

GOVERNMENT OF PAKISTAN
CUSTOMS APPELLATE TRIBUNAL
KARACHI BENCH-I,
3rd FLOOR, JAMIL CHAMBERS
SADDAR, KARACHI

Before: **Mr. Muhammad Nadeem Qureshi, Member Judicial-I, Karachi,**

Customs Appeal No.K-313/2014

M/S.Khadim Motors,
1, Al-Hayat Market, Plaza Square,
M.A.Jinnah Road, Karachi.

Appellant

Versus

1. The Collector of Customs (Appeal)
P.E.C.H.S. Karachi
2. The Deputy Collector of Customs Adjudication-I
Custom House, Karachi.

Respondents

Mr. Khalid Hayat, Advocate, present for the Appellant.
Mr. Imran Gul, A.O, present for the Respondents.

Date of Hearing: 19.03.2015
Date of Order: 31.12.2015

JUDGMENT

MR. MUHAMMAD NADEEM QURESHI, MEMBER (JUDICIAL-I): By this Judgment, I will dispose of Customs Appeal No. K-313/2014 filed by the appellant against Order-in-Appeal No. 8459 to 8478/2014 dated 21.02.2014, passed by the Collector of Customs (Appeals), Karachi.

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2. Brief facts of the case are that, consequent upon detection of a case of fraudulent removal of consignment without payment of leviable customs duty and other taxes from M/s. Pak Shaheen Off-Dock Container Terminal, Kemari, Karachi, wherein criminal proceedings were initiated vide FIR No. 111/2011 dated 29.11.2011, an exercise to conduct the audit of the consignments cleared through the aforementioned Off-Dock Terminal was also undertaken and scrutinized in order to ascertain and take necessary action against the actual culprits involved in this malpractice of clandestine removal of goods from M/s. Pak Shaheen Container Services,



Karachi. The investigation and scrutiny of the documents / data carried out in this

particular case so far has revealed that M/s. Khadim Motors imported a consignment of auto parts, declared to contain Rubber Bush=2160Pcs, =20 packages, weighing 540 KG vide IGM No.10011 dated 23-10-2011, Index No.258 and sought clearance thereof against Goods Declaration (GD) bearing Machine No. KAPR-HC-4354 dated 01.11.2011, filed through their Customs Clearing Agent M/s. Flying Horse, Karachi. Further scrutiny of the documents revealed that 1x20ft container bearing number MOAU-6715416 comprising of 05 Less Container Load (LCL). Consolidated consignments consisting of 148 Packages weighing 5907.60 Kg having volume of 16.667M was shipped by M/s. The Freight Services (Thailand) Company Limited, Yanawa, Bangkok to M/s. Facilities Shipping Agency, M1, Queens' Centre, Karachi against consolidated Master Bill of Lading No. MOLU13801159353 dated 02.10.2011. Out of aforesaid 05.LCL consolidated consignments, one consignment of 139 cartons Automotive Rubber Parts of RBI Brand of Thai Origin, weighing 3,106,600/-Kg Gross, 2823.67 Kg Net, having volume of 5.815M pertains to M/s. Khadim Motors, Karachi. However, Facilities Shipping Agency, while filing under section 43, 45 of Customs Act, 1969 illegally substituted / reduced and mis-declared the weight as 600 Kg-Gross, 540Kg.-Net instead of the actual 3106.600/Kg.-Gross, 2832.67Kg-Net, the reduced weight also appeared in the House Bill Lading BKAR-1110-6424-L dated 02.10.2011 relating to M/s. Khadim Motors, with the active of the importers. Subsequently the container was moved to Off-Dock Terminal, M/s. Pak Shaheen Container Services Ltd, Karachi. The aforesaid Terminal staff, conniving with the Importers and their associates did not record / report the difference of the actual quantity and weight as compared to the quantity and weight given in the relevant IGM at the time of de-stuffing / warehousing of the goods / container. Thus M/s. Pak Shaheen Container Services illegally stored un-manifested / undeclared cargo and not timely informed the relevant customs authority rather they concealed the same at the time of customs examination / assessment and facilitated the removal / delivery of the same to the aforesaid importers / customs agents with the collusion of the Customs Staff of MCC preventive and Terminal Operator's staff posted at the Exit Gate of the Terminal. M/s. Khadim Motors, Karachi filed a Goods Declaration (GD) bearing Machine No. KAPR-HC-4354 dated 01.11.2011, filed through their Customs Clearing Agent M/s. Flying Horse, Karachi, declaring the description and quantity as auto parts, Rubber Bush 20

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packages / Carton weighing 600Kg-Gross and 540Kg.-Net. The same goods were presented before the Customs Examination Staff and the Examination Report was endorsed on the GD accordingly. The differential quantity of goods weighing 2284Kg.-Net of Auto Parts R/Bush, remained un-assessed and non-duty paid with active connivance of the concerned staff of the custodian M/s. Shaheen Container Services (Pvt) Ltd., Off-Dock Terminal Operators and their other associates, as the same was neither presented for the examination nor weighed as the integral part of the consignment and as such the said goods were not present to the Customs Examination Staff for examination / inspection. At the time of delivery again with the active connivance of the concerned staff of the Custodian M/s. Pak Shaheen Container Services (Pvt) Ltd., Terminal Operators, five Gate Passes as well as vehicles were used for the purpose to take delivery of 20 Packages of Auto Parts, R/Bush weighing 540Kg.-Net as declared in the GD as well as assessed for duty and taxes by the Customs which otherwise would have been carried out on single vehicle. They however, succeeded to get the deliver along with undeclared / un-manifested and non duty paid quantity of Auto Parts R/Bush weighing 2284Kg. The said vehicles were gate out with the connivance of the concerned staff posted at the Exit Gate of the Terminal.

3. The adjudicating officer vide Order-in-Original No.400/2012 dated 05-06-2013, imposed recovery of Rs.3,42,809/- as well as personal penalty of Rs.2,00,000/- on each of the appellants, importer, clearing agent, freight forwarder and Custodian M/s. Pak Shaheen Container services (Pvt.) Ltd.



Being aggrieved and dis-satisfied with the Order-in-Original, M/s. Khadim Motors filed appeal before Collector of Customs (Appeals), Karachi, who vide Order-in-Appeal No 8459 to 8478/2014 dated 21.02.2014 rejected the same.

5. Being aggrieved and dis-satisfied with the Order-in-Appeal, M/s. Khadim Motors, filed the instant appeal before this Tribunal on the grounds incorporated in the Memo of Appeal.

6. On the date of hearing, Mr. Khalid Hayat, Advocate appeared on behalf of the appellant and contended that, the impugned Order-in-Original and Order-in-Appeal passed by the Respondents are not sustainable under the law and is liable

to be dismissed. He further contended that the consignment of the subject GD was cleared and out of charge way back in the year 2011 and too under the strict vigilance of the custom officials, therefore, in view of such fact, no question of removal of un-assessed / non duty paid consignment arises. The import documents i.e. Bill of Lading, invoice and packing list shows the same weight of 560 net weight and 600 Kg gross weight as declared by the appellant in subject GD, the consignment of the appellant went from the rigors of three examination conducted by the custom officials and nothing contrary to the declaration of GD was found out, therefore the proceedings of the show cause notice was perverse, illegal, and unlawful. He further contended that, there are three documents which governs import transaction i.e. Bill of Lading, Commercial invoice and packing list. After arrival of the consignment for home consumption, the importer files GD containing true and correct particulars of the import on the basis of these documents. He further contended that the adjudicating authority did not have clear cut directions to whom put the blame of unfounded allegations. In a result, the respondent No.2 tried to create nexus between the appellant, custodian and freight forwarders, which is otherwise not supported from the record of the case file. That both respondents failed to appreciate the contention of the appellant which was submitted in reply to show cause notice that specific documentary evidence is required for leveling strict allegation of under declaration, which is otherwise not proven from record. Perusal of show cause notice along with order in original shows that the entire story of illegal removal of un-assessed, non-duty paid consignment was self made by the custom officials to trap the appellant who is importer as the impression was created as if the appellant is involved into alleged under declaration and were involved in removal of un-assessed non duty paid items from the custodian despite the fact that the illegal removal of consignment were also denied by the freight forwarders, Custodian etc., which aspect of the case was ignored by the respondent while hearing appeal before him. The Import documents do not show any misdeclaration attracting the provisions of untrue and false particulars in terms of section 32 of the Custom Act, 1969. When the GD was in accordance with law as well as import documents and the same also went through the custom process and leviable custom duty and taxes were paid on it and after having it out of charged, then the transaction becomes past and closed transaction for all intent and purposes. The contents of show cause notice are self contradictory as much



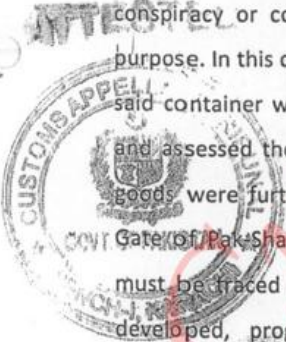
as the show cause notice says that the goods were 100% examined by the relevant Custom officials and on the other hand the show cause notice states that the duties were short paid. He further contended that the Consignment cannot be removed without paying duties/taxes as per manifest. In this case, the process was examined/assessed/checked by the Custom Officials at least three times and the charges of removal of un-manifested cargo without payment of duties and taxes is baseless and uncalled for. The show cause notice was issued just to strengthen FIR No.S1/MISC/02/2012/DC-EW lodged against illegal removal of imported consignments without payment of leviable duties/taxes from M/s.PakShaheen, Off-Dock Container Terminal, Kemari, Karachi, which is not maintainable under the law. Show cause notice does not point out as to who has allegedly evaded custom duties/taxes and who has committed alleged offence. The show cause notice suffers from inordinate delay of 13 months when the delivery of the goods was taken on 10-11-2011 by the appellant, which shows that the show cause notice is after thought and manipulated one. The respondent No.1 erred in law to pass the Order-in-Appeal in a cyclostyled manner as mutatis mutandis, which is not sustainable under the law. It is well settled law that every case has to be decided on its own peculiar facts and circumstances of the case through separate speaking order, which the respondent No.1 failed to do so. The show cause notice was issued by concerned Deputy Collector Appraisement, whereas the order in original was passed by the respondent No.2, who had no jurisdiction at all at the time of passing the order in original, therefore, on this ground alone, the show cause notice and order in original were liable to be dismissed. Even the said aspect was also ignored by the respondent No.1 while hearing the appeal, therefore, the Order-in-Original and Order-in-Appeal was defective in nature and liable to be set aside. In view of above, He respectfully prayed on behalf of the appellant that this Tribunal may be pleased to annul / set-aside Order-in-Appeal No.8459 to 8478/2014 and Order-In-Original No.400/2013 and show cause notice No.ITC/185/2012-VI dated 31-12-2012 in the interest of justice.



7. The department/respondents had not filed cross objections under sub-section (4) of Section 194-A of the Customs Act, 1969. However, on behalf of the Respondents, Mr. Imran Gul, A.O, appeared and argued the matter on the basis of judgment passed by the Single Bench (Member Judicial) of this Tribunal and

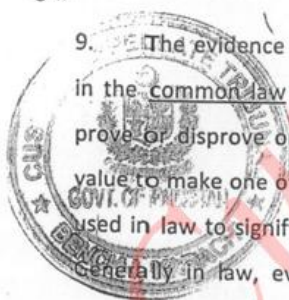
relied on the observations made thereon. He specifically pointed out that, on the said set of documents and proceedings the Tribunal has already passed the judgments bearing Nos. K-234/2014 to K-239/2014 and K-245/2015 in favour of the respondent/department, wherein the whole controversy was decided after considering the legal obligations as required under the law. In support of that, he prayed that the subject appeal is liable to be dismissed in the best interest of justice.

8. Arguments heard and concluded. After perusal of the record file as well as the arguments extended by both the parties, it has been observed that the main ingredients of allegations against the appellant are based on the propositions (i) abetment (ii) collusion (iii) conspiracy to defraud government revenue. The subject allegations required strict connotations and deliberation to be analyzed viewed under the legal prospects. I, prefer to conclude and observe accordingly. It is better to understand the meaning of abetment at first instance as per Black's Law Dictionary abet means: *"To facilitate the commission of a crime, promote its accomplishment, or help in advancing or bringing it about. It includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime"*. Therefore, abettor should have intent and knowledge of crime. Here in this case there is no element of criminal intent or *mens-rea* hence the charge of abetment is not sustainable. Similarly collusion denotes a secret combination, conspiracy or concert of action between two or more persons for deceitful purpose. In this case, it is evident from the record of the case that, the seal of the said container was broken in presence of the customs officials, who examined and assessed the same, leviable duties were paid accordingly, later on subject goods were further checked and examined by the custom officials at the Exit Gate of Pak Shaheen's Off Dock Terminal. If there was some irregularity that must be traced from where it was originated and by whom it was initiated, developed, progressed and culminated. It is the bonafide duty of the respondents/customs officials to specify the sequence of probable events with iota of evidence in proof of the allegations, in which they are hopelessly fail and not been able to establish their alleged claims thereon, as mandated under the law, as prescribed in the Para 105 of the CGO 12/2002. Therefore, collusion is not proved between any of the parties hence the charges of conspiracy to defraud the national exchequer are ill founded as no guilty mind



or guilty knowledge has been proved by the reconciliation exercise. The evidence of collusion and abetment has not been produced by the respondents. Evidence can be placed or comes in four basic forms (i) Demonstrative evidence, (ii) Documentary evidence, (iii) Real evidence and (iv) Testimonial evidence. Some rules of evidence apply to all four types and some rules apply to one or two of them. All of these forms of evidence must be admissible, though, before they can be considered as probative of an issue in a trial. Basically, if evidence is to be admitted at court, it must be relevant, material, and competent. To be considered relevant, it must have some reasonable tendency to help prove or disprove some fact. It need not make the fact certain, but at least it must tend to increase or decrease the likelihood of some fact. Once admitted as relevant evidence, the finder of fact (judge) will determine the appropriate weight to give a particular piece of evidence. A given piece of evidence is considered material if it is offered to prove a fact that is in dispute in a case. Competent evidence is that which accords with certain traditional notions of reliability. Courts are gradually diminishing the competency and rules of evidence by making them issues related to the weight of evidence. In the impugned case the Respondents failed to prove the allegation by any evidence. Moreover, the court is entitled to assess the particular piece of evidence by having regard to the whole of the evidence in the light of the issues at trial. Unfortunately, the Respondent could not bring either probative or relevant evidence against the present appellant.

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9. The evidence produced by the Respondent against appellant is irrelevant in the common law of evidence, the tendency of a given item of evidence to prove or disprove one of the legal elements of the case, or to have probative value to make one of the elements of the case likelier or not. Probative is a term used in law to signify "tending to prove." Probative evidence "seeks the truth". Generally in law, evidence that is not probative (doesn't tend to prove the proposition for which it is proffered) is inadmissible and the rules of evidence permit it to be excluded from a proceeding or stricken from the record "if objected to by opposing counsel." A balancing test may come in to the picture if the value of the evidence needs to be weighed versus its prejudicial nature. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence: This definition

incorporates the requirement that evidence be both material ("of consequence to the determination of the action") and have probative value ("having any tendency to make the existence of any [material] fact...more probable or less probable than it would be without the evidence"). Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. The initial step in determining relevancy is therefore to identify the "matter properly provable." To discover the relevancy of an offered item of evidence one must first discover to what proposition it is supposed to be relevant. Said dictum of law has not been followed or adopted by the respondents, for better reasons known to them.

10. Evidently, there is no show cause notice against the officials to whom, appointed as custom officers and performing their duty for clearance and assessment of the subject consignment. Even otherwise at the time of passing the Order-in-Original the adjudicating officer made the direction for determining the role of concerned staff and for taking necessary action under the relevant provisions of law against those officers who are found guilty of negligence, inefficient and connivance, even in presence of such observations the respondent had not initiated any action against the culprits (customs officials) involved in the subject scam, if so occurred, during the clearance of the subject consignment, active role, participation and connivance has not been specified nor has been identified through any iota of evidence. Without involvement of the custom officers the subject alleged scam has never been accomplished successfully. That very aspect is crucial in this case, and being custodian of law, court is required to maintain the administration of justice and equity, 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 statutes that, what has not been expressly

written by legislature could not be implied. Such standards of legal maxims are not maintained in this case. The superior courts have time and again emphasized that quasi judicial proceedings need to fulfill the requirement of law for evidence and proof of crime need to be authenticated by corroborative chain of events. In this case neither any proof, whatsoever is on record against the appellant for illegal removal of goods without customs formalities nor any solid evidence has been found in the reconciliation report of undelivered goods at Off-Dock Terminal of Respondent. Therefore provisions of section 16, 32A, 79, 155(J) and 192 of the Customs Act, 1969 do not merit to be invoked.

11. It has also been noticed and observed that the show cause notice was issued on the presumptions, the presumptions only valid when it substantiated by the evidence. The mens rea in criminal law is concerned with the state of mind of the defendant, the most true crimes will require proof of mens rea where mens rea is not required the offence is one of strict liability. The 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 one who acts recklessly. In this case the element of mens-re has not been proved by any direct or corroborative evidence, the primary requirement for invoking the relevant provisions of law, there is no element of mala-fide or mens-rea. Two questions were raised in the case of Moon International V. Collector of Customs (Appraisal) Lahore reported as PTCL 2001 CL 133 (1) whether mens-rea is essential for the purpose of sub-section (1) of /Section 32 and (2) 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-ra on the part of the any organization or maker of the statement. The Superior Courts have dealt these questions at length in following landmark judgments reported as 2002 MLD 130, 2003 PTD 552 and 2004 PTD 2977. The absence of element of mens rea on part of the appellant is visible hence no violation of Section 32 of the Customs Act, 1969, was committed. This is a legal lacuna and orders suffering such serious infirmity are always declared to be null and void.

12. After observing the ratio of the legal obligations as observed and referred above, it is mandatory to observe the legality and illegality of the show cause


notice which was issued on 31.12.2012, in the said impugned case which was contrary to the facts and report of contravention made during the hierarchy of the customs, the respondents are hopelessly failed to equate the charges properly against the appellant and the show cause notice in respect thereof was deficient vague, incomplete and unspecified. The authority issuing a show cause notice would have to make out a case itself as to under which provision of the Act the case fell would have to incorporate the grounds and reasons in the Show Cause Notice. Failure on the part of authority without mentioning the proper provisions of law and jurisdiction would render the same invalid and illegal. If the Show-Cause Notice is not properly worded in as much as it does not disclose essential particulars of the charge any action based upon it should be held to be null and void." The above view also gains strength from the Judgment reported as 1984 ECR 645 Bombay (The Calcutta Manufacturing Co .Ltd vs. The Assistant Collector of Customs) is applicable to the facts and circumstances of the case and observed that "A Show-Cause Notice must contain sufficient material to support a prime facie charge where the Customs produced no such material; the proceedings commenced by the impugned show cause notice were to be struck down." And also a hallmark Judgment of the Honorable High Court of Sindh at Karachi in the case of M/s. Kamran Industries vs. Collector of Customs reported as PLD 1996 Karachi 68 is applicable to the facts and circumstances of the case and observed That "Where Show Cause Notice is defective all subsequent proceedings will be void including the appellate orders. Therefore, show cause notices should not be issued mechanically, but should exhibit a proper application of mind by the issuing authority."

13. In furtherance of above observations, court is duty bound to refer here the golden principle of law observed by different higher courts about the powers of the state functionaries and use of powers thereon, state functionaries have no power and authority to conduct fishing and roving inquiries without possessing any definite and proper information, just in hope to unveil some concealment and illegality on the part of the tax payer/citizen. In other words, before embarking upon any inquiry the state functionary must already possess some definite material so as to establish any illegal action having been taken by the citizen. It is imperative to place on record that equity is the soul of the law in

dispensation of justice, in the instant matter, the respondent has furnished the substantial evidence in support of their case. The Honourable Supreme Court of Pakistan in a hallmark judgment namely *Imtiaz vs. Ghulam Ali* reported as PLD 1963 SC 382 laid down the rule that the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All the technicalities have to be avoided unless it is essential to comply with them on ground of public policy. Any system which by giving effect to the form not to the substance defeats substantive rights is defective to the extent. The ideal must always be a system that gives to every person what is his right under the law.

14. By getting the strength stated and observed herein above particularly the interpretation of law and legal propositions in the light of prescribed law and by following the ratio decidendi observed by the Superior Courts along with my additional observations made herein above, I am of the considered view that, the proceedings in the subject case are infested with inherent legal infirmities and substantive illegalities, tantamounts to the patent violation of prescribed law and that too, in utter disregard of principle of natural justice, hence the impugned proceedings conducted and orders passed during the hierarchy of the customs against (upto the extent) of present appellant are hereby declared null and void ab-initio, therefore, accordingly set-aside, appeal is allowed with no order as to cost.

15. Judgment passed and announced accordingly.


(MUHAMMAD NADEEM QURESHI)
Member (Judicial-I)