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-412/2015

M/s. Ashrafi Enterprises,
Karachi.

Appellant

Versus

1. The Deputy Collector of Customs,
MCC, (West), Customs House,
Karachi.

2. The Collector of Customs (Appeals),
Karachi

Respondents

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Mr. Farooq Talib Hussain, Consultant for the Appellant
Mr. Ghulam Yasin, P.A. for the Respondents

Date of Hearing: 19.05.2015
Date of Order: 27.05.2015

ORDER

Mr. Khalid Mahmood, Member Technical: This order disposes of Customs Appeal No.K-412/2015 directed against order-in-appeal No.9885/2015 dated 18.02.2015 passed by the Collector of Customs (Appeals), Karachi.

2. Brief facts of the case are that the appellants imported a consignment under the description "Plastic Head with Blade (parts of Disposable Razor)" and filed Goods Declaration bearing No.KAPW-HC-170117 dated 20.06.2014 under the HS Code 8212.9000, Quantity 8770/kg at the rate of unit price US $ 0.500/kg whereas the same

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was assessed under HS Code 8212.1000, Quantity 3658400/pc at the rate of unit price of US $ 0.0150/pc.

3. The appellant aggrieved from the assessment order filed an appeal before the Collector of Customs (Appeals), Karachi who passed order as under:

> *"I have examined the case record. The appellant had imported the goods and declared them under heading 8212.9000 @ custom duty 20% and value US $ 0.50/kg whereas they were found to be goods conforming to heading 8212.1000 @ custom duty 25% and value US $ 0.0150/pc. The assessing officer extended favour to the appellant by not framing a case for attempt to evade duty and taxes. During the hearing the appellant claims that the subject item is assessed at value US $ 0.02/pc. This claim is even higher than the impugned assessment. I accordingly hold that appellant have no case, hence appeal is rejected"*

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4. Aggrieved, the appellants filed this appeal before this Tribunal on the following grounds:

> "Being aggrieved and dissatisfied by the order passed by the respondent in above noted case which was not communicated to appellant under section 215 of the customs Act 1969 our appeal is within time and request your honor kindly condone the delay.
>
> Brief facts of the case giving rise to this appeal are that the appellant imported a consignment of plastic head with blade (part of disposable razor) falling under PCT heading 8212.9000 quantity 8915 Kg at the unit value of USD 0.50/Kg vide commercial invoice cum packing list dated 15 06.2014 and bill of leading dated 15.05.2014 from China, claiming assessment on basis of evidential record in terms of Section 25(5) of the Customs Act, 1969. On filing GD, representative sample was sent according to its report, the goods were reported to be cartage of safety Razor not falling within.
>
> That while making assessment, the value was assessed on the basis of unsigned. un-dated, said to be guide line issued by some un-known person at 0.01000/- per PC giving 50% in the value of discount razor by classifying under PCT heading 8212.2000 which was objected by appellant on the basis that identical part of disposable razor was being regularly assessed at 1.10 per kg even in the presence of aforesaid so called guide line as per evidential GD KAPW-HC-131627 dated 10.04.2014 and data pertaining to Karachi and Lahore but of no avail.
>
> That aggrieved by the assessment made at USD 0.01/pc in violation of the evidential data of identical goods showing assessment at 1.10 kg and changing classification from 8212.9000 to 8212.1000 by respondent No.1.
>
> That the so called guide line issued by some un-known person or officer is nullity in the eyes of law because the value of any item can only be determined by the Director valuation of Collector under Section 25-A

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by following the methods and sequential order provided in section 25 of the Customs Act, 1969. The so called guide line cannot be termed as determination under the above provisions of law.

That if the goods in question are assessed at 0.0100/pc, the value thereof in weight would exceed USD 6.00/Kg whereas identical goods are being regularly assessed and released at USD 1.10/Kg at all Customs stations in the Country. Thus, assessment at USD 0.01/pc would be un-justified and illegal rather discrimination with the appellant.

That the appellant would not be able to dispose of goods in the market where the identical goods assessed and released at USD 1.10/Kg are available at cheaper rate then the same goods assessed and released at USD 0.0100/pc (USD 6.00/Kg approx). Moreover, classify cartage (Plastic head with blade as complete razor under PCT heading 8212.2000 is also illegal and un-justified.

That admittedly the goods imported by the appellant is not complete razor as also admitted by the respondents. It is a part of the complete razor appropriately classifiable under PCT heading 8212.9000 as in also indicated in the un-signed list/guideline for making assessment thereof. Hence, change of classification on the part of the respondents in un-justified and illegal.

Under the circumstances, it is respectfully prayed that this appeal may kindly be accepted, impugned order as well as assessment be set a aside and the goods be directed to be assessed at USD 1.10/kg on the basis if evidential record in term of section 25(5) of the Customs Act, 1969.

5. The counsel argued that the appellant filed online 1st review application under Rule 441 of CR 2001 before Appraiser and showed his disagreement to the assessment of higher value as lower value is available in data of imports maintained under Rule 110 ibid in terms of clause (d) ibid. Subsequently, the appellant filed 2nd review application before the Respondent-1 but both applications of appellant were rejected and the appellant was asked for payment of duty and taxes in violation of section 25 of the Customs Act, 1969 in sequential manner in the absence of availability of evidential invoice of the same period and country (see expression of sub rule (a) of rule 107 of the Customs Rule 2001) which has to be supplied to the person affected as per mandatory requirement of law read with para 78 of CGO 12/2002 dated 15.06.2002. The declared value of the appellant was fair as the import has been made against registered sale contract, which cannot be summarily rejected unless the respondent proves otherwise through incriminating evidence. Therefore, review applications were filed under Rule 441

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of CR 2001 with reasons and showing disagreement as the assessment was against the section 25(1) of the Customs Act, 1969. Besides, the lowest value of imports of identical goods is available with the department and before enhancing value on the basis of evidential invoice of the period expressed in Rule 107(a) of the Customs Rules 2001, such evidence has to be supplied to appellant as directed in para 78 of CGO 12/2012. The goods have to be assessed under identical transaction value in terms of Section 25(5) ibid by applying lowest import value of data maintained under Rule 110 ibid in terms of clause (d) ibid. They further contended that the respondent also failed to abide by the provision of law contained in sub section (5) of Section 25 of the Customs Act, 1969 and Chapter IX of Customs Rules, 2001. The said proposition of law stood validated from the reported judgments of Tribunals i.e. 2009 PTD (Trib) 1926 and 2010 PTD (Trib) 2432, 2010 PTD (Trib) 2472, 2011 PTD (Trib) 987 & 2011 PTD (Trib) 2624. In this regard he quoted a judgment of the Hon'ble Supreme Court of Pakistan passed in CP. No.1502 of 2004, which upheld the principle enshrined in Article 25 of the Islamic Republic of Pakistan which holds that "A facility allowed to some and denied to one is the discrimination".

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6. The departmental representative contested on arguments as urged in the grounds of appeal and issues raised in the impugned order during his verbal arguments as well as in para-wise comments filed before this Tribunal.

7. It has been observed that when the appellants in the GD filed by them clearly declared that the imports are against confirmed contract/agreement, they discharged the burden laid upon them under section 25(1) of the Customs Act, 1969 and under Rule 109 of the Customs Rules, 2001. For disputing the said value, it was mandated upon the respondent to transmit the message under sub-rule (2) of Rule 109 of Chapter IX and 437 of Sub-Chapter III of Chapter XXI of Custom Rules, 2001 to the appellants for transmitting/scanning additional documents. On the contrary, no such exercise was undertaken either by the Appraiser and Respondent No.1. The department failed to discharge the onus of establishing that the value declared by the

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appellants was not the transaction value within the meaning of section 25(1) of the Customs Act, 1969. The Hon'ble Supreme Court of Pakistan and High Court and Tribunal observed on the subject issue in their judgments reported Customs Appeal No.K-249/2000/13372, Customs Appeal No.K-35/2002, Customs Appeal No.K-1670/2001, 2005 PTD (Trib.) 617, 1668/LB and 1669/LB of 2002, Customs Appeal No. K-1281/05, 1986 MLD 790 Karachi PLD 1996 Kar. 68, 2006 PTD 909, PLD 2003 SC 124 = 2003 CLD 621; 2007 SCMR 1357 = 2007 PTD 1858, 1992 SCMR 1083, 2005 PTD 1250 and 2008 SCMR 438.

8. Besides, the provisions of section 25 of the Customs Act, 1969 have to be followed in sequential manner barring certain exceptional cases where massive group under invoicing is rampant. However, resort to subsequent methods is not permissible without exhausting the sequence indicated in section 25 as it would frustrate the spirit and essence of the transaction value which in the first instance has to be established as colourable and tainted. The mere insertion of words "may or may not" in place of 'are required to" in subsection (15) of section 25 of the Customs Act, 1969 through Finance Ordinance, 2007 does not give unbridled authority to Customs Administration to interpret the provisions of section 25 ibid, the way they would want. Discretion has to be exercised within limits based on reason and fair play. It is specifically provided in subsection (10) of the section 25 that subsections (1), (5), (6), (7), (8) and (9) define how the Customs value of the imported goods is to be determined by the customs. The methods of customs valuation are normally required to be applied in a sequential order except reversal of the order of subsections (7) (8) at the importer's request, if so agreed by the Collector of Customs. This aspect has been examined in a Division Bench in a case of 2008 PTD 1494 Messrs Toyo International Motorcycle v. Federation of Pakistan and 3 others. Their lordship observed:-

> *"Common factor in sections 25 and 25A is determination of value on the basis of the procedure provided in section 25 in the sequence mentioned therein. The language of sections 25 and 25A provides for an authority to determine the value of a particular item but the same is not independent of the various provisions of section 25.*
>
> *A plain reading of provisions of sections 25 and 25A convey that common factor in them is determination of value on the basis of the procedure provided in section 25 in the sequence mentioned therein. Each one of them serves the same purpose if looked from angle of language of law and the principle of interpretation of a fiscal statute."*

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and in para 24 and 25 further that:

"In principle this court has agreed with learned Legal Advisor Mr. Izhar-ul-Haque Sheikh, Advocate, that section 25A is a non obstante clause and it is in supersession to section 25, therefore, all the arguments with regard to adoption of the said procedure as a normal and mandatory requirement stands abated. However, the matter does not end there. There is a very clear direction for the Collector of Customs and Director of Customs Valuation, which is discussed hereinafter.

(25) the provisions of section 25A(1) reproduced earlier can be classified in the following manner:-

(v) That it is a non obstante clause, hence it supersedes section 25,

(vi) That the Collector of Customs can prepare such advice at his own motion,

(vii) That the Director of Customs Valuation can prepare the same on request of a person,

(viii) That while preparing such advices, the sequential order provided u/s 25 shall be followed".

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9. In the cited judgment the question under consideration was as to how the Section 25 of the Customs Act, 1969 is to be applied by the Director-General of Valuation for determining the value of the imported and exported goods for issuance of ruling under section 25-A of the Customs Act, 1969.

10. The established principle of interpretation of the tax law is that the plain language of the law is to be applied. A bare perusal of section 25 shows that it is specifically provided in subsection (1) of section 25 that the customs value of the imported goods, subject to the provisions of this section and rules shall be the transaction value i.e. the price actually paid or payable for the goods when sold for export to Pakistan. The detailed guidelines in this behalf are given in subsections (1), (2), (3) and (4). The provisions contained sub-sections (1) to (4) of Section 25 contain primary methods of valuation and in the first instance the primary methods of valuation is required to be adopted in each case of the valuation of the imported consignment which is essential to keep the spirit of transaction value alive. The detailed guidelines in this behalf are confined in section 25 and the rules reproduced above, thus, is a very important

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requirement of law that before resorting to the method provided in subsection (5) the Customs officials shall make an exercise in accordance with the provisions contained in subsections (1) to (4) of section 25 and if thereafter they find that the customs value of the imported goods cannot be determined under the provisions of subsection (1) they shall resort to the method provided in subsection (5) and not otherwise. It shall be an exercise duly reflecting on the record so that the appellate forums may examine whether the requirements of law has been carried out or not. I am fortified in my view in this behalf with the provisions contained in sub-rule (3) of Rule 109 which provided that "when a final decision is made, the appropriate officer shall communicate with the importer in writing his decision and the grounds therefore." In addition to the specific provisions contained in subsection (10) of section 25 to the effect that the methods of customs valuation are required to be applied in a sequential order we find that it is provided in subsection (6) that, if the customs value of the imported goods cannot be determined under the provisions of subsection (5) method provided in subsection (7) shall be resorted to and similar provisions are contained in subsections (7), (8) and (9). For the said reason, it is held that different methods of valuation provided in section 25 of the Customs Act, 1969 and Customs Rules, 2001 are required to be applied in a sequential order, and without visible exercise reflected on record no resort can be made to secondary method of valuation. In these cases the evidences available of like contemporaneous imports on record and also produced by the appellants have been ignored, no visible exercise brought on record or communicated to the appellants to assessable value arrived at by ignoring the sequential manner.

11. The subject assessment of the value was admittedly made by the respondent under the provisions of section 80 of the Customs Act, 1969, against which an appeal lies under section 193 of the Customs Act, 1969. However, values fixed through valuation rulings in terms of section 25-A of the Customs Act, 1969, by the Collector of Customs or Director of Customs Valuation are subject to review under the provisions of section 25D of the Customs Act, 1969. For ease of reference, the referred sections 25-A, 25-D, 86 and 193(1) are reproduced below:

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Section 25A - Power to determine the customs value. (1) Notwithstanding the provisions contained in section 25, the Collector of Customs on his own motion, or the Director of Customs Valuation [on his own motion or] on a reference made to him by any person [or an officer of Customs], may determine the customs value of any goods or category of goods imported into or exported out of Pakistan, after following the methods laid down in section 25, whichever is applicable.

2) The Customs value determined under subsection (1) shall be the applicable customs value for assessment of the relevant imported or exported goods.

3) In case of any conflict in the customs value determined under subsection (1) the Director-General of Customs Valuation shall determine the applicable customs value]

[Section 25-D

"Review of the value determined".—Where the customs value has been determined by the Collector of Customs or Director of Valuation or any other authority competent to do so, a review application shall lie before Director General of Valuation and any proceeding pending before any court, authority or tribunal shall forthwith abate].

[Section 193(1)

Appeals to Collector (Appeals).—(1) Any person [other than] an officer of customs aggrieved by any decision or order passed under [sections 79, 80 and 179 of this Act by an officer of Customs not below the rank of an Assistant Collector] [***] may prefer appeal to the Collector (Appeals) within thirty days of the date of communication to him of such decision or order;

12. The Lahore High Court vide its reported judgment 2008 PTD 1594 'Sun Traders v. Deputy Collector of Customs, Faisalabad' and 4 others held in unambiguous terms that "law required that when a valuation was determined by the Collector or Director of Customs Valuation, etc., a review petition lay before the Director-General under section 25-D of Customs Act, 1969 and an application lay to the Director-General under section 25-A (3) of the Customs Act, 1969, in case of conflict in the customs valuation determined under subsection (1) of section 25-A of Customs Act, 1969." This view confirmed by a different angle by the Hon'ble High Court of Sindh while deciding the Special Customs Reference Application 35 of 2009 whereby the Customs Appellate Tribunal dismissed the appeal of the appellants which was filed in terms of section 194A of the Customs Act, 1969 against order of the Collector (Appeals) passed u/s 193 ibid, while holding that:

"The Tribunal seems to have misled itself in considering that the impugned order before it was that of valuation ruling which was not the case rather it was an order of adjudication passed

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u/s 193-A of the Customs Act against which appeal only lies to the Tribunal. The impugned order of the Tribunal is thus not in accordance with law.

In the circumstances, we set aside the impugned order and remand the matter to the Tribunal for fresh decision of the appeal"

13. The Customs Valuation of imported goods shall be the transaction value that is the price actually paid or payable on the goods exported to Pakistan. The appellant's invoice value is a declaration of transaction value and no evidence has been brought on record to the contrary. Customs Authorities are under legal obligation to accept transaction value in terms of Section 25(1) of Customs Act, 1969, for assessment of duties and taxes.

14. It has been observed that the assessment made by the respondent on higher value is in total disregard to basic principles of Primary & Secondary Valuation Methods. It did not address the mandatory requirement of application of valuation methods. If the respondent has used section 25(5) of the Customs Act, 1969 (valuation on basis of similar goods) then Customs Valuation Rules pertaining to secondary valuation methods had to be kept in view. The rule 117 of the Customs Rules (sub-chapter IV Secondary Methods of Valuation) explicitly states that in applying sub-section (5) of Section 25 of the Customs Act, 1969, the appropriate officer shall whenever possible, use a sale of identical goods at the same commercial level and substantially in the same quantities of the goods being valued. The respondent has not confirmed that he used values of sale of identical goods at the same commercial level and substantially in the same quantity. If the learned respondent has not complied with the requirement of Customs Valuation Rule 117, then his assessment is defective in nature, not consonant with the opening statement of Section 25 depicting that customs value of imported goods shall be determined on basis of provisions of statute complied with Customs

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Valuation Rules. The compliance with Customs Valuation Rules is mandatory while arriving at any customs value and if this aspect is not considered the dictates of statutes are not complied with and resulting assessment shall be ultra vires to Section 25 of the Customs Act, 1969.

15. In view of the aforesaid detailed discussion, judgments of Apex Courts, Tribunal and data of 90 days providing that the similar consignments of appellant as well as other importers have been assessed and released @ US 1.10/kg, it is evident that the impugned consignment was dealt with differently by taking value on per piece basis, on higher side. It is in order to refer to judgments of the Hon'ble Supreme Court of Pakistan passed in CP No.1502 of 2004 upholding the principle enshrined in Article 25 of the Islamic Republic of Pakistan *"A facility allowed to some and denied to one is the discrimination"*. That being so, I am of the considered view that the assessment order as well as order-in-appeal No.9885/2015 dated 18.02.2015 suffer from obvious illegalities. Both the orders are hereby declared illegal and set aside with direction that the impugned goods be assessed to duty and taxes @ US $ 1.10/per kg. The appeal is disposed of accordingly.

(KHALID MAHMOOD)
Member Technical-I
Islamabad

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Mr-No. 688, dt 29/5/15
GOVERNMENT OF PAKISTAN
CUSTOM EXCISE & SALES TAX APPELLATE
TRIBUNAL KARACHI BENCH-II

Appeal No.(s)/CM No.(s) Cusk-412/15 dated 03-3-15
M/s. Ashrafi Enterprises, Karachi
Order-in-original No. 9885/15 dated 18-2-15 issued
By Collector of Customs (Appeals), Karachi
Copy forwarded to
1. M/s Ashrafi Enterprises,
2. Mr. Faraz Talib Hussain (con)
3. Collector of Customs MCC West, Karachi
4. Collector of Sales Tax
5. Collector of Customs
6. Director General
7. Office Copy.

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29/5/2015
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Customs Appellate Tribunal
Bench-II, Karachi.
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