

GOVERNMENT OF PAKISTAN
CUSTOMS APPELLATE TRIBUNAL, BENCH-III,
2nd FLOOR, JAMIL CHAMBERS,
SADDAR, KARACHI

Before: *Mr. Khalid Mahmood, Member Technical-I, Islamabad.*

Customs Appeal No. K-366/2014 / 5376

M/s. Qamar & Company, (NTN No.2442069)
72-A, Block-III,
Delhi Mercantile Cooperative Housing Society,
Karachi.

Appellant

Versus

1. The Collector of Customs,
MCC (Appraisement West), Customs House, Karachi.
2. The Additional Collector of Customs (Adjudication),
Karachi.

Respondents

Mr. Muhammad Afzal Bhatti, Advocate for the Appellant
Mr. S.M. Wasi, A.O. for the Respondents

Date of Hearing: 19.01.2015
Date of Order: 07.04.2015

ORDER

Mr. Khalid Mahmood, Member Technical: Through this order, I intend to dispose of Customs Appeal No.K-366/2014 which has been directed against order-in-original No.177670 dated 11.02.2014 passed by the Additional Collector of Customs (Adjudication), Karachi.

2. Brief facts of the case are that the appellants imported a consignment from Busan (Korea) declared to contain "Glue assorted sizes poster colors, books for kids etc." at a

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declared net weight of 10,761Kgs which arrived at Karachi vide IGM No.113 dated 07.11.2013, Index No.907. The appellants sought clearances of goods through clearing agent M/s Nisar Shanghai & Sons License No.KCUS-1404 by filling goods declaration vide Machine No.KAPW-HC-59161 dated 13.11.2013 under PCT heading 3506.1000, 3213.1000 and 4820.1090. The value of whole consignment was declared US \$ 36,160/79. The goods were re-examined jointly by the staff of AIB/R&D and examination staff of KICT in the light of GD information retrieved from system. On physical examination of the consignment it was asserted that the appellants have allegedly grossly misdeclared the actual weight of the goods (with essential packing). It has been alleged that the weight of impugned consignment was found weighing 20.752Kgs as against the declared 10.761Kgs which was allegedly 9991Kgs excess (92%) of the total consignment. Therefore, it was held by the respondent that the appellants have allegedly deliberately concealed the actual weight of the goods and misdeclared the value by filing incorrect, fake and forged declaration in order to get assessment on suppressed quantity.

3. It was further held by the learned respondent that the appellants committed offence under Section 32(1)(2), 32(A) and 79(1) of the Customs Act, 1969, Section 33 of the Sales Tax Act, 1990, and Section 148 of the Income Tax Ordinance, 2001, punishable under clause (14), 14(A) & 45 of Section 156(1) of the Customs Act, 1969, read with SRO 499(1)72009 dated 13.06.2009. The offences so mentioned in the Show Cause Notice were contested by the appellant before the respondent substantiating that if carefully scrutinized the allegations were not tenable as most of the goods assessed as glue sticks were infact not the glue sticks at all. Further the appellant submitted before the respondent during the adjudication that weight was not excess 92% but only to 16% kgs which was due to the nature of the goods for which UoM (units of measurement) as depicted in Tariff were different.

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The adjudicating officer after hearing the case concluded as follows:



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"The charge of mis-declaration of weight stands established. I therefore order confiscation of the goods under section 156(1), clause 14, read with section 32(1) & (2) of the Customs Act, 1969. However, an option under section 181 of the Customs Act, 1969 is given to the importer to redeem the confiscated goods on payment of fine Rs.915,637/- (nine hundred fifteen thousand six hundred and thirty seven) being twenty percent (20%) on the offending value of the goods in terms of SRO 499(I)/2009 dated 13.06.2009 in addition to duty and taxes chargeable thereon. I impose penalty Rs.457,818/- (four hundred fifty seven thousand eight hundred and eighteen) on the importer equal to Ten percent (10%) of the offending value of the goods under clause 14 of Section 156(1) of the Customs Act, 1969. A penalty of Rs.50,000/- is also imposed on the Clearing Agency. The respondents are warned to be careful in future".

5. The appellants being aggrieved of the impugned order, filed an appeal under Section 194-A of the Customs Act, 1969, before this Tribunal, highlighting the following grounds:-

- (i) That the impugned order passed by the learned Respondent is whimsical, perfunctory and without any effort to understand the issue therefore, it is illegal and has no force.
- (ii) That calculation of the department for alleged excess weight is not based on correct premise and does not care to avoid double counting.
- (iii) That the alleged excess weight to the tune of 92% is not the correct picture but based on assumption only.
- (iv) That application of value to the impugned consignment also suffers legal flaws as correct and applicable values have not been applied to the impugned goods.
- (v) That valuation of goods under Article-VII of GATT / Section 25 of the Customs Act, 1969, coupled with Customs Valuation Rules is done on basis of weight of actual goods, whereas, in the impugned Show Cause Notice the weight of packing has also been included for assessment. If this argument is entertained then customs shall be rightful to demand the duty on the weight of container as the imported goods are brought to the port in 20 ton or 40 ton containers. Therefore, application of prices including the cartons/packing for items at serial No. 1-4 has no legal rationale.
- (vi) That the following items which are depicted vide serial No. 5 -10 of the

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Show Cause Notice and held so by the respondent in his order are not
Glue Sticks:-

(in SCN)

Description

- (5) GCL-IO-Gold Glitter Glue in bulk pack, 80 cartons declared net 1743 liters, weight with essential packing 2324Kgs.
- (6) PNG10P5-R Wooden 3-d puzzle & glitter: 12 cartons declared net weight 15.12 liters, weight with essential packing 7L136Kgs.
- (7) GCL5136: Glitter Glue large Blister Pack 15 cartons declared net 95.04 liters, weight with essential packing 195.84Kgs.
- (8) Ice jewelry deco (poster colors glass deco 10 colors). 14 cartons net 35.28 liters, weight with essential packing 105.50Kgs
- (9) GD22P13WM13 13 Colors assorted paints 05 cartons declared net 14.3 liters, weight with essential packing net 30.55Kgs
- (10) HLD20 DP High fighter with florescent solid lead 05 cartons 20grs net weight 52Kgs approx (ii) 10 cartons 16.67grs net weight 52Kgs approx (iii) 10 cartons 40grs net weight 123Kgs approx. Gross total 76.67grs net weight 227Kgs
- (vii) That the above are not governed by the Valuation of Glue Sticks vide Ruling 585/2013 dated 30.09.2013. therefore, calculation of excess weight on this account is fictional.
- (viii) That the per unit value applicable to the impugned items is as follows:

S.No.	Description	Per unit value applicable
(1)	GSW8 Glue Stick (Free Washable) 825 cartons declared Net 3960Kgs, weight including plastic casing and cap 9405 Kgs.	4.31
(2)	GSW15 Glue Stick small 80 cartons declared net 480Kgs, weight including plastic casing and cap 960Kgs.	4.31

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(3)	GSW22 Glue Stick 170 cartons declared net 1795.20Kgs, weight including plastic casing and cap 3427.20Kgs	4.31
(4)	GSW35 Glue Stick 120 cartons declared net 1512Kgs, weight including plastic casing and cap 2678Kgs.	4.31
(5)	GCL-IO-Gold Glitter Glue in bulk pack, 80 cartons declared net 1743 liters, weight with essential packing 2324Kgs.	0.85
(6)	PNG10P5-R Wooden 3-d puzzle & glitter: 12 cartons declared net weight 15.12 liters, weight with essential packing 71.136Kgs.	1.10
(7)	GCL5136: Glitter Glue large Blister Pack 15 cartons declared net 95.04 liters, weight with essential packing 195.84Kgs.	1.10
(8)	Ice jewelry deco (poster colors glass deco 10 colors), 14 cartons net 35.28 liters, weight with essential packing 105.50Kgs	1.25
(9)	GD22P13WM13 13 Colors assorted paints 05 cartons declared net 14.3 liters, weight with essential packing net 30.55Kgs	1.25
(10)	HLD20 DP High fighter with florescent solid lead 05 cartons 20grs net weight 52Kgs approx (ii) 10 cartons 16.67grs net weight 52Kgs approx (iii) 10 cartons 40grs net weight 123Kgs approx. Gross total 76.67grs net weight 227Kgs	2.11
(11)	GD-book (drawing books for kids) 500 books net weight 150Kg. Ginss deco kids drawing book 10 cartons 150Kgs	1.00
(12)	(i) Slim Star ultra-fine color pointer 14 cartons 178.75Kgs (ii) PM 120 GD paint marker water 19 cartons 13680pcs, 384.18Kgs (iii) PSSB6-D1 window sticker 5 carton, 8 cartons 116.81Kgs (iv) GDI OP 31 2 cartons weight including packing 21.24Kgs.	1.00

(ix) That from the above facts it is obvious that (i) neither the processing staff has depicted correct weight (ii) nor they have applied the correct per unit value. The confusion of the customs staff is visible from the fact that they have not been able to differentiate between "Glue Stick" and "Glitter Glue in Bulk" for the per unit value purpose and for adding or not the weight of packing material.

(x) That above facts indicate that impugned Show Cause Notice has been issued without going into detailed study of the case therefore, Show Cause Notice not only suffer inherent defects which make it legally void but also reflects incorrect assertion for excess weight and value. If this Show Cause Notice is transformed into order, the resulting order will be equally void and legally unsustainable. "It is now a well settled law, that where the initial order or notice was void, all



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subsequent proceedings, or superstructures build on it were also void. Where any adverse finding was given in the adjudication order on allegations or contentions or findings which are not incorporated in the show cause notice, the entire proceedings would be rendered as void for reason of breach of natural justice, which was breach of law as held by the [Supreme Court in Anisa Rehman v. P.LA 1994 SCMR 2234].

- (xi) That the Appellant has declared correct description of goods, correct PCT, correct quantity, correct origin and correct value, which makes the declaration of the Appellant absolutely correct. The declaration of the Appellant is not suffering on account of any misstatement or document which is incorrect in its material particulars. Therefore, invoking provisions of Section 32(1), 32(2), 32(A) and 79(1) of the Customs Act, 1969, have not rationale owing to missing mens-rea on part of the Appellant. It is submitted that charges of misdeclaration cannot be invoked in absence of mens-rea. Mala-fide and mens-rea are necessary ingredients for committing any offence, including that of smuggling. [Moon International v. Collector of Customs (Appraisement) Lahore PTCL 2001 CL 133]. There are two questions which need to be addressed before invoking section 32 of the Customs Act, 1969, for mis-declaration (a) whether mens-rea which is essential element for the purpose of subsection (1) of section 32 has been proved and (b) whether a demand for short recovery can be made under the provisions of sub-section (2) of section 32, without proving any guilty intention, knowledge, or mens-rea on the part of the maker of the statement. If element of mens-rea is not visible and guilty intention is not proved then provisions of Section 32 cannot be invoked as held in the following landmark judgments :-

- (i) Union Sport Playing Cards Co. v. Collector 2002 YLR 2651
- (ii) Al-Hamd Edible Oil Limited v. Collector 2003 PTD 552
- (ii) A.R. Hosiery Works v. Collector of Customs (Export) 2004 PTD 2977

6. The respondent reiterated the assertions reflected in the Show Cause Notice and held in order-in-original, which inter-alia included as follows:-

- 1) Appellant imported a consignment from Busan (Korea) declared to contain Glue assorted sizes poster colors, books for kids etc. "at a declared net weight of 10,761 Kgs which arrived at Karachi vide IGM No.113 dated 07.11.2013, IndexNo.907.

ATTESTED The Appellant sought clearances of goods through clearing agent M/s Nisar Shanghai & Sons License No.KCUS-1404 by filling goods



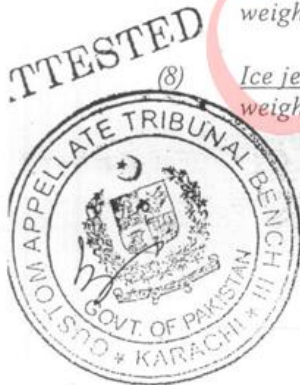
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declaration vide Machine No.KAPW-HC-59161 dated 13.11.2013 under PCT heading 3506.1000, 3213.1000 and 4820.1090.

- 3) The value of whole consignment was declared US \$ 36,160.79. The goods were re-examined jointly by the staff of AIB/R&D and examination staff of KICT in the light of GD information retrieved from system.
- 4) On physical examination of the consignment it was held that the appellant have grossly misdeclared the actual weight of the goods (with essential packing). The weight of impugned consignment was found 20,752Kgs as against the declared 10,761Kgs which was allegedly 9991Kgs excess (92% excess) of the total consignment. The appellant has deliberately/ willfully concealed the actual weight of the goods and misdeclared the value by filing incorrect, fake and forged declaration in order to get assessment on suppressed quantity.
- 5) The appellant has committed offence under Section 32(1)(2), 32(A) and 79(1) of the Customs Act, 1969, Section 33 of the Sales Tax Act, 1990, and Section 148 of the Income Tax Ordinance, 2001, punishable under clause (14), 14(A) & 45 of Section 156(1) of the Customs Act, 1969, read with SRO 499(I)/2009 dated 13.06/2009.

7. During the course of hearing the appellants' advocate submitted that the entire case was based on incorrect perception that all the impugned goods were Glue Sticks whereas factually the following items initially considered to be glue sticks were in effect not glue sticks, as explained below:-

<u>SN</u> <u>(in SCN)</u>	<u>DESCRIPTION</u>
(5).	GCL-IO-Gold Glitter Glue in bulk pack 80 cartons declared net 1743 liters, weight with essential packing 2324Kgs.
(6).	PNG10P5-R Wooden 3-d puzzle & glitter: 12 cartons declared net weight 15.12 liters, -weight with essential packing 71.136Kgs.
(7)	GCL5136: Glitter Glue large Blister Pack 15 cartons declared net 95.04 liters, weight with essential packing 195.84Kgs.
(8)	Ice jewelry deco (poster colors glass deco 10 colors), 14 cartons net 35.28 liters, weight with essential packing 105.50Kgs



- (9) GD22P13WM13 13 Colors assorted paints 05 cartons declared net 14.3 liters, weight with essential packing net 30.55Kgs
- (10) HLD20 DP High fighter with florescent solid lead 05 cartons 20grs net weight 52Kgs approx (ii) 10 cartons 16.67grs net weight 52Kgs approx (iii) 10 cartons 40grs net weight 123Kgs approx. Gross total 76.67grs net weight 227Kgs

8. The appellants counsel also submitted that the fact being so, all the items were not to be assessed on the basis of per unit of value of glue sticks. The applicable per unit value for the items which were actually not the glue sticks to be determined as per relevant Valuation Ruling No.585/2013 dated 30.09.2013 as follows:-

- (i) That the per unit value applicable to the impugned items depicted in the Show Cause Notice is @ US \$ 4.31 per kg for S. No.(1),(2),(3) & (4), @ US \$ 1.10 per kg for items at S.No. (6) & (7), @ US \$ 1.25 per kg for Item S. No.(8) & (9), @ US \$ 1.00 per kg for item at S.No.(11) & (12), @US \$ 0.85 per kg for item at S. No. (5) and @ US \$ 2.11 per kg for item at S.No.(10)

9. On the assertion by the appellants' advocate that the above items were not glue sticks then how the same were treated as glue sticks and how their assessment on basis of per unit value was justified, the respondent was asked to offer any legal rationale for that. However, the Departmental Representative could not forward any plausible reason for the assessment of items other than glue sticks on the basis of per unit value of glue sticks. From the above facts it is obvious that (i) neither the processing staff depicted correct weight (ii) nor they applied the correct per unit value. The confusion of the customs staff is visible from the fact that they have not been able to differentiate between "Glue Stick" and "Glitter Glue in Bulk" "color", "Posters", and "puzzles", for the purpose of per unit value and for adding or not, the weight of packing material. The above facts indicate that impugned Show Cause Notice was issued without going into detailed study of the case and therefore, it contained inherent defects, in terms of assertion for excess weight and value. The counsel further argued that if the defective Show Cause Notice has been transformed into order, the resulting order is be equally void and legally unsustainable. Reliance is placed on [Supreme Court in Anisa Rehman v. P.I.A 1994

SCMR 2234] "It is now a well settled law, that where the initial order or notice was void, all

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subsequent proceedings, or superstructures build on it were also void. Where any adverse finding was given in the adjudication order on allegations or contentions or findings which are not incorporated in the show cause notice, the entire proceedings would be rendered as void for reason of breach of natural justice, which was breach of law ".

10. It is evident that the appellants declared correct description of goods, correct PCT, correct quantity, correct origin and correct value. The declaration of the appellants does not suffer any misstatement or document which is incorrect in its material particulars. Therefore, invoking provisions of Section 32(1), 32(2), 32(A) and 79(1) of the Customs Act, 1969, has no rationale owing to the missing element of *mens-rea* on the part of the appellants. The charges of misdeclaration cannot be invoked in absence of *mens-rea*. Mala-fide and *mens-rea* are necessary ingredients for committing any offence, including that of smuggling. [Moon International v. Collector of Customs (Appraisement) Lahore PTCL 2001 CL 133]. There are two questions which need to be addressed before invoking section 32 of the Customs Act, 1969, for mis-declaration (a) whether *mens-rea* which is essential element for the purpose of sub-section (1) of section 32 has been proved; and (b) whether a demand for short recovery can be made under the provisions of sub section (2) of section 32, without proving any guilty intention, knowledge, or *mens-rea* on the part of the maker of the statement. If element of *mens-rea* is not visible and guilty intention is not proved then provisions of Section 32 cannot be invoked as held in the following land mark judgments:-

- (a). *Union Sport Playing Cards Co. v. Collector* 2002 YLR 2651
- (b). *Al-Hamd Edible Oil Limited v. Collector* 2003 PTD 552
- (c). *A.R. Hosiery Works v. Collector of Customs (Export)* 2004 PTD 2977

11. On account of above legal position, the impugned order-in-original resulting from a Show Cause Notice which was void *ab-initio* being based on incorrect facts, is held as without merits and unmaintainable. The same is therefore, set aside. Accordingly, the goods which are not glue sticks as depicted vide S.No.5 to 10 of Show Cause Notice are ordered to be assessed according to their description and the relevant per unit value as referred to above in para-8(i).



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The items which are specifically glue sticks as depicted vide S.No.1 to 5 of Show Cause Notice shall be assessed according to their applicable Valuation Ruling. As no violation of Section 32 of the Customs Act, 1969, stands established, the redemption fine and penalty are remitted. The Appeal succeeds.

12. Order passed accordingly.

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(Khalid Mahmood)
Member Technical-I
Islamabad

GOVERNMENT OF PAKISTAN
CUSTOMS AND EXCISE TAX
APPELLATE TRIBUNAL, KARACHI

Appeal No(s) CN 163 868-30/122013
M/S. Qamar & Company
Order-to-Order 177670-11022014
by Additional Collector
copy forward to
1. M/S. Qamar & Company
2. Collector of Customs
3. Collector of Sales Tax
4. The Director General
Karachi / Hyd / Quater
5. The Director of General P.C.C.
6. Office Copy.

(Saddiq-ur-Umer)
Assistant Registrar

163 868-30/122013

dt 30/12/13

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