

**BEFORE THE CUSTOMS, FEDERAL EXCISE & SALES TAX
APPELLATE TRIBUNAL, SPECIAL BENCH, KARACHI.**M/s U. Trade Logistics (Pvt), Ltd,
Karachi.

Versus

Appellant

1. The Collector of Customs
(Adjudication-I) Custom House,
Karachi.2. The Collector of Custom
MCC West Custom House,
Karachi.

Respondents

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| 1. | For the appellant. | Mr. Madan Lal, Advocate. |
| 2. | For the respondent. | Mr. Amar Aamir, A.C &
Mr. Imtiaz Hussain, A.O. |
| 3. | Date of hearing. | 11.11.2015. |
| 4. | Date of judgment. | 19.11.2015. |

JUDGMENT

MR. GHULAM MURTAZA BHATTI, CHAIRMAN/MEMBER (JUDICIAL). This appeal is directed against Order-in-Original No. 289101-21112014 dated: 21.11.2014 passed by the Collector (Adjudication), Karachi.

2. Brief facts of the case are that the importer M/s Shan Associates, electronically filed Goods Declaration No. KAPW-HC-57908-20-10-2014 and declared to contain KNITTED PILE FABRIC (POPULAR) classifying the goods under HS Code 6001.9290 claiming customs duty @ 16% under FTA regime vide SRO 659(I)/2007, Sales Tax 3% and Income Tax @ 1% under SRO 1125(I)/2001. The importer determined his liability of payment of applicable duty and taxes and sought clearance under Section 79(1) of the

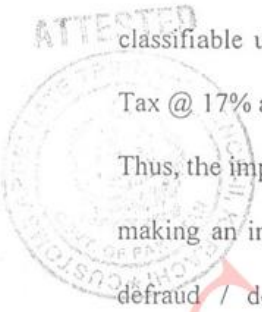
Customs Act, 1969 under Self Assessment system through their clearing agent M/s U Trade Logistics license No. KCUS-2929.

3. 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 attributes of the goods. The report of the examining staff is reproduced below :-

"No document found inside the container. Inspected the lot and examined. Declared description:- Polyester Fleece Fabric Shawls in assorted colours, size 7'-5" x 4"-5", packed in poly bags, qty-20 Pcs/ Bag x 834 =16,680 Pcs=12530 kgs approx, duly sealed r/sample is being forwarded to DC Group-IV to check all aspects, brand and I/o-not shown, 100% weight checked by KICT weighbridge vide slip # 479011 dt:21.10.2014 and found gross wt-12730 kgs."

5. And whereas, bare perusal of the examination report, revealed that consignment actually consisted of "Polyester Fleece Fabrics Shawls in assorted colours, size 7'-5" x 4"-5", packed in poly bags, qty-20 Pcs/ Bag x 834 =16,680 Pcs=12530 kgs approx, classifiable under PCT heading 6214.9010 chargeable to Customs Duty @ 25%, Sales Tax @ 17% and Income Tax @ 3% as against declared duty/taxes (mentioned in Para-1). Thus, the importer has deliberately mis-declared the description of goods, PCT, as well as making an inadmissible claim of concessionary notifications with malafide intention to defraud / deprive the state exchequer from its legitimate revenue amounting to Rs.42,96,689/-. The offending value of the goods comes to Rs.86,50,936/-.

6. And whereas the importer and the clearing agent have, thus, violated the provisions of 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



92/

under clause 14, 14-A and 45 of Section 156(1) of the Customs Act, 1969 clause 11 (C) of Section 33 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001 read with SRO 499(I)/2009 dated: 13.06.2009.

8. Finally the Collector (Adjudication) has held as under :-

"I have gone through the case record and considered written/verbal arguments of the respondent and the department. The main PCT heading 6001 clearly states that 'Pile fabrics, including long pile fabrics and terry fabrics, knitted or crocheted' and heading 6214 is meant for 'Shawls, scarves, mufflers, mantillas, veils and the like.' The respondent declared the goods as 'knitted Pile Fabrics (Polar)' and sought clearance under PCT heading 6001.9290 claiming benefit of FTA CD @ 16% vide SRO 659(I)/2007 and Sales Tax 3% & Income Tax @ 1 % under SRO 1125(I)/2011. dated: 31.12.2011. However, on examination the goods were found to be Polyester Fleece Fabric Shawls in assorted colors, size-7'-5" x 4"-5", 16,680 Pcs (12,530 Kgs) which are appropriately classifiable under PCT heading 6214.9010 Customs Duty @ 25% , Sales Tax @ 17% and Income Tax @ 3%. It is evident that the respondents have mis-declared the description of goods and wrongly claimed concessionary SRO to avail the benefit of FTA. The stance of the department is correct that assessable value in respect of the impugned goods has to have some nexus vis-à-vis price of the raw material of polar fabric (@ us\$3.30/Kg) as available in Valuation Ruling 683/2014 dated: 11.09.2014. Moreover, the Collectorate has also clarified that the total re-assessed value comes to Rs.43,64,416/- involving duty and taxes Rs.23,22,415/-. Hence, the charges leveled in Show Cause Notice stand established. I, therefore, order confiscation of the subject goods under section 156(1) clause 14, read with section 32(1) & (2) of the Customs Act, 1969.

25

However, an option under Section 181 of the Customs Act, 1969 is given to the importer to redeem the confiscated goods on payment of 35% Redemption fine amounting to Rs.15,27,546/- in terms of SRO 499(I)/2009 dated; 13.06.2009 of the value of offending goods (as determined by the department) in addition to payment of duty and taxes chargeable thereon. I also impose a penalty of Rs.1,00,000/- on the importer and Rs.50,000/- on the clearing agent for violation of above mentioned provisions of law.

9. Feeling dis-satisfied with the above treatment, the appellant filed appeal before this Tribunal on the following grounds :-

1. That the Clearing Agent / appellant have certain responsibilities to discharge for conducting his business, however, is neither assigned any function, duties, responsibilities deeds or actions of other stakeholders like shipping agent, shipping lines, transporters, freight forwarders consolidators aboard, B/Ls, nor he bear any legal responsibility for them. The Clearing Agent are licensed for certain specific functions only, therefore, he has no knowledge whatsoever about the intentions of importers, their alleged collusions with freight forwarders or exporters abroad and if there is some irregularity that must be traced from where it was originated and by whom it was initiated, developed, progressed and culminated and above all it must be found out that who was the beneficiary. The following issues will clear the sequences of probable events may be helpful :-
 - a). The importer negotiates with exporter abroad to import certain goods. The Clearing agent would have not any knowledge on this account.
 - b). The importer contracts payment through L/C, Agreement, Advance payment, payment at sight etc, the Clearing Agent is not in the loop.
 - c). The importer contracts with shipper, consolidators, for shipment of goods, the clearing Agent have no knowledge about the terms and conditions.



- d). The imported goods arrive in Pakistan in Port Terminal and manifest depicting consignments to be shifted to off dock terminal are not shared with Clearing Agent.

2. Whether the goods which arrive as consolidated consignments are actually those which are reflected against any particular index, clearing Agent is unable to predict as goods are packed and bundled.

105(a)1 Shipping lines carrying import containers meant for approved off dock terminal shall submit a copy of IGM containing information in respect of all such containers to AC (Import) as well as to entry port and port of destination.

105(a)2 Only specified as above containers shall be allowed movement from port to off dock terminal.

105(b)11 the Shipping Agent shall apply to Assistant Collector of Customs (Imports) on the prescribed application from alongwith copies from AC's office.

105(b)12 The application for transportation of import container shall be submitted in quintuplicate. The carrier shall collect all the five copies from AC's offices.

105(b)13 The distribution of copies to the different authorities of port.

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In the above procedural step, no function is assigned by the Customs General Order to the Clearing Agent.

3. As per para 105(b)14, the bonded carrier shall satisfy himself, prior to transportation of import cargo from port to off dock terminal regarding weight, quantity and description of goods, given in IGM. That besides responsibilities of bounded carrier as per para 105(b)21 the custom officer posted at exit the gate of port of entry shall set the import container(s) weighted at the weighbridge and tally the weight with the mentioned in IGM and record it and in case of difference of 5% or more is found in the actual weight in IGM, the containers shall not be allowed as per para 105(b)22. Similarly the customs officer posted at respective exit gate shall verify the particulars of containers and affix his seal 105(b)24. As regards procedure for arrivals at the destination post is this case various steps of required mechanism are given at 105(c) (26) (33) the customs officer posted at off dock terminal is requested to weight the containers received there and tall the weigh one recorded at the entry port 156(c)(28). In case there is difference of more than 1% between the weight recorded at entry port and off dock terminal, the carrier shall be held responsible.

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4. That from the above procedure it is crystal clear that right from consolidation of goods abroad their treatment by freight forwarded role of shipping line, the receiving and dispatch of imported goods at port of entry, its journey to off dock terminal various functions are allocated to shippers, freight forwarders, customs offices but none to the appellant instead of asking for explanation of the alleged irregularity from shippers, bonded carriers and relevant customs officer only the appellant has been rejected to the impugned orders which is neither legal nor pertinent. If allegedly excess goods of different description arrived in M/s Pak Shaheen, whether any customs officer posted at the port of destination ever reported any difference in weight to his organization or ever any report was submitted by the bounded carrier about any discrepancy of weight or description as per provision of CGO 12/2002. The learned respondent never looked into that but to issue Show Cause Notice later culminated into Order-in-Original to the appellant who does not come into picture for any irregularity.
5. That the impugned order alleges the appellant for and abetment / collusion in the offence for violation of section 16, 32(1), 32A , 79, 155(1) and 192 of Customs Act, 1969 read with section 3(1) of Import and Export (Control) Act, 1959, section 3 & 6 of Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001. The legal meaning of abet is to facilitate the commission of crime, promote its accomplishment, or help in advancing or bringing it about. It includes knowledge of wrongful purpose of perpetrator and counsel and engagement in crime. Now when this legal definition of abetment is superimposed on the role, function and responsibilities of various stakeholders regarding import of containers meant for off dock terminal as given in para 105(a)(b)(c), then truth or otherwise about the allegation of abetments sifted out. Neither the appellant had any knowledge of goods being purchased abroad for import into Pakistan nor the respondents were part of mechanism of consolidation of goods by freight forwarder nor respondent had any influence on shipper, bonded carriers or customs officer all functioning for making arrival of import containers at Pak Shaheen container off dock terminal. Therefore, the appellant was neither in a position to facilitate the crime promote its accomplishment nor it could held in advancing it as the goods were consolidated and manifested somewhere else. Similarly, the appellant had no presence in that country where irregularity was initiated by way of incorrect consolidation, issuance of B/L and allotment of indexes, therefore, the appellant had no knowledge of wrongful purpose of perpetrators and it had no role in encouraging the crime. Hence, the criminal element of the appellant as a Clearing agent is explicitly missing, therefore, in absence of any proof of mens rea charge of abetment against the appellant are not sustainable.



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6. Similarly charges of collusion which denotes secret combination, conspiracy for deceitful purpose are illogical because how appellant as Clearing Agent would be conspiring with the importer who presents their goods to various freight forwarder / shipper abroad. The assertion is devoid of any appeal to a probative mind hence not sustainable.
7. That Show Cause Notice is creation of law and if the relevant provisions of law do not support invoking of cited provisions of law for the GD which never processed, no assessment was made, no short levy was made, no short payment was determined and no more in the field after having been demised by due process of law and too by the competent authority neither has a rationale nor any legal cover. Therefore, appellant vehemently denies the charges and submit no legal action is due against the appellant under the existing provisions of law. The other aspect worth mentioning is that similar Show Cause Notice to M/s Pak Shaheen Off-dock Terminal Operator (the respondent) has been held legally not sustainable by the learned Collector (Appeals). Such self contradicting non-specific and contrary to legal provisions of law based order shall not withstand any legal scrutiny at any judicial forum.
8. That the appellant being clearing agent as "agent" of the "Principle" has a very limited role and the agent cannot be victimized for any mistake, error or irregularity of the principle unless it is proved that agent willfully acted to conceal some facts or tried to certain limits. In the impugned case, the appellant neither indulged in any transgression of established act nor attempted to persuade customs by any use of deceptive or reprehensive methods for clearance of impugned goods. Therefore, no willful involvement of appellant is visible from his acts or conduct for violation of well established norms of conduct of clearing agent as depicted vide Rule 101 of the Customs Rules vide SRO 450(I)/2001.
9. That section 209 of the Customs Act, 1969 determines a limited liability but not absolute liability on customs agent. In context of above provisions of law it proves that the appellant neither placed order, transacted money or maneuvered import of excess quantity impugned order therefore, responsibility for excess quantity imports remain limits to the Principle and it will not travel beyond him as the agent has very limited liability under section 209 of the Customs Act, 1969 for imported goods duties and taxes. Various case laws quoted/relied by appellant i.e. Customs Appeal No.1899/01 decided by Tribunal and SBLR 2002 Tribunal 136 also confirm the doctrine of limited liability in context of clearing agent.
10. That impugned Show Cause Notice is based on the presumptions only. It is settled principle of the law that no action can be initiated under the law mere under presumption only. Presumption could only be valid if these are



9

substantiated by the evidence which is not the case in the impugned Show Cause Notice. Mens-rea in criminal law is concerned with the state of mind of the defendant. Most true crime will require to proof of mens rea. Where mens rea is not required the offence is one of strict liability. There are three main levels of mens rea; intention, recklessness and negligence. Intention requires the highest degree of fault of all the levels of mens rea. A person who intends to commit a crime, can generally be said to be more culpable than generally be said to be more culpable than one who acts recklessly. Intention differs from motive or desire (per Lord Bridge v Moloney [1985]AC 905. Intention can be divided into direct intent and oblique intent. The majority of cases will be quite straight forward and involve direct intent. Direct intent can be said to exist where the defendant embarks on a course of conduct to bring about a result which in facts occurs. The conduct achieves the desired result. Oblique intent is more complex. Oblique intent can be said to exist where the defendant embarks on a course of conduct to bring about a desired result, knowing that the consequence of his actions will also bring about another result. Neither direct nor indirect intent of mens-rea on behalf of the appellant has been proved therefore, penalizing appellant is based only on presumption.

11. That a subjective test for mens rea intent is concerned with the accused perspective. In relation to oblique intent it would be concerned only with whether the accused did foresee the degree of probability of the result occurring from his actions. An objective test looks at the perspective of a reasonable person. It is arguable that since intention requires the highest degree of fault, it should be solely concerned with the defendant's perception. In addition intention seems to be a concept which naturally requires to subjective inquiry. It seems somehow wrong to decide what the defendant's intention was by reference to what a reasonable person would have contemplated. However, originally an objective test was applied to decide oblique intent [DPP v Smith [1961]AC 290]. No objection test is positive against the appellant.



12. That the House of Lords accepted that a subjective test for Criminal intent or mens rea was applicable. However, R v Moloney left a problem with regards to the degree of probability required. This was considered in [R v Hancock & Shankland [1985] 3 WLR 1014], the degree of probability was still causing problems and the cases of ER v Manoney and R v Hancock and Shankland were reviewed by the Court of Appeal in R v Nedrick which reformulated the test. [R v Nedrick [1986] 1 WLR 1025]. The authority of this test was questioned in Woollin. The House of Lords largely approved of the test with some minor modification setting the current test of oblique intent [R v Woollin [1999] AC 82]. Without plausible evidence the appellant has charged for the offence which he never committed and for which degree of probability is minimal and which fails the test of criminal intent on part of the appellant.

13. That the element of mens-rea against the appellant has not been substantiated and proved by any direct or corroborative evidence, the primary requirements for invoking the relevant provisions of law. That in this case there is no element of malafide or mens-rea. Malafide or 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]. Therefore, two question (a) whether mens-rea is essential for the purpose of sub-section (1) of Section 32 and 920 whether a demand for recovery can be made or penalties can be imposed under the provisions of sub-section (2) of Section 32, without proving any guilty intention, knowledge or mens-rea on the part of the any organization or maker of the statement. The superior courts have dealt these question at length in following land mark judgments reported as 2002 MLD 130, 2003 PTD 552 and 2004 PTD 2977.

14. That the absence of element of mens-rea on part of the appellant as clearing agent is visible; hence, any violation of Section 32 of the Customs Act, 1969 is not substantiated and denied. The appellant submits that no penal actions sue against the appellant as clearing agent under any penal clause. The learned respondent has rejected the contention of the appellant without recording any plausible reasons there for and penalized the appellant without legally rebutting the plea of the appellant.

15. The above order is legally not tenable on two accounts :-

For not indicating the elements of mens rea, his intentions, motives involving direct or indirect oblique intent and not subjecting the whole allegation to any subject6 or objective test to find out veracity test to find out veracity of allegations about the intent.

For no recording the reasons for not acceptances of legal points raised by the appellant before the respondent in the hearing and as written response and rejecting the contention of the appellant without recording the reason for every point raised.

For the point 179(i) above the appellant submits that it practice world over to not charge any person unless the concrete evidence for his subjective or objective intent verifying the mens rea os proved. In this regard, he quoted a land mark customs case on the issue of mens rea of the Hon'ble High Court of South Africa reported as The Statew vs Galit Kramash Case No. CC 167/98, 1908/10/27.

16. Whereas, for 17(ii) above it is submitted that the respondent cannot and should not have rejected plea of the appellant without countering it with legal provisions. But unfortunately all the legal points submitted by the




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appellant were not considered by the respondent and reason for rejecting them was not recorded by the respondent too. This is a great legal lacuna and orders suffering such serious infirmity are always declared to be legally sustainable in this regard, he quoted a judgment of the Supreme Court of India reported as STPL 273 SC, SLP(C) No.23763 of 2008.

17. The above two case laws squarely apply to the case of the appellant, therefore, it is requested that impugned Order-in-Original against the appellant as clearing agent suffering from serious legal infirmities and void ab-initio may be set-aside.

10. We have heard both the parties, perused the record and reached to the conclusion that the clearing agent cannot be held responsible for any offence which has not been established as against the principle importer, therefore, penalty imposed upon the clearing agent is remitted.


(KHAWAJA UMAR MEHDI)
MEMBER (TECHNICAL)


(GHULAM MURTAZA BHATTI)
CHAIRMAN / MEMBER (JUDICIAL)

CERTIFICATE.

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It is certified that this judgment consists of 10 pages and each page has been dictated, corrected and signed by us.


(GHULAM MURTAZA BHATTI)
CHAIRMAN / MEMBER (JUDICIAL)

