

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

Before: Mr. Muhammad Nadeem Qureshi, Member (Judicial-I), Karachi
Mr. Mohammed Yahya , Member (Technical-I), Karachi

Customs Appeal No.K-992/2013

M/s. Kaka Traders,
Karachi

Appellant

Versus

1. **The Directorate General of Intelligence,
& Investigation F-B-R,
81-C, Block -6, P.E.C.H.S
Karachi**
2. **The Collector of Custom,
Collectorate of Customs,
(Adjudication-II)
Custom House
Karachi**

Respondents

Mr. Nadeem Ahmed Mirza (Consultant) present for the Appellant.
Mr. Saud Hassan Khan (S.I.O) present for the Respondent.

Date of Hearing: 07.07.2015
Date of Order: 16.12.2015

JUDGMENT

Mr. Muhammad Nadeem Qureshi , Member (Judicial-I), By this order, we will dispose off Customs Appeal No. K- 992/2013 filed by the appellant against Order-in-Original No.10/2013 dated 07.08.2013, Collector of Custom (Adjudication-II (here-in-after to be referred as respondent no. 2) passed by the respondent no. 2.

2. Brief facts of the case as reported by the Directorate General Intelligence and Investigation, FBR Regional Office Karachi, reported that in pursuance of an information that miscellaneous taxable goods/ ready to sell food/ spices item were being imported and cleared by M/s. Mars International situated at 215, 2nd Floor, Panorama Centre, Fatimah Jinnah Road, Karachi as raw material for in house consumption without payment of Value Addition Tax and on payment of reduced rate of Income Tax as applicable to industrial concerned under Sales Tax Special Procedure Rules 2007, vide SRO 480(I)/2007 dated 09.06.2007 read with SRO525/(I)2008, dated 11.06. however, the finished items like Almonds, Small

Cardamom, Cloves, Inshell / Ground Nut Kernels, Peanut Kernels, Dry Coconuts, Cassia whole, Khopra, Tamarind, Coriander Seeds, Sago Seeds, Cinnamon, Desiccated Coconut, Caraway Seeds, Betel Nuts Children Shoes, Gum Copal, Mono-Sodium Glutamate, Sodium Formaldehyde Sulfoxanate, Medical Herbs and Crude Drugs, Fennel Seeds Black Pepper and Mace reported and cleared by the importer were subsequently disposed off by him locally. A carefully analysis/scrutiny of import data revealed that the importer did not pay the minimum value addition tax as levied on all taxable goods, excluding those meant for in-house consumption at import state #2% and 3% in terms of provisions of rule 58(A) and 58(B) of the Sales Tax Special Procedure Rules, 2007, vide SRO 480(I)/2007 dated 09.6.2007 as amended vide 525(I)/2008 dated 11.06.2008 on aforementioned items including black tea. Apparently, the levies were avoided by the importer on the plea that they were registered as "Manufactures" with the Sales Tax Department. The Sales Tax Returns filed by the respondent were silent about in house consumption of under reference consignments, as per data 499 consignments were imported and cleared by the importer.

3. The Collector of Customs, (Adjudication) Customs House Karachi vide Order-in-Original No. 10/13 dated 07.08.2013. The operative part of the order reproduced as under:

"I therefore order M/s. Mares International situated at 215, 2nd Floor, Panorama Centre, Fatimah Jinnah Road Karachi to pay Rs. 42850278/-/(Additional Sales Tax of Rs 22342870/- and Income Tax of Rs. 20507408/-) under section 32 of the Customs Act 1969, Section 36 of the Sales Tax Act 1990, Section 148 and 161(2) of the Income Tax Ordinance, 2001 readwith Section 202 of the Customs Act, 1969. I also impose penalty of Rs. 5000000/-(Rupees five million only) under clauses 14 and 14A of the Customs Act, 1969. Though the submissions made by the clearing agents that they had prepared Goods Declaration on the basis of documents furnished by the importer including Sales Tax Registration which showed the status of the importer as manufacture as well that they had not connived in any mis declaration lead me to give benefit that they might not have colluded to mis declared and thereby evade taxes, nonetheless, I find them negligent to observe that the importer who was importing substantial quantities of raw materials through them under concession as "manufacturing" did not deal in manufacturing of those raw material /goods not did he have a manufacturing facility for them. I therefore, impose a penalty of Rs. 100,000/- (Rupees One hundred thousand) each on the four Customs House Agents M/s. Ahsan International, M/s. Qayyum & Sons and M/s. Kaka Traders under clause 14 of section 156(1) of the Customs Act, 1969.

4. Being aggrieved and dis-satisfied with the impugned Order-in-Original the Appellant filed the instant appeal before this Tribunal on the grounds incorporated in the Memo of Appeal

5. On the date of hearing, the advocate of the appellant contended that the sole function of the Customs House Agent is to prepare the Goods Declaration on the basis of import documents showing the description of goods, quantities value and PCT Heading etc. and file the GD under Section 79(1) of the Customs Act, 1969. Such duties and functions have correctly been discharged. The Customs House Agent is not responsible for the subsequent treatment of the goods imported by their client. Whether the importer uses the imported goods in manufacturing or disposes of in the local market is an exclusive act of the importer and the Customs House Agent cannot be held responsible for such an act. In fact, there is no misdeclaration of value, description, PCT rate of duty etc. on the part of the Clearing Agent hence charge of mis-declaration under Section-32 of the Customs Act, 1969 is unjustified and untenable. He further contended that, clearly the appellants have fulfilled their responsibility filing GD based on the documents provided by the importer without any mal-intent. In fact, there is no evidence available on record which proved the malafide of the Customs House Agent nor is there any evidence to substantiate connivance of the Customs House agent with the importer for defrauding the government of their legitimate revenue. Thus imposition of penalty on the appellant is void and without jurisdiction hence required to be withdrawn. As a Clearing Agent it is their job to make a declaration in accordance with the documents/information supplied to them by the importers and they have been faithfully performing this duty.

6. No cross objections under sub-section (4) of Section 194-A of the Customs Act, 1969 were submitted by the department/respondents. However, on behalf of the Respondents, Mr. Saud Hasan Khan, Intelligence Officer, appeared and further contended that, clearing agent furnish the documents on behalf the importer having the vicarious liability he responsible of any misdeclaration caused and created after filing the goods declaration (GD), as such the adjudicating authority after scrutiny of the record established that clearing agent involved in the alleged offence and therefore, penalty was imposed on him, subject order is well within frame work of legal norms and prayed that the same may be upheld in the interest of justice.

7. After hearing the arguments extended by both the parties. Perusal of the record, it has been observed that the appellants act on behalf of the imported submitted the documents of import, filed the GD which was accordingly processed and the goods were released out of charge. Later on show cause notice was issued against the importer alongwith affiliates including present appellant that there is

nothing specifically alleged against the present appellant in the show cause notice the only allegation against the present appellant is under section 32(1)(2) and 32A of the Customs Act, 1969 alongwith section mentioned in the show cause notice the present appellant evidently performed and this charged his duty and functions in line with section 207, 208 and 209 of the Customs Act, 1969 have not been invoked in the show cause notice which was obviously under their mandate but the reasons better known to deducting agency the provisions of section 108 and 109 of the Customs Act, 1969 alongwith provision of section 207, 208 and 209 of the Customs Act, 1969, as such personal penalty imposed on the appellant is void of law, there is also no evidence available to establish the act of connivance which was also not charged specifically in the show cause notice. Evidently neither specific charge of connivance as to the role of appellant has been mentioned nor the provisions of Section 207, 208 and 209 of the Customs Act, 1969 read with Chapter of the Customs House Agent Rules, 2001 notified under SRO 450(I)/2001 dated 18.06.2001 have been invoked. It is settle law that where provisions in orders have been invoked without their mention in the show cause notice, such orders are held void of law. In case of Collector Central Excise and Land Customs and others versus Rahmdin reported as 1987 SCMR 1840, the apex Court has held that, "...Order of adjudication being ultimately based on a ground which was not mentioned in the show cause notice was palpably illegal on the face of it." The Hon'ble High Court of Lahore in case of DG Khan Cements Co, Ltd Lahore V/s Collector of Customs, Sales Tax and Central Excise Multan reported as 2003 PTD 1797 has observed, "Authority issuing a show cause notice would have to make out a case in the show cause notice itself as to under which provision of act, the case followed have to incorporate the grounds and reasons in the show cause notice very clearly and explicitly so that it could be ascertained that show cause notice fall under Section 36(1) or 36(2) of the Sales Tax Act, 1990. Failure on the part of authority issuing show cause notice is this behalf would render the same invalid and illegal." In case of M/s. Kamran Industries V/s. Collector of Customs reported as PLD 1996 Karachi 68 where under the Hon'ble High Court of Sindh at Karachi has held 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."

8. The clearing agent should be held responsible under the provision of Section 209 of the Customs Act, 1969 readwith Licensing Rules, 1971 in which he

is equally bond alongwith the importer to give correct declaration of the consignment and remain faithful to the State. Similarly in terms of sub-rule (V) of Rule 102 of Customs Rules, 2001 the clearing agent is responsible to exercise due diligence to ascertain the correctness of information which he "exercise" to a client with reference to any customs business". In the present case the appellat discharged his duties properly in accordance with the procedure and rules and no such kind of violation as attributed against the appellat in the show cause notice. The contents of show cause notice refers to irregularities committed by the importer only.

9. In view of the aforesaid legal infirmities in the show cause notice and subsequent order of the respondents fails a test of being in order and have not warrant with the legal frame work as held by the superior courts in their Judgments. The Honourable Supreme Court of Pakistan in PLD 2005 (SC) page 842 Khyber Tractors Vs. Government of Pakistan held that "Courts are required to do justice between the parties in accordance with provision of law. 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" The Honourable Supreme Court further held in its Judgment 1987 SCMR page 1840 Central Excise and Land Customs Vs. Rahim Din "orders of adjudication, being ultimately passed on the ground, not mentioned in the show cause notice was probably illegal on the face of it".

10. Having said so, the subject appeal is allowed upto the extent of remitting personal penalty as imposed on the appellat and the show cause notice is declared void of law and orders emanating from it also stand annulled upto the extent of appellat/clearing agent only.

11. Order passed and announced accordingly.

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22/12/15.

Sd-

(MOHAMMAD YAHYA)
Member (Technical-1)

Sd-

(MUHAMMAD NADEEM QURESHI)
Member (Judicial-1)

Approved: K-992/2013 13/05/2013
Kaka Traders Karachi
10/2013
Collector of Customs Adis
07/18/2013

Kaka Traders Karachi
Nadeem Ahmad Mirza
MCA-Adviser