GOVERNMENT OF PAKISTAN
CUSTOMS APPELLATE TRIBUNAL
KARACHI BENCH – I
3RD FLOOR, JAMIL CHAMBERS
SADDAR, KARACHI

Before:- Mr. Mohammed Yahya, Member (Technical – I), Karachi

Customs Appeal No.K-928 to K-930/2014

M/s. Haris Trading Company,
Through: Sardar Muhammad Ishaque, Advocate,
Suite No.302, 3rd Floor, Plot No.87-S,
Al-Ghafoor Chalet, Allama Iqbal Road,
Off. Khalid Bin Walid Road, Block-2, P.E.C.H.S.
Karachi ..... Appellant

Versus

The Additional Collector of Customs,
Model Collectorate of Customs (Export),
3rd Floor, Custom House,
Karachi. ..... Respondent

Sardar Muhammad Ishaq, Advocate, present for the appellant.
Mr. Muhammad Younas, P.A., present for the respondent.

Date of hearing: 13.11.2015
Date of Order: 17.11.2015

ORDER

Mr. Mohammed Yahya, Member (Technical-I), Karachi: By this order I intend to dispose of the Customs Appeals No.K-928 to K-930/2014 filed by M/s. Haris Trading Company, Through: Sardar Muhammad Ishaque, Advocate, Suite No.302, 3rd Floor, Plot No.87-S, Al-Ghafoor Chalet, Allama Iqbal Road, Off. Khalid Bin Walid Road, Block-2, P.E.C.H.S. Karachi, under Section 194-A of the Customs Act, 1969, against Order-in-Original No.249279-16082014 dated 16.08.2014 passed by the Additional Collector of Customs, Model Collectorate of Customs (Export), Karachi.

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2. Brief facts of the case are per Show Cause Notice CN-192855-21032014 dated 08.05.2014 the M/s. Haris Trading Company, 47-Faiz Market, Chowk

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Yadgar, Peshawar, NTN No.2148931, filed a Goods Declaration (GD) vide No.KPEX-SB-101006-15-03-2014 for export of Marble Blocks, PCT heading 2515.1200 valuing at US$ 5998/- (Rs.593762), against Form "E" No.NIB0201962 dated 10.03.2014 and sought shipment after availing the facility of self assessment and clearance system in WeBOC. The risk management system selected the subject goods declaration for examination and assessment.

3. Whereas, on assessment it was found that exporter have not uploaded original Form "E", which was an essential piece of documents for export. The exporter was requested for uploading/scanning the requisite Form "E" under Section 155-M, but they failed to do so.

4. Whereas, the value of the goods was also less declared by the Exporter @US$0.0357/Kgs. The identical goods are being cleared and assessed @US$0.15/Kgs. Thus assessable value of the goods would be US$25200/- =Rs.2494548/-, against the declared value of US$5998/- (Rs.593765). The net difference between declared and ascertained value comes to US$19202/- =Rs.1900805/-. Had it not been detected the exporter would be succeeded not to bring the previous foreign exchange in the country.

5. Thus the exporter have violated the provisions of Section 32(1)(C), 32A(1), and 155-M(1/a) of the Customs Act, 1969 read with Section 131(1/a) of the Customs Act, 1969, further with Section 22 of the Foreign Exchange Regulation Act, 1947, punishable under clauses 14, 14A, 66 & 77 of Section 156(1) of the Customs Act, 1969, read with Section 23 of the Foreign Exchange Regulation Act, 1947. M/s. Haris Trading Company, Peshawar called upon to show cause as to why penal action under the aforesaid provisions of the Customs Act, 1969 and Foreign Exchange Regulation Act, 1947, should not be taken against them for committing of aforesaid acts.

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6. On the basis of Show Cause Notice CN-192855-21032014 dated 08.05.2014 the Additional Collector, Collectorate of Customs (Exports), Karachi , passed an

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Order-in-Original No.249279-16082014 dated 16.08.2014. The operative part of this order is reproduced as under:

> *"I have gone through the case record. Non appearance of the exporter or his clearing agent shows that they have nothing to say in their defense and, hence, charges leveled in the show cause notice stand established. I therefore impose a penalty of Rs.50000 on the exporter. Moreover, the Assistant Collector of Customs (Examination) is hereby directed to get the form E as per assessed value from the exporter and get it verified from the bank. In case of non-provision of form E of the revised value, the particulars of form E already mentioned in GD be got verified from the concerned bank and in case of non verification from the bank, the matter may immediately be referred to the Export Intelligence Branch of the Collectorate for further proceedings."*

7. Being aggrieved and dis-satisfied with the impugned Order-in-Original No.249279-16082014 dated 16.08.2014, passed by the Additional Collector, Collectorate of Customs (Exports), Karachi, the appellant filed the instant appeal before this Tribunal on the relevant grounds incorporated in the Memo of Appeal which is reproduced as under:

> *"1. That the Appellant is a responsible professional businessman i.e. Importer and running his business in lawful manner, accordingly. The appellant has never indulged in activities in derogation of law, maintain all the prescribed record of the Customs and Sales Tax properly and pay all duty and taxes, honestly, diligently and regularly, for the last many years.*
>
> *2. That the Appellant as per their business routine legally and lawfully purchased the exported goods in-question, the goods was exported through exports genuine documents i.e. Commercial Invoice, Packing List and Bill of Lading and filed the Goods*

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Declaration with Customs Authorities for clearance of exported goods, in terms of the Customs Act 1969, read with Rules and declared the true, complete & correct export value, description, classification of the export goods and weight, which is clearly indicate the exported goods and Value and NO any duty draw back claim filed on the GD, furthermore correct Form "E" already uploaded by the appellant on the system.

3. That the contents of the show cause notice are concocted, baseless and the charge alleged in the show cause notice, enhance the value without any documentary evidence, without calling the specific information as well as without determining the goods, under the Customs Act, 1969, in accordance with the requirement of law and rules, not disclosed the any evidence in the GD, nor any evidence regarding call the documents and notice under Section 26 of the Customs Act, 1969, which assessing the consignment or showed the evidence on computer display nor provided the any documentary evidence neither proper specific provisions under Section 25 of the Customs Act, 1969 for enhance of the value is not mentioned in the show cause notice and without jurisdiction as per SRO.886(I)/2012, regarding revenue matter, passed the ex-party order established the allegation mentioned in the show cause notice, it is illegal, against the principal of law, null & void, ab-initio, void ultra-viral and without lawful authority, therefore, "the Appellant on the other side established that they have prima-facie, case there is no evidence to established the element of mens-rea, knowledge, dishonest, belief and fraudulent intention not provide the required documents by the Appellant. The Appellant was never satisfied on account of basis of determination of value i.e. which method has been used for such assessment and whether the methods were applied his squirted manner or not as has been held by the Honourable High Courts.

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Furthermore, the determination of exported goods is built-in Job of the Customs Officers in terms of under Section 80(1) of the Customs Act, 1969 read-with Rule 438 of Sub-Chapter-III of Chapter 21 of Customs Rules 2001, process / scrutiny the imported goods, the Section 80(1) of the Customs Act, 1969, read-with Rules 438 of Customs Rules 2001, are read as under:-

> Section 80. Checking of goods declaration by the Customs. (1) On the receipt of goods declaration under Section 79 an officer of Customs shall satisfy himself regarding the correctness of the particulars of imports, including declaration, assessment and in case of the Customs Computerized System, payment of duty, taxes and other charges thereon.
>
> Rule 438 Assessment of Custom Authority. Where any declaration has been filed under Rule 433 or additional documents have been submitted under Rule 437 the Customs shall satisfy itself as to their correctness including its value, classification, claim of exemption, payment of duty and taxes and may be re-assess the goods during or after clearance.

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In view of the above, that the Respondent without call the any documents and evidence himself the process and assessment therefore, all proceeding on the basis of assumptions or presumptions, it is illegal & against the law & incorrect interpretation of provisions of Statute and Rules made there under which is unwarranted in law as held by the Honourable High Court of Sindh in case of Al-Hilal Motors reported as PTCL 2004 CL 1. Furthermore, in this regard the Appellant gain strength from the case laws, reported in PLD 1988 Lahore 177, PTCL 1995 CI-123 and Tribunal Order in Appeal No.K-1292/2011, in respect of M/s Bina

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Paper, wherein the Hon'able High Court has held that "where order of Customs Authorities were passed on the basis of no evidence, such orders therefore not sustainable being illegal and without lawful authority," therefore, such proceeding, being illegal and without lawful authority.

4. That as per Rule 109 of Chapter-IX of the Customs Rules 2001 the burden of proof rests on the shoulders of Assessing Officer to explain the method of assessment. And as per Rule 113 of the Customs rules, 2001 provides the primary method of valuation. The Respondent has not applied this method and has given no justification of their actions.

5. That as per S.No.1(d) appearing in SRO 487(I)/2007 dated 09-06-2007 that values are not determined on the basis of direct evidence and accept declared transaction value and matter thereof is finalized subject to post import audit. Furthermore, the procedure set out in Customs Rules 2001 amended vide SRO.704(I)/2007, the Respondent under legal obligation to follow the statutory provisions in terms of SRO.704(I)/2007 dated 14-07-2007, but the essence of said SRO has been violated with a view to victimize the importer.

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6. That the under Rule 107(a) of the Customs Rules, read-with Article 85 of Qanun-e-Shahadat 1984, the Customs Authorities were under legal obligation to provide evidences of high transactional value of last 90 days. It is noteworthy that the export data / record being maintained by MCC Port Qasim and PACCS is based on documents and information collected from Public and Private sector, therefore, there is no prime aspect of "secrecy" is involved as pleaded by the learned Respondent. In the light of Article 85 of Qanun-e-Shahadat 1984; our request for exhibition of evidence of value during last 90 days was quite justified and maintainable in the

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eyes of law but it was declined without any plausible reasons / ground.

7. That the impugned assessment order does not refer to any evidence in the form of an actual import of identical goods at a higher value during the relevant period. The identical cases i.e. absence of actual evidence of import in respect of identical goods from the same supplier / country of origin during same period have already been decided by the various Authorities, i.e. Adjudication Authority, Collector of Customs Appeal, Collector Adjudication-I, the Honourable Customs Appellate Tribunal, the Honourable High Courts and Honourable Supreme Court of Pakistan, in favour of the Importers.

8. That the Honourable Lahore High Court, Lahore decided the case in various Writ Petitions reported in PTCL 2008 CL 409 in respect of M/s Toyo International Motorcycle, held that "Section 25 is follow up of the General Agreement of Trade and Tariff (GATT) and is to bring a new system based upon harmony, trust and mutual respect.---------- The methods of customs valuation are required to be applied in a sequential order under Section 25(10) the contents of General Agreement of Trade and Tariff are not to be considered. ---------- Sequential order provided in Section 25 is mandatory, therefore, valuation advice prepared and issued in total disregard of the same is illegal.----------Non reference to adoption of procedure provided in Section 25 in valuation advice would lead to presumption that if the sequential order was adopted and is not mentioned in letter, it was against revenue and draftsman of valuation advice."

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9. In the wake of above when the Honourable Islamabad High Court has decided that impugned Valuation Ruling No.216/2010 dated 03-02-2010, is set aside and all cases are remanded back

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and has been directed to pass a fresh order / ruling regarding determination of customs value of above said items in accordance with law and rules as well as guidelines provided in the said judgment. The logical outcome of the said order of the Honourable Islamabad High Court is that the assessment made on the defunct valuation ruling (set aside by the order of the Honourable High Court) has no legal force abinitio. Those cases have to be finalized as per new valuation ruling based on import data of 90 days and in conformity with provisions of the Customs Act, 1969 and Customs Valuation Rules (including Rule 110 and 121 ibid). And for the current cases the D.V. has to be accepted as arbitrary valuation benchmark to secure the differential amount has since been set aside by the Honourable Islamabad High Court.

10. That the Customs Department have violated the guidelines given by the Honourable High Court in W.P. No.1756/12, hence entire act of the Customs Department regarding non acceptance of the declared value of the imported goods of the appellant being the highest value of the imported goods and determine / assess the value of the imported goods in terms of sub Section (1) of Section 25-A on his own motion but after following the methods laid down in Section 25 and 25-A of the Customs Act, 1969. The Section 25A of the Customs Act, 1969 cannot be used for the wholesale determination of the Customs value which transforms the "determination" in view of Section 25A to an impressible fixation of value. In the instant matter, the Customs Authorities in contrary to the provisions of the Section 25A has fixed the customs value of the impugned goods which is impressible / settled in the case of Saadia Jabbar, in CP No.2673/2009 as held by the Honourable High Court, that value shall be determined in accordance with the difference in brands, quality, reputation, specification and characteristics of the goods. The provision of Section 25(5)(d) of the

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Act, 1969 has been deliberately and malafidely violated while determining the value in the impugned ruling and the Customs Authorities deliberately neglected the lowest transactions of the Appellant as per Customs data / record of last ninety days prior to date of import. The impugned guideline / advice / is illegal and unlawful and is on higher side and issued without following law, hence liable to be set-aside. The provision of under Section 5(d) is reproduced below:-

> (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) & (c).

Upheld by the Honourable Supreme Court of Pakistan, reported in 2012 SCMR 617. The Customs Department instead of determining the value under Section 25 in sequential order has made malpractice of assessing the impugned goods on the predetermined value on the basis of the valuation advice / guideline on the alleged ground of under invoicing from time to time, which is not permissible under the law.

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11. That the scheme and methods as laid down under Section 25 were never followed by the Respondents i.e. (Collector of Customs and Director of Valuation), while determining the value while the Appellant declared actual value paid by him in term of Section 25(1) of the Act read with Rules 113 of the Customs Rules 2001.

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12. That basis above fixation of prices without visible exercise reflected on record under sub Section (1) to (4), (5), (6), (7) or (8) in a manner other than the prescribed under the law would potently be illegal as held in case reported as 2006 PTD 909 and 2006 PTD 2807.

13. That the Appellant has correctly declared the value of exported goods and is prepared to contest and challenge the arbitrarily and whimsically enhanced value by the Respondent, it is illegal and against the law. Furthermore, that an invoice price cannot be routinely discarded except on the strength of clear evidence that the invoice is not genuine and it does not show the real price as has been transacted between the importer and foreign supplier, and that something else has passed clandestinely between the importer and foreign supplier. Reliance upon Rehan Umer Vs. Federation of Pakistan & Others (2005 PTD 909).

14. That the Appellant of the exported consignment was required to be taken at transaction value i.e. the price actually paid on the imported goods. Unless it is proved that the transaction value is based on fake documents or it is the result of any relationship between the buyer and seller the Customs Authorities is under legal obligation to accept transaction value under Section 25(1) of the Customs Act, 1969 for the assessment of duties and taxes.

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15. That the Respondent failed to appreciate that there is absolutely no evidence whatsoever to suggest that the transaction value on the basis of which the Appellant has declared the value of exported consignment is incorrect or the parties to the transaction are related in any manner. In the absence of any evidence the transaction value declared by the Appellant should have been accepted. The Respondent had nothing before him to

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support an 'imaginative' value applied to the Appellant's exported consignment. This order of loading of value is bad in faith as well as in law.

16. That the Respondent revenue authorities shall discharge their statutory duties strictly in accordance with the provisions of the Customs Act, 1969 and follow the sequential steps provided in Section 25 of the Customs Act 1969 and Chapter IX of Customs Rules, 2001 for the ascertainment of transaction value and shall not resort to arbitrarily and mechanically 'loading' the correctly declared values.

17. That the Honourable Supreme Court decided the matter in M/s Humayun Ltd Vs. Pakistan & Others as reported in PTCL 1992 CL. 23, wherein it is held that "where the evasion of duty is not willful the imposition of penalty is illegal". Not to speak of any willful evasion, in the instant case, there is no evasion of tax / duty or loss of revenue at all. The Exporter did not act malafidely with intention to evade the tax, the imposition of penalty is not justified, and reliance is place on case referred as PTCL 1995 CL. 415. In view of the above correct factual position the show cause notice is clearly illegal and malafide and is liable to be withdrawn this allegation mentioned in the show cause notice and set-aside the impugned order, passed by the Respondent, in the best interest of justice."

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I have examined the record of the case and heard the arguments of Council of the appellant as well as the representative of the respondent MCC (Exports), Karachi. After hearing the arguments of the both parties and going through the complete record of the case I am convinced that this is a classical case handled by the respondent in an extreme haste, unprofessional manner, without application of mind by the Adjudicating Officer, totally ignoring the legal provisions including various judgments of the Superior Courts on the subject. The Customs Authorities have invoked clause (c) of sub-section 1 of Section 32,

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clause (a) of sub-section 1 of Section 32A, clause (a) of sub-section 1 of Section 155(a), Section 131 of the Customs Act, 1969 read with Section 22 of the Foreign Exchange Regulation Act, 1947. A plain reading of clause (c) of sub-section 1 of Section 32(a) says:

> "32. [72][False] Statement, error, etc:- (1) If any person, in connection with any matter of customs,-
>
> (a) makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or"

9. This provision cannot be applied in isolation. It has to be read and applied in conjunction with sub-section (2) of Section 32, which provides, where by reason of any documents or statement as aforesaid or by reason by some conclusion, any duty [109][,taxes] or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within [73][five] years of the relevant date, requiring him to show cause why he should not pay the amount specified in the notice. Considering this provision in law and that in the instant case no duty, tax or charge leviable has been short levied or not paid. Invoking of clause (a) of sub-section 1 of Section 32 of the Customs Act, 1969 becomes irrelevant.

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10. Coming to clause (a) of sub-section (1) of Section 32(A), this provision deals with a situation where a person causes to submit documents including those filed electronically, which are concocted, altered, mutilated, false, forged, tempered or counterfeit to a functionary of customs. In the instant case the exporter has not committed any of these crimes rather he has submitted or electronically uploaded Form 'E'. Therefore, question of invoking this provision of the Customs Act, 1969 does not arise.

11. As far as invoking Section 131 of the Customs Act, 1969 is concerned the exporter in the instant case has uploaded the From "E" in the system. Since the

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appellant has submitted the GD alongwith the required documents as prescribed by the Board as such invoking Section 131 of the Customs Act, 1969 in the instant case becomes irrelevant.

12. Coming to clause (a) of sub-section (1) of Section 155(a) of the Customs Act, 1969, I agree that the law provide appropriate Customs Officers to require for inspection certain documents or record. In the instant case all relevant documents required at the time of export a consignment have been provided by the appellant to the Customs Authorities. Thus, invoking this Section with reference to the subject case also becomes irrelevant.

13. As far as the provision of Foreign Exchange Regulation Act, 1947 which the Adjudicating Officer has exercised, a question arises as to whether the Adjudicating Officer is empowered by the legislation or sub-ordinate legislation to exercise the same? The best course of action could have been to refer the matter to State Bank of Pakistan for taking the cognizance of the situation. In view of the above observations and discussions I am convinced that the Show Cause Notice No.CN-192855-21032014 dated 08.05.2014 and the Order-in-Original No.249279-16082014 dated 16.08.2014 suffer from serious legal infirmities. Accordingly, the Show Cause Notice No. CN-192855-21032014 dated 08.05.2014 is vacated and the Order-in-Original No.249279-16082014 dated 16.08.2014 is set aside and the appeals are accepted with no order as to cost.

14. Order passed and announced accordingly.

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3860
19/11/15

(Mohammed Yahya)
Member (Technical – I)

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Appeal No. Old
Appeal No. New. K-929/2014 26/9/2014
M/s. Haris Trading Co.
Order-in-Original
by Dy. Collector MCC Export Karachi

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19/11/2015

Asstt. Registrar
Customs Excise & Sales Tax
Appellate Tribunal
Karachi Bench

CN-182638-18022014-

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