

SADDAR, KARACHI

Before: Mr. Muhammad Nadeem Qureshi, Member Judicial-I, Karachi.
Mr. Mohammed Yahya, Member Technical-I, Karachi

Customs Appeal No. K-458 of 2014

M/s. Muhammad Shafique,
56-Litton Road, Ijaz Center,
Lahore.

Appellant

Versus

1. The Additional Collector-II,
MCC-Appraisalment (West),
2nd Floor, Customs House,
Karachi.
2. The Deputy Collector,
Appraisalment (Group-I VII)
Model Customs Collectorate,
Appraisalment (West),
Karachi.

Respondents

Mr. Muhammad Afzal Awan, Advocate, present for the appellant.
Mr. Abdul Ghani, E.O., present for the respondents.
Date of hearing: 02.12.2014
Date of order: 09.02.2015

JUDGMENT

Mr. Muhammad Nadeem Qureshi, Member Judicial, Karachi: This judgment will disposed of the appeal filed, under Section 194-A of the Customs Act, 1969, by Mr. Muhammad Shafiq, against Order-in-Original No.31/2014, dated 07-05-2014, passed by the Additional Collector of Customs, Karachi.

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02. Brief facts of the case are that M/s. Awan Law Associates vide letter No. Nil dated 26-07-2013 filed a refund claim amounting to Rs. 5,337,202/- on behalf of importer Mr. Muhammad Shafique, bearing CNIC No. 35202-2815638-9 with the plea that he imported one unit old and used vehicle vide Goods Declaration No.KAPR-HC-20705 dated 16-08-2012 and got the same cleared under PCT Heading 8703.2490 instead of PCT Heading 8702.9090 which, according to them, resulted into excess payment of Rs. 5,337,202/- and requested for refund of the same.

03. Being aggrieved and dis-satisfied with the impugned Order-in-Original, passed by the adjudicating officer, appellant filed instant appeal before this Tribunal on the grounds incorporated in the Memo of Appeal.

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Limousine, bearing Chassis No.5GRN22U47H105324, from United States of America, under bill of lading bearing No.KH15492145 dated 28-06-2012 and on arrival of the said car, the appellant filed Goods Declaration bearing No.KAPR-HC-20705 dated 16-08-2012, respondent department assessed the said vehicle under HS Code 8703.2490 attracting 100% duty and recovered the same from appellant before allowing release of the vehicle from port area. The lawfully applicable HS Code was 8702.9090 attracting 20% duty and taxes. The respondent had recovered additional duty and taxes from the appellant at the time of clearance of said consignment. He further argued that there is no dispute between the parties hereto that the limousine is a Motor Vehicle fitted with 18 seats and is designed for transportation of 18 persons, hence, no controversy on existence of facts. The respondents are bent upon to fraud with the law on the seating capacity or transportation capability, by discussing the nomenclature of the motor vehicle without reference to its seating capacity or designed for transportation. There is a classification at Sr. No.22 in Para-3 of the Customs General Order 12/2002 which reads: "*Vehicle designed for transport of 10 or more (including driver) having 10 or more seats (including driver and jump seat. Alternatively with drivers and from seat and empty rear portion/compartment but designed for 10 or more persons subject to certification by the manufacturer/recognized sole agent/sole distributor (on behalf of the principal i.e. manufacturer) that the vehicle was originally designed for transport of 10 or more persons*". All the filed forces of FBR are under obligation of Section 4 and 223 of the Customs Act, 1969 to obey the same. Rather non-obedience to the same is culpable under Section 156(1) of the Customs Act, 1969, Section 166 of Pakistan Penal Code and others. He further argued that the Pakistan Customs Tariff 87.02 cover all Motor Vehicles of different categories irrespective of name or nomenclatures (including limousine and others) detailed in its sub-headings 8702.1010 to 8702.1090 exclusively having capacity for transportation of 10 or more persons. It is noteworthy that seating capacity is the sole criterion of demarcation for classification between 87.02 or 87.03. Whereas PCT Heading 87.03 deals with all nomenclatures of Motor Vehicles those having capacity for transportation of less than 10 person excluding those for transportation for more than 10 person.

5. Learned counsel further contended that the appellant submitted the requisite certificate from the manufacturer of vehicle under import to the effect that the said vehicle is made for the purpose of transportation for 18 (2 front and 16 rear passengers) persons i.e. for ten or more persons as mentioned in the said classification guidance,

issue letter dated 26-07-2013 to the respondent No.2 for refund of over paid amount to the appellant. On receipt of documents calling memo dated 26-08-2013 the appellant submitted all the requisite documents, required by the respondent vide its letter dated 09-09-2013, but no such approval of refund or lawful reply has been received to the appellant, causing loss of his financial interest gravely as the said amount is being stuck up with the respondent for the period of more than a year. He further argued that the impugned Order-in-Original is illegal, unwarranted by facts and law of the case, without lawful authority arbitrary and based on non-bonafides for undue enrichment at the expense of importer. The same has been passed in total defiance to the laws and precedents of the superior courts and subsequently prayed to annul the impugned Order-in-Original and refund the duty and taxes recovered by the respondents, in excess to the lawfully leviable rate of duty and taxes from the appellant, being differential amount of HS Code 8703 and 8702 as the contention of the appellant is well proved by the law and dicta of higher forum and classification notes.

06. The respondent has not filed the counter objections in compliance of Section 194-A (4) of the Customs Act, 1969, even though the option was given by the Court in this regard. On the date of hearing the Departmental Representative appearing on behalf of respondent contraverted the arguments extended by the appellant and supported the impugned Order-in-Original and prayed that the subject appeal be dismissed and impugned order be maintained in the interest of justice.

7. We have examined the case record and gone through the arguments extended by both the parties before the court and documents placed thereon, it has been observed that the subject impugned vehicle was imported and GD was filed on 16.08.2012 which was accordingly assessed under HS Code 8703.2490, attracting 100% duty and recovered the same from the appellant before allowing the release of the vehicle. In presence of the classification guidance and instructions already given by the department to the filed officers all over the country about the same type of vehicle, which is the subject matter of this appeal also. The importer is required to produce certificate from manufacturer of Hummer vehicle, or from his recognized sole agent/distributor indicating that the subject vehicle has been designed for transport of ten or more persons in accordance with the provisions mentioned at Sr. No.22 of paragraph 3 of CGO 12/2002 and as such appellant establish his claim the classification of vehicle under said reference. By preproducing the requisite certificate the subject vehicle shall fall outside the ambit of PCT Heading 8703, in proof thereof the appellant accordingly claimed the refund which was denied through

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appellant at the time of importation as such referred claim merits no consideration and is rejected.

8. After perusal of the explanatory notes of PCT heading 8703 it has been noticed that, Motor Cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702) including station wagons and racing cars falls under this heading. This heading also covers motor vehicles of various types (including amphibious motor vehicle) designed for transport of persons, it does not, however, covers the motor vehicles for heading 8702. This heading through the explanatory note further describe the type of motor cars (e.g limousines, taxis, sports cars and racing cars). Evidently the issue of seating capacity found significant to distinguish the PCT heading 8702 from PCT heading 8703. It is also advantageous for us to further clarify and distinguish the enforcement of PCT heading 8702 under the circumstances when the vehicles falls under the category for the transport of ten or more persons, including the driver. Provisions mentioned at serial No.22 (a) of paragraph 3 of CGO 12/2002, prescribes the detail about the category of vehicles amongst that, legislature used the word synonymous along with bus/coach, means, having the same nature, equivalent and similar, category of vehicle for the transport of ten or more persons including the driver, falls under the PCT heading 8702 of Chapter 87 of Customs Import Tariff, evidently the appellant's vehicle was originally designed for transportation of ten (10) or more persons are admitted as per examination report and sale certificate issues by the manufacturer which is not disputed. The respondents from the start had struck to the stance that the vehicle-in-question being luxury one, not falls in HS Code 8702. However, this contention is misconceived on the ground that in the whole HS Code 8702 there is no provision which exclude luxuries vehicles having ten or more seating capacity as described above and code is silent about this aspect.

9. It is also important to clarify the controversy by placing the definition of two words "limo" and "limousine", for understanding, meaning of word limo is a stretched large comfortable car, specially name as van or small bus that takes people to and from airport. By considering the same it is easier to capture the wisdom behind the mind of legislature, as well as the structure of the compendium of classification differentially separated with the specific conditions from one HS Code to another for the purpose to equate the category of goods.

10. It is also important to understand that law require credible grounds for impregnating a stance forwarded with a purpose to implement certain section of law on

his rights, to claim legitimate revenue inadvertently paid in excess, to the government exchequer. There is no provision in HS Code 8702 of the Pakistan Customs Tariff that it excludes "luxury vehicles". What has not been written can therefore not be implied? It is pertinent to point out that as per compendium of classification opinion (Adoption 2001) even the luxury vehicles have been classified under HS Code 8702 provided that, these are for the transport of ten or more persons seating capacity. The subject matter and controversy caused thereon with regard to the classification shall be examined strictly in accordance with the General Interpretative Rules of the Harmonized coding system. The first note mandates that, for legal purpose, classification shall be determined according to the terms of heading and relative section or chapter notes. After doing so and going through the text of heading 8702, it further elaborate vide Explanatory Notes to the Harmonized Commodity Coding and description system, which are authentic source of interpretation vide Pakistan Rule (1) of General Interpretative Rules, for its importance same is reproduced as under:-

"For the purposes of interpretation, Explanatory Note to the Harmonized Commodity Coding and Description System published by World Customs Organization, Brussels as amended from time to time shall be considered authentic source of interpretation."

The Explanatory Note to Heading 8702 reads as under:-

"This heading covers all motor vehicles designed for transport of ten (10) persons or more (including the driver) which includes motor buses and coaches, trolley busses."

11. This is one of the important aspect of this case to analyze the maxims of law, equity and natural justice. The description of the brands of the different vehicles, cars, wagons and other specific indicators regarding the claim of intellectual property rights by the manufacturers, as being their proprietors in the well know mark/trade mark/brands and subsequent established goodwill and recognition all over the world has no criteria for making assessment or invoking any specific PCT Heading for the purpose to differentiate the vehicles from one code of classification to another. Comparatively, we have the example about the Mercedes brand, the manufacturers of that brand specifically produced the motor cars of all types. They also introduced a vehicle having the seating capacity more than ten persons excluding the driver seat, the introduction of said category of vehicle obviously falls under the PCT Heading of 8702 and not under 8703 question of luxuries or brand sets at par, for the purpose of interpretation of explanatory, harmonized commodity code and description system published by World Customs Organization (Brussels) amended from time to time and shall be considered authentic

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this present instant case the subject required compliance was properly concluded, admitted and not been rebutted by the respondent at any stage of the proceedings.

12. It is also settled principle that, to maintain the administration of justice, not to prejudice any one, courts are required to do justice between the parties in accordance with the provisions of law, as the litigants, who approaches the court for the relief is bound to substantiate that, the procedure has been adopted by him, in accordance with the law because it is elementary principle of law that, if a particular thing is required to be done in a particular manner it must be done in that manner, otherwise it should not be done at all. It is also a well settled principle of interpretation of fiscal statues that, what has not been expressly written by legislature could not be implied. Such standards of legal maxims are not maintained in this case, specially the appellant submitted or referred, different judgments passed by the Tribunal on the same subject point which were not taken into consideration during the hierarchy of the customs.

13. The statutory duties are not properly been performed by the Department and are found transgressional from the statutory provisions of law, Article 4 of the Constitution of Islamic Republic of Pakistan every citizen enjoy the protection of law and to be treated in accordance with law is inalienable right of every citizen, wherever he may be, and every other person for the time being within Pakistan, clause (a) of Sub Article (4) express that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. It is in this sense that an action which is mala-fide or colorable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant consideration is also not an action in accordance with law. Action taken upon no ground at all or without proper application of mind by the quasi judicial authorities, would also not qualify as an action in accordance with law and would therefore, have to be stuck down as being action taken in unlawful manner. A person acting in pursuance of a statute cannot be set to be acting bona-fide, if he has no reasonable ground for believing that the statute justifies him in what he does. If the case, therefore is one where there are no grounds or the grounds are such that no reasonable person would have acted on the supposition that he was acting under the authority of statute, then it is a case of the court to look into it. In order to thwart, the commission of unlawful act in derogation of the provision of the statute the Hon'ble Supreme Court of Pakistan in reported judgment PTCL 2003 CL 345 held that "the thing should be done as they are required to be done, or not at all" and in PLD 1971 Supreme Court 61 "neglect of plane requirement of an absolute statutory

violation or non-observance of the method prescribed by law for doing an act in a particular manner or mode, such provision of law is to be followed in letter and spirit and achieving or attaining the objective of performing or doing of a thing in a manner other than provided by law would not be permitted. The same observation has been made by the Hon'ble Supreme Court of Pakistan in the Civil Petition filed by Director General of Intelligence & Investigation and others v M/s. Al-Faiz Industries (Pvt.) Ltd and others reported as 2006 SCMR 129 "if the law had prescribed method for doing of a thing in a particular manner, such provision of law is to be followed in letter and spirit and achieving or attaining the objective of performing or doing of a thing in a manner other than provided by law would not be permitted."

14. By getting strength from the judgments of the superior courts as well as the observation made thereon in addition for the purpose to maintain the elementary principle of law, we hold that the adequate breach of natural justice has been equated with breach of law during the hierarchy of customs and orders passed thereon by the respondent are without any warrant of law declared illegal, void, ab-initio hereby set-aside having no legal effect on various counts as detailed above, as such the appeal is accordingly allowed as prayed with no order as to cost. Respondents are directed to comply the refund process in accordance with Section 33 of the Customs Act, 1969 accordingly.

19. Order passed and announced accordingly.

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(MUHAMMAD YAHYA)
Member (Technical-I)

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(MUHAMMAD NADEEM QURESHI)
Member (Judicial-I)

GOVERNMENT OF PAKISTAN
CUSTOMS APPELLATE TRIBUNAL
BENCH-I KARACHI

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Appeal No. Old
Appeal No. New: K-458/2014 13/05/2015
M/s. Muhammad Shafiqul Latif
Order in appeal: 31/05/14 27/05/2015
by: Addl. Officer of Customs, Karachi

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Assistant Secretary
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