GOVERNMENT OF PAKISTAN
CUSTOMS APPELLATE TRIBUNAL BENCH-II,
3rd FLOOR JAMIL CHAMBER, SADDAR KARACHI

Before : Mr. Tahir Zia Member Judicial-II Karachi

Customs Appeal No.K-137/2015

M/s. Naseem Autos,
Having office at 20/5 LMC Market,
Badami Bagh,
Lahore ..... Appellant

Vs.

1. The Additional Collector of Customs Adjudication-I,
Collectorate of Customs Adjudication-I
Custom House, Karachi

2. The Collector of Custom,
Appraisement (West), Karachi .....

Mr. Salman Yousuf (Advocate) present for the Appellant
Mr. Zulfiqar Zaman (A.O) present for the Respondent

Date of Hearing: 18.08.2015
Date of Order: 02.12.2015

ATTESTED

CUSTOMS APPELLATE TRIBUNAL BENCH-II, KARACHI
GOVT. OF PAKISTAN

ORDER

MR. TAHIR ZIA, MEMBER (JUDICIAL-II): By this order, I will dispose of Customs Appeal No.K-137/2015 filed by the appellant against Order-in-Original No.296865 dated 08.12.2014, passed by the Additional Collector of Customs Adjudication-I, Karachi.

2. Brief facts of the case as reported by MCC Appraisement West that the importer M/s Naseem Autos electronically filed Goods Declaration No. KAPW-HC-KAPW-HC-40241-17-09-2014 and declared to contain Self Adhesive Reflective Sheet at a declared invoice value US$ 31602.00 under

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PCT heading 3919.1090 declaring the total weight 23570 Kgs. The importer determined his liability of payment of applicable duties & taxes in terms of Section 79(1) of the Customs Act, 1969. In order to check as to whether the importer has correctly paid the legitimate amount of duties and taxes, the under reference GD was selected for scrutiny in terms of Section 80 of the Customs Act, 1969 and was referred to Examination for confirmation of description, quantity and other physical attribute of the goods. The Shed staff reported that on the basis of examination ascertained net weight is 25890 Kgs as against declared weight 23570 Kgs. Hence, a difference of weight has been found as 2320 Kgs i.e 11.27%. The scrutiny of the declaration and exam report it revealed that Self Adhesive Reflective Sheet are classifiable under PCT heading 3919.9090 which attracts C.D.@ 20% with no any exemption/concession under FTA SRO-659(I)/2007 dated 30, June, 2007 as against declared PCT 3919.1090 CD @ 20% with claiming of FTA concession @ 16%. For ease reference examination report is re-produced as under:-

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> ASSESSMENT ALERT (EXCESS WEIGHT: 2320 KG (11.27%) FOUND IN ITEM NO.1 FOUND) DOCUMENTS NOT FOUND INSIDE THE CONTAINER. GOODS ARE EXAMINED ON THE BASIS OF INFORMATION RETRIEVED FROM THE SYSTEM. ON PHYSICAL EXAMINATION FOLLOWING GOODS ARE FOUND: SELF ADHESIVE REFLECTIVE PAPER FOR AUTOVEHILCES CONSISTING OF 1. SELF ADHESIVE REFLECTIVE SHEET OF ASSORTED COLORS PACKED IN ROLLS PACKED IN CARTONS WITH ITEM NO: # 3200, SPEC: SIZE: 1.22MX45.7M, BRAND: TONGUING 1/O: CHINA (PRINTED ON CARTON) QTY: 1210 ROLLS N.W= 22890 KG (APPROX) 2. SELF ADHESIVE REFLECTIVE SHEET OF ASSORTED COLORS PACKED IN ROLLS PACKED IN CARTONS WITH ITEM NO: #3300/3400, SPEC: SIZE: 1.22MX45.7M, BRAND: AUDI/NOT SHOWN. 1/0: NOT SHOWN. QTY:150 ROLLS N.W= 3000 KG(APPROX) CHECK

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WEIGHT 100% FOUND 28080KGS VIDE KICT WEIGHTBRIDGE CERTIFICATE (ATTACHED) IMAGES ARE ALSO ATTACHED FOR FURTHER CONFIRMATION. GROUP MAY CHECK ALL ASPECTS. SAMPLE OF BOTH ITEMS HAS BEEN FORWARDED TO CH LAB FOR CONFIRMATION OF ACTUAL DESCRIPTION PCT AND ALL ASPECTS. NOTE: FEES CHARGEABLE ON SAMPLE TESTING WILL BE PAID BY IMPORTER/AGENT. The aforesaid facts prove that the importer has deliberately concealed / declared the weight of the goods take an attempt for getting the goods assessed on suppressed value and quantity for evading legitimate amount of taxes to the tune of Rs.1,281,227/- willfully and with malafide intention. The offending value of the goods is works out to be Rs 2, 113,9,34/-. The importers are therefore, indulge in deliberately concealing the weight of the goods in order to take an attempt of getting the goods assessed on suppressed value and payment of duty / taxes to the tune of Rs.1,281 ,227/- willfully and with malafide intention. The act of the importer attracts the provisions of Section 32(1), (2), 79(1) of the Customs Act, 1969 read with Section 33 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001, punishable under clause (1) (14) of Section 156(1) of the Customs Act, 1969 read with SRO 499-(I)/2009 dated 13.06.2009, as amended from time to time.

ATTESTED

3. After issuing show cause notice, adjudicating proceeding were initiated and the case was decided against importer.

4. The Additional Collector of Customs Adjudication, Karachi, did not agree with replies of M/s. Naseem Autos and passed the Order-in-Original No.296865 dated 08.12.2014, reproduced as under:-

> *"I have examined the case record and considered written/verbal submissions of the respondents and the department. The importer M/s Naseem Autos filed GD No. KAPW-HC-40241-17-09-2014 and*

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declared-the goods as 'Self Adhesive Reflective Sheet' under PCT heading 3919.1090 weight 2,3570 Kg. On examination the weight of goods was found to be 25,890 Kg. The difference of weight came to be 2,320 Kg (11.27% excess). The department classified the subject goods under PCT heading 3919.9090 CD@ 20% with no concession of SRO as against PCT heading 3919.1090 CD 20% as declared by the respondent claiming benefit of FTA SRO 659(I)/2007 dated 30.06.2007 CD 16%. As per GD the respondent declared the value of goods as US$ 31,602/- (Rs.3,310,760/-) and the department assessed the goods at US$ 51-,780/- (Rs.5,424,694/-). The difference of declared and assessed value came to Rs.2, 113,934/-. It is evident that the respondents mis-declared the weight of the consignment to get the goods cleared on suppressed value and payment of lesser amount of duty and taxes by claiming FTA concession under above mentioned SRO. In view of above, the charges levelled in the Show Cause Notice 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 20% Redemption Fine Rs. 422,787/- (Rupees four hundred twenty two thousand seven hundred and eighty seven) in terms of SRO 499(I)/2009 dated 13.06.2009 of the velue of offending goods (as determined by the departmental) in addition to payment of duty and taxes chargeable thereon. I also impose a penalty of Rs.10,0000/- (Rupees one hundred thousand) on the importer."

522,787
fine + penalty

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5. Being aggrieved and dissatisfied with the Order-in-Original, the appellant filed the instant appeal before this Tribunal on the grounds as under:-

i. That the respondent has not appreciated the facts and peculiar circumstances of the instant case in its true perspective and have violated the principles of natural justice while passing the ONO by rejecting or not considering / ignoring the bona fide contention of the appellant and as such has erred in passing the ONO which is liable to set aside on this ground.

ii. That at the outset it is submitted that the show cause notice and the impugned Order should have been vacated as the appellant himself at the time of filing of Good Declaration mentioned/disclosed and pointed out to the Customs department the fact/doubt about the weight hence, there was no willful or malafide intention to declare the lesser weight of the consignment on part of the appellant by any stretch of imagination, therefore confiscation of goods and imposition of fine in this respect was illegal and not warranted under the law.

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iii. That the allegation of mis-declaration attributed in terms of section 32 of the Customs Act 1969 is not maintainable as the goods were examined on the request of the Importer under the 1st Examination system hence after this exercise the respondent cannot invoke the penal provisions of section 32 of the Customs Act 1969 as now it is a settled law that in case of 1st Examination no penal action can be initiated.

iv. That, through the written reply it was submitted by the Appellant as under:-

> "That in International or Local Market the subject item is always sold for the price of Roll or Sqm as in this case, however as per Pakistan Customs Tariff / Law the unit of measure for the subject item is "Kilogram" therefore we did not rely on the weight given by the supplier but preferred to mention the weight on the basis of available information with the note / remarks "CONSIGNMENT WEIGHT IS NOT CONFIRMED PLZ CONFIRM THE WEIGHT AT THE TIME OF EXAMINATION, WILL BE ACCEPTED", this means that we have already pointed out that we are not sure about the weight , the same must be checked before assessment through proper customs examination and we will accept the weight whatever it will be found at the time of examination." the aforementioned remarks clearly indicates that the Appellant himself made a request for 1st Examination of the consignment categorically to ascertain the actual weight of the consignment, but the respondent has very conveniently avoided to even give any finding on this issue which established beyond any shadow of doubt that the learned respondent while passing the impugned order has seriously erred in law and fact and has passed the same in a cursory manner.

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v. That even through the written reply the err was pointed about the wrong calculation of value of offending goods the Learned Respondent has impose fine on wrongly calculated value i.e. Rs. 21,13,934/- instead of correct value of Rs. 486,106/- , this only fact is sufficient to accept that learned Respondent did not given due consideration to the contention of the Appellant, hence this ground alone makes the impugned order a nullity in the eyes of law and hence liable to be set aside in favor of appellant.

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vi. That the Learned Respondent even attempted to go a step further even beyond the show cause notice by making an observation that the Appellant had deliberately and with malafide intent mis-declared the HS Code & Description (though not mentioned in the show cause notice) with a view to evade a revenue. It is submitted with profound respect that such an observation was not warranted in law as the learned respondent had no authority to add anything to the show cause notice by making such a futile attempt to improve the case of the Customs department as neither there is or was any allegation of mis declaration of description nor there is any wrong description claimed or found against the appellant, hence this observation makes the impugned order a nullity in the eyes of law and hence liable to be set aside in favor of appellant.

vii. That, there was no element of mensrea and willful or deliberate attempt on part of the Appellant, as mandated under sub-para (B) of para 101 of the CGO 12/2012.

6. The Respondent has submitted parawise comments / counter objection in reply to the memo of appeal, which are summarized as under:-

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i) The Appellant has not sought release of the consignment under PCT heading 3919.9090 with 20% custom duty rather claimed PCT 3919.1090 @ 16% with FT claim which was inadmissible. The Pakistan Customs Tariff is designed as per International Harmonized Commodity system which clearly indicates that the unit of measurement for declaration is of the Self adhesive reflective sheet on weight basis and not on rolls or meterage basis. The commentary of the appellant is self created and no relevancy with the facts of the case. The importer has filed Goods Declaration under WeBOC system which is designed as self assessment system and normally the goods are cleared upon the importers declaration in accordance with the spirit of the system as "self assessment". The appellant comments are amazing. They had declared weight, value and PCT heading for clearance of

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goods. Luckily the case was intercepted by the Assessment Officer on the suspected grounds which proved during the course of examination of goods. Value of goods and taxes thereto have been worked out on the basis of declared value and assessed value i.e. US$ 1.35/Kg and US$ 2/Kg respectively and evidential proof have already been given in summary of the case as well.

ii) The material and contents offered in summary of the case as parawise comments of the appeal filed by appellant provide sufficient material to this Honourable Court to go through the facts of the case in the light of existing laws and procedure wherein a considerable amount of duty / taxes has been detected and appellant has been paralyzed accordingly.

7. I have considered the arguments of the rival parties and perused the available record and my findings thereon are as under:-

8. I find force in the contentions of the learned AR in as much as the appellant/importer conceded no material information on GD detail having, bearing upon valuation and payments of duties and taxes thereon. It acted in accordance with the international market practice and declared goods measurement in rolls/length. However, it also wrote very clearly in items detail that "consignment weight is not confirmed please confirm that weight at the time of examination, will be accepted" thus after its own honest disclosure, the appellant can't be held guilty by any stretch of imagination. In the circumstances, action of the Customs Authority in imposing penalty and fine was totally arbitrary and unjustified as there was no willful default/misdeclaration but there was bonafide declaration by the importer. So invoking of S.32 of the Customs Act 1969 was too far fetched. The imposition of penalty is not mandatory only for the reason that it has been prescribed in the statute. The authorities should give due regard to the facts and

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circumstances of each case before invoking of S.32 ibid. Guidance in this regard can be had from the judgment of the Honorable Lahore High Court reported as 2004 PTD 1048=89 TAX 136 wherein there lordships held that,

> *"Levy of penalty is a matter of discretion which must be exercised by the authorities judiciously on consideration of relevant circumstances. Penalty should not be imposed merely because it is lawful to do so. If the offence is of a technical or venial in nature, the authorities will be justified in refusing to levy penalty."*

9. Under the facts and circumstances of the case discussed supra and in absence of mensrea on the part of appellant the fine and penalty imposed in the instant case is hereby remitted to the appellant. The Order-in-Original passed by Additional Collector of Customs Adjudication, Karachi is modified to this extend only.

10. Order passed accordingly.

(Tahir Zia)
Member (Judicial-II)
Karachi

CUSTOM EXCISE & SALES TAX APPELLATE TRIBUNAL
Appeal No.(s)/CM No.(s) K-137/15 Date 20/1/15
M/s Naseem Autos
Order-in-original No 286865/14 Dated 08/12/14
By ADC Adj-I,
Copy forwarded to
1. M/s. Naseem Autos
2. Salman Yousuf Adv,
3. Collector of Customs
4. Collector of Customs
5. Collector of Customs
6. Director General
7. Office Copy

4/12/2015
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