PTCL CL. 455; Rehan Umar v. Collector of Customs Karachi and others 2006 PTD 909 and Muhammad Amin Muhammad Bashir Ltd. v. Government of Pakistan and others 2015 SCMR 630 ref.

Imad-ul-Hassan for Petitioners.

Ghulam Haider Shaikh and Asim Mansoor Khan, Deputy Attorney General for Pakistan (DAG) for Respondents.

Dates of hearing: 19th, 26th February, 4th and 11th March, 2016.

JUDGMENT

IRFAN SAADAT KHAN, J.---The instant petition was admitted for regular hearing on 20.03.1993 for considering the following question of law:--

"Whether the action of the respondents in demanding export duty on "molasses" inclusive of the amount of export duty in the normal prices as worked out under section 25(5)(b) of the Customs Act, 1969, is in violation of law, illegal and without jurisdiction and the petitioners are not liable to pay the export duty on FOB value of the goods inclusive of export duty leviable".

2. Briefly stated the facts of the case are that the petitioners are a Private Limited Company carrying on the business as an exporter of Pakistani goods to the foreign purchasers. During the period under consideration the petitioners opened a Letter of Credit with their bank for exporting "molasses" to U.K. and other European countries. In the shipping bills the petitioners declared the value of the goods at US \$ 44 per metric ton, however, the respondents through a U.O. Note bearing No.E/72/87 dated 11.03.1989 assessed the export value at US \$ 50 per metric ton and thereupon charged export duty on the said value. It is the claim of the petitioners that the respondents are not entitled under the law to levy export duty on the value of the goods exported FOB (Free on Board) as according to the petitioners the said calculation is not based on proper interpretation of section 25(5)(b) of the Customs Act, 1969, ("the Act") which was challenged in the instant petition.

3. Mr. Imad-ul-Hassan Advocate has appeared on behalf of the petitioners and submitted that the respondents were not justified, while assessing the export value of the goods, for the purposes of export duty, on FOB goods to add export duty in the value of the goods, which is in violation of section 25(5)(b) of the Act. He submits that the said provisions of the law provides a mechanism for determining the price of the export goods which clearly mentions that for export purposes the value of the goods would be normal price including the export duty chargeable. As per the learned counsel the law requires exporter to include export duty chargeable in respect of goods shipped FOB who would then be entitled to claim repatriation of the export duty paid on those goods from the foreign buyer. According to the learned counsel sub-clause (b) of subsection (5) of section 25 of the Act clearly provides that export duty is to be included in the normal price of the goods and thereafter those goods are to be exported. He has submitted that firstly the respondents erred in misinterpreting the provisions of section 25(5)(b) of the Act by devising a method of calculation of the value of goods by adding export duty in the normal price and thereafter again imposing export duty on the said value, which amounts to tax on tax or double taxation. He further submits that the respondents have made the assessment on the basis of a U.O Note at US \$ 50 per metric ton by totally ignoring the provision of section 25(5)(b) of the Act. The learned counsel has further submitted that for the purposes of calculating the customs duty it is always the actual value of the goods which is to be kept into mind and not the value inclusive of export duty for the purposes of charging the export duty. He has also submitted that previously also the petitioners had exported "molasses" and the calculation made by the respondents was by considering the normal value of the goods, which is exclusive of the export duty, but so far as the charging of the duty on the consignment under question is concerned a totally new

method was adopted by the customs authorities, firstly, by misinterpreting the provisions of section 25 of the Act and, secondly, on the basis of a U.O. Note, which is contrary to the provisions of the Act. The learned counsel further submitted that the interpretation adopted by the customs authorities is contrary to the Customs General Order relating to Tariff Laws issued by the Government of Pakistan and in this regard invited our attention to paras 19.37 and 5.25 of the said General Order. He has added that the present interpretation of section 25 of the Act is also contrary to the various circulars/instructions issued by the Central Board of Revenue [CBR] (now Federal Board of Revenue) which are binding on the respondents and in this behalf invited our attention to certain circulars issued by the CBR for calculation purposes. The learned counsel also invited our attention to a questionnaire wherein certain queries were replied by the CBR and stated that reply to question No.25 by the CBR is quite clear wherein it has been clarified that export duty would be calculated on the export price as if no export duty had been paid. He further submits that the normal value of the export assessed at US \$ 50 per metric ton on the basis of U.O. Note is also contrary to the Customs Laws and Regulations itself as how could the customs authorities by ignoring the provisions of the Act make a calculation on the basis of U.O. Note. He has, therefore, in the end, submitted that since the calculation made by the customs authorities is not in accordance with law, the same may be disapproved. In support of his above contentions, the learned counsel has placed reliance upon the following decisions:

- i) Phassco Harware Co. v. The Government of Pakistan and 3 others PLD 1989 Kar. 621.
- ii) Messrs Abdul Aziz Ayoob v. Assistant Collector of Customs and 3 others (PLD 1990 Karachi 378)
- iii) Collector of Customs (Valuation) and another v. Karachi Bulk Storage and Terminal Ltd. (2007 SCMR 1357)

4. Mr. Ghulam Haider Shaikh Advocate has appeared for the respondents and, at the very outset, submitted that this petition is not maintainable, since petitioners have challenged the method of assessment. He has further submitted that whether the method of assessment and the calculation of the export duty made by the respondents was in accordance with law or otherwise could not be challenged in a writ petition as the petitioners, if have any grievance, can file an appeal against the said assessment before the customs authorities under the relevant provisions of the law, hence, according to him, this petition is premature and is liable to be dismissed. He has also submitted that it is a settled proposition of law that where an aggrieved person has the remedy to challenge the action taken against him before the competent forum by way of filing of appeal, writ petition, being an alternative remedy, could not be availed. He has maintained that a hierarchy has been provided under the customs law for redressal of the grievance of petitioners by way of filing an appeal before the competent forum, hence, according to him, this petition is liable to be dismissed. In the alternative, the learned counsel maintained that the instant petition is not maintainable since valuation made by the respondents was based on a method devised by the customs authorities, which is binding upon them, and hence no illegality or impropriety has been committed by the respondents in this behalf. The learned counsel has submitted that assessment of the goods has been made on the basis of interpretation of section 25 of the Act, which categorically provides

that export duty is to be charged on the value which is inclusive of the export duty, hence, according to him, it could not be claimed that the petitioners have been taxed twice or a duty has been imposed on a duty, rather the provisions of law, according to him, clearly stipulates that the export duty, which is to be repatriated by the seller, is to be charged on the normal export value inclusive of the export duty. He further submitted that the petitioners are liable to pay export duty on the FOB value of the goods inclusive of the export duty leviable. He, in the end, submitted that this petition is bereft of any merit and is liable to be dismissed. In support of his above contentions, the learned counsel has placed reliance upon the following decisions:--

- (i) Khalid Mehmood v. Collector of Customs, Customs House, Lahore (1999 SCMR 1881)
- (ii) Securities and Exchange Commission of Pakistan v. Mian Nisar Elahi and others (2009 SCMR 1392)
- (iii) Mst. Kaniz Fatima through Legal Heirs v. Muhammad Salim and 27 others (2001 SCMR 1493)
- (iv) Rehan Umar v. Collector of Customs, Karachi and 2 others (2006 PTD 909)
- (v) Abdul Aziz Ayoob v. Assistant Collector of Customs and 2 others (PLD 1990 Karachi 378).
- (vi) Messrs Al Amna International through Proprietor and others v. Federation of Pakistan through Secretary Chairman, Federal Board of Revenue and others (2014 PTD 370)
- (vii) Messrs Associated Industries Ltd. v. Federation of Pakistan and 2 others (2014 PTD 552).

5. Mr. Asim Mansoor Khan, DAG has appeared on behalf of the Federation and has adopted the arguments of Mr. Ghulam Haider Shaikh and states that this petition is not maintainable as the petitioners should have availed the remedy available to them, if they were aggrieved in respect of the method of assessment/valuation made by the custom authorities. He has also submitted that in his view it would be in the interest of justice if the matter is remanded to the customs authorities, since the matter pertains to a factual dispute with regard to the method of assessment/valuation, which could only be decided by the customs authorities. He has also submitted that this petition is also not maintainable on the ground that same has been filed on the basis of apprehension alone and the petitioners may be asked to avail the departmental remedy. He, therefore, in the end, submitted that this petition since is not maintainable may be dismissed.

6. Mr. Imad, in his rebuttal, has stated that since the action taken by the respondents is not appealable therefore, this petition has been filed and further submitted that the controversy is not a factual dispute rather the same is based on the interpretation of section 25 of the Act, hence, this petition is maintainable.

7. We have heard all the learned counsel at considerable length and have also perused the record and the decisions relied upon by them.

8. It is seen from the record that the basis of adopting valuation of the goods exported by the petitioners was made by the respondents on the basis of a U.O. Note by totally ignoring the provisions of section 25 of the Act. A question would arise whether the respondents by ignoring the provisions of section 25 of the Act can make the assessment on the basis of U.O. note by ignoring the instructions issued from time to time to them. In our view the answer of this question is in negative. The Customs Authorities have no jurisdiction under the law to base the assessment on some Note by ignoring the relevant provisions of the Customs law. Reference in this regard may be made to the following reported judgments:--

i) Rehan Umar v. Collector of Customs Karachi and others (2006 PTD 909)

"18. No enhancement in the value could be made on the recommendation of some working committee, which is not supported with any evidence."

ii) Messrs Abdul Aziz Ayoob v. Assistant Collector of Customs and others (PLD 1990 Karachi 378)

"6 We would straightaway record that such basis, as a rule, suffers from serious infirmity and should be avoided. Where such a letter or certificate is relied upon the Embassy concerned should be asked, as opined in the Supreme Court judgment, to attach a price list or certificates from traders or their own certified assessment in the relevant country and short of this the version of the Embassy should not be accepted or relied upon.

7. However, in this case such reliance was placed and the following observation occurs in the order dated 30.4.1984:--

"The normal value was determined on the basis of valuation advice supported with the enquiries/confirmation made through Embassy of Pakistan, abroad."

Clearly, the Customs were in error in doing so."

iii) Phassco Hardware Co. v. The Government of Pakistan and others PLD 1989 Kar. 621

"7. It may be pertinent to point out that prior to the incorporation of above Section 25-B, the Central Board of Revenue had started issuing Customs General Orders fixing the prices of the various items for the purpose of valuation under the Customs Act. One of such Customs General Orders was CGO 5/85 which related to the Auto Parts. The above CGO was amended and then substituted by CGO 10/87. The legality of the above CGO had come up for consideration in the case of Indus Automobile (Pvt.) Ltd. v. Central Board of Revenue and 2 others, reported in PLD 1988 Karachi 99, in which a Division Bench of this Court, to which one of us, (Ajmal Mian, C.J.) was a member, dilated upon the above question and held that CGOs do not have any statutory force but the same were framed in order to provide effective application of Section 25 of the Act. It was observed, "if the CGO was to be enforced in supersession or in violation of the provisions of sections 25 and 30 of the Customs Act, we would have no hesitation to hold that an administrative order of the CBR could not bypass or allow the

deviation of a statutory provision." In order to provide the legal cover for the fixation of valuation by the C.B.R. or by any officer authorized by it, the above section has been incorporated which is in line with section 14(2) of the Indian Customs Act, 1962. The object of the above section seems to be to reduce the discretion which was exercisable by the customs appraising staff which generated malpractices of under invoicing in cases of import and over-invoicing in cases of export. The object of the above section apparently is of public good."

9. From the above decisions it is clear that valuation should be based on the law and not on either the recommendations of some committee or based on some Note. These U.O. Notes or recommendations of a committee could not partake the provisions of law as it is a settled proposition of law that the provisions of law should be adhered to and not the Notes or recommendations, if any. These Notes or recommendations could only be considered as guidelines where no proper method of valuation/assessment is available before the Customs officials, however when a basis of valuation or assessment is provided these provisions of law have to be complied with in letter and spirit. In the instant case, it is seen that the respondents were swayed away by a U.O. Note and have ignored the provisions of Section 25 of the Act while making the valuation/assessment, which is in our view could not be done. The Customs Authorities should make the assessment/valuation on the basis of provisions of section 25 of the Act, which in the present case appears to have been missing. We, therefore, keeping in view the facts, circumstances of the case and the decisions referred to above, disapprove the method of valuation/assessment adopted by the Customs Authorities and remand this matter to the Customs Authorities for making the valuation of the goods exported as per the provisions of Section 25 of the Act. In the instant case the main question raised was with regard to valuation, which is the prerogative of the Customs Authorities hence on that ground also the matter is set aside with the directions to the Customs Authorities to make a fresh valuation/assessment keeping in view the relevant laws prevailing at that time. In this regard we were able to lay our hands on the decision given by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Amin Muhammad Bashir Limited v. Government of Pakistan and others (2015 SCMR 630) wherein the Hon'ble Apex Court observed as under:--

"18. Since the precise fixation of the price is the prerogative of the Customs Department we remand the case to the dealing department for fixation of price afresh in terms of section 25-B of the Customs Act, 1969 as it was prevalent at the relevant time. If the appellant is aggrieved by the fixation it may avail the remedies available to it under the provisions of the Customs Act, 1969."

10. We; therefore, allow this petition by directing the respondents to make a fresh assessment/valuation of the exported goods as per the provisions of Section 25 of the Act as prevalent at the time of assessment/valuation, which should be based on cogent reasons after giving proper opportunity of hearing to the petitioners.

11. Needless to state that the petitioners would be entitled to avail the departmental remedies, if any, if they do not agree with the valuation/assessment made by the Customs Authorities in this behalf.

MH/S-47/Sindh Case remanded.

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