

IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Reference Application No.75 of 2022
(The Collector of Customs Vs. M/s. NETPAC)

And

Constitutional Petition No.D-2065 of 2022
(M/s. NETPAC Vs. Federation of Pakistan and another)

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Zulfiqar Ahmad Khan

Dates of hearing	:	29.09.2022, 27.10.2022 and <u>03.11.2022.</u>
For the applicant (in Special Customs Reference Application)	:	Mrs. Masooda Siraj, Advocate along with <u>Mr. Javed Hussain Advocate.</u>
For the petitioner (in Constitutional Petition) and the respondent (in Special Customs Reference Application)	:	Mr. Imran Iqbal Khan, Advocate along with <u>Mr. Aneel Zia, Advocate.</u>
For the respondent No.1 (in Constitutional Petition)	:	Mr. G.M. Bhutto, Assistant Attorney <u>General for Pakistan (AAG)</u>
For the respondent No.2 (in Constitutional Petition)	:	<u>Mirza Nadeem Taqi, Advocate.</u>

JUDGMENT

IRFAN SAADAT KHAN, J. Since the subject matter of the Special Customs Reference Application (SCRA) and the Constitutional Petition (CP) are the same, hence these are being decided by this common judgment.

2. The CP has been filed on the ground that the department is not implementing the order passed by the Customs Appellate Tribunal (CAT) in Customs Appeal No.K-7550/2021, dated 22.12.2021, which

is causing prejudice to the petitioner, as the department, on the ground that they have preferred the SCRA are not releasing the goods imported by the petitioner. The department, however, on the other hand has filed the instant SCRA by raising a number of questions of law, however, only the following question of law was admitted for regular hearing, vide order dated 03.06.2022:

Question No.3 Whether the less payment of duty / taxes made through self-assessment by declaring lower invoice value i.e. US\$ 5320/- instead of found invoice value i.e. 89294/- (1578%) is a mis-declaration within the meaning of Section 32(1)(c) and Section 181 of the Customs Act, 1969 read with SRO 499(I)/2009 dated 13.06.2009?

3. Briefly stated the facts of the case are that the petitioner, who is also the respondent in the SCRA, is engaged in import and export of different types of Finger Reader, Access Control System, Biometric Access Control and Walkthrough Metal Detector. The petitioner imported certain goods, vide Goods Declaration No.KAPW-HC-167012 dated 17.05.2021, by declaring value of the said goods at US\$ 5320/-. The department however retrieved an invoice from the container showing value of the goods at US\$ 83974/-. The department thereafter initiated proceedings against the petitioner by issuing a Show Cause Notice (SCN) dated 09.06.2021 calling upon the petitioner to furnish their reply. The petitioner then furnished their reply, however the same was not found satisfactory by the department and thereafter Order-in-Original No.ONO-1706182-07092021, dated 24.08.2021, was passed whereby the petitioner was found to be involved in suppression of the value of the goods imported by them. The department then, through the above referred ONO, assessed the

value of the goods at Rs.13,945,694/-, however gave an option to the petitioner to redeem the said goods on payment of redemption fine of Rs.4,880,993/-, along with penalty of Rs.300,000/-. Being aggrieved with the said order an appeal was preferred before the CAT who, vide impugned order, allowed the appeal and set aside the ONO with the directions to the department to issue delay detention certificate in favour of the petitioner. The petitioner then approached the department for release of their consignment as well as issuance of delay detention certificate, as per the order passed by the CAT; however, when the said request was turned down thereafter the instant petition has been filed. On the other hand, the department has filed the present SCRA in which, vide order dated 03.06.2022, only question No.3, which is reproduced supra, was admitted for regular hearing.

4. Ms. Masooda Siraj Advocate, along with Mr. Javed Hussain Advocate, has appeared on behalf of the applicant in SCRA and stated that in order to check whether the importer has declared correct value of the imported goods, the GD was selected for scrutiny in terms of Section 80 of the Customs Act, 1969 (the Act) and during physical examination, the department retrieved an invoice showing higher value of the imported goods than the value declared by the importer. The department, according to her, detected gross mis-declaration, within the meaning of Section 32(1)(c) of the Act, and came to the conclusion that the value declared by the importer under Section 25(1) of the Act was not correct. The department, according to her, detected that though in the GD declared by the importer the origin of the goods was shown to be from Dubai but according to her the goods in fact

were imported from ZKTECO Co. Ltd. China (hereinafter referred to as ZKTECO). According to the learned counsel since fake and forged documents were furnished by the importer thereafter SCN was issued. She stated that though a purported reply was furnished by the importer but that reply was not found satisfactory and thereafter Order-in-Original bearing No.ONO-1706182-07092021, dated 24.08.2021 was passed, as the importer was found to have willfully suppressed the value of the imported goods. Appeal was preferred before the CAT by the respondent which, according to her, was incorrectly allowed on the ground that the invoice value as declared by the importer should be considered as the transactional value, as per Section 25 of the Act, and that the importer cannot be penalized on the basis of the invoice of ZKTECO.

5. The learned counsel submitted that initial burden of declaring true particulars of the imported goods was upon the importer and if the importer fails to declare the true particulars of the imported goods, the customs officials have the authority, under the provisions of Section 32 of the Act read with Rule 39 of the Customs Rules, 2001, to act accordingly. She stated that the provisions of Section 25A of the Act are quite clear which specifically provide that the value of the goods have to be taken as per the value mentioned in the retrieved invoice. She, therefore, stated that since the value declared by the importer was the suppressed value, which does not match with the value as retrieved from the container, the Customs Authorities were fully justified in adopting the value mentioned in the retrieved invoice. She, therefore, stated that the order of the CAT is not based

on proper appreciation of the facts and the law and therefore the question posed in the present SCRA may be decided in favour of the department and against the respondent/importer. In support of her above contentions, the learned counsel has placed reliance on the following decisions:

- i) *Junaid Traders Vs. Additional Collector of Customs (Appraisalment-I) [2012 SCMR 1876]*
- ii) *Federation of Pakistan through Secretary, Ministry of Finance, Federal Board of Revenue, Islamabad and others Vs. Messrs Horlson International, Karachi and others (2018 PTD 1403)*
- iii) *Order passed by the Hon'ble Supreme Court of Pakistan in the case of Collector of Customs, Karachi Vs. M/s. Muhammad Shafiq (Civil Appeal No.1846 of 2016)*

6. Mr. G.M. Bhutto, AAG appearing for the respondent No.1 and Mirza Nadeem Taqi appearing for the respondent No.2 in the CP have adopted the arguments of Ms. Masooda Siraj.

7. M/s Imran Iqbal Khan and Aneel Zia, Advocates have appeared on behalf of the respondent in SCRA and as counsel for the petitioner in the CP. They, at the very outset, stated that the question of law raised in the instant matter is firstly not a question of law and secondly it does not arise from the order of the CAT. They stated that the SCRA may be answered in favour of the respondent and against the department. They, while elaborating their viewpoint, stated that the decision of the CAT is based on factual findings, as the CAT has clearly opined that the proforma invoice retrieved from the container cannot be considered to be a conclusive evidence for determining the value of the imported goods. According to the learned counsel it has

categorically been observed by the CAT that no effort whatsoever was made by the department to bring on record any contract or agreement between ZKTECO and the importer. According to the learned counsel, the order of the CAT is based on examination of the documents furnished by the respondent, which comprised of actual invoice, name of the person from whom goods were imported, agreement between importer and M/s Decent Middle East L.L.C. Dubai (the company from whom goods were imported hereinafter referred to as Decent), import documents, commercial invoices, details regarding bank transactions, Bill of Lading, EIF Form etc.

8. The learned counsel stated that it was only on the basis of the above referred documents that the CAT came to the conclusion that no mis-declaration, suppression of duties, furnishing of fake or forged documents was detected. The learned counsel stated that the goods were imported through a valid contract from Decent and the duties on the basis of the invoice produced by the importer were paid in accordance with law. The learned counsel also questioned the invoice found /retrieved from the container by terming it as fake and forged. They stated that no effort whatsoever was made by the department to enquire from ZKTECO with regard to the invoice retrieved from the container and with regard to the value shown in the said invoice. The learned counsel stated that no doubt the initial burden was always upon the importer to declare true value of the imported goods but in the cases where the department do not accept the value of the imported goods, the burden lies upon the department to show /prove with regard to the value they propose to adopt for the purposes of duty

and taxes. They stated that in the instant matter the department, upon retrieving the invoice, directly jumped to the conclusion that the value as declared /shown by the respondent was incorrect without fulfilling the legal parameters, as enshrined under the law.

9. The learned counsel stated that the documents produced by the importer comprised of bank statements showing the channel through which the payments were made, the contract made between the parties and other relevant documents. The learned counsel stated that neither any enquiry nor any homework with regard to veracity or otherwise of the retrieved invoice or other documents produced by the respondent was made by the department and it was on this shortcoming on the part of the department that the CAT decided the matter in favour of the respondent. The learned counsel invited our attention to the decisions given by this Court in SCRA No.347 of 2018, SCRA No.491 of 2016 (authored by one of us, namely, Irfan Saadat Khan J.), SCRA No.238 of 2010 and order in SCRA No.29 of 2010 (which decision subsequently affirmed by the Hon'ble Supreme Court of Pakistan in Civil Appeal No.629 of 2011 vide order dated 23.01.2017) and stated that upon retrieving any invoice, which do not match with the invoice produced by the importer, it is the responsibility of the Customs Authorities to co-relate the difference between the two invoices and to enquire from the shipper of the retrieved invoice with regard to its veracity or otherwise, as this burden lies squarely upon the department and in case this exercise is not done, no arbitrary assessment could be made by the department.

10. The learned counsel, therefore, stated that it was the incumbent duty of the Customs Authorities to have substantiated the imposition of duties and taxes by seeking confirmation from the shipper and to ascertain the market value or the rates as shown by other importers of similar consignment and only then that the department could make out a case of mis-declaration against an importer. According to the learned counsel all these aspects are missing in the instant matter, which is evident from the record and duly noted by the CAT. He lastly prayed that this SCRA may, therefore, be dismissed by answering the question in favour of the respondent and against the department and directions may be issued to the department to release the consignment and to issue delay detention certificate in accordance with law.

11. The matter has been heard and the record has been perused. The decisions relied upon by the learned counsel for the parties have also been considered.

12. The record reveals that the proceedings against the respondent (importer) were initiated by the department when an invoice was retrieved from the container. The legal formalities in this regard, i.e. issuance of SCN and obtaining reply, were fulfilled. However the reply furnished by the importer (petitioner), in respect of the SCN dated 02.06.2021, though was reproduced in the ONO dated 24.08.2021, was not found acceptable by the department and thereafter the impugned demand was raised against which, as stated above, appeal was preferred by the respondent, which was decided in their favour, against which SCRA was filed and when the order of the

CAT was not followed, CP was filed. Record also reveals that when the proforma invoice was retrieved by the Customs department no effort, whatsoever, was made by them to co-relate the purchases made by the importer whether these were from ZKTECO. The record also did not show any agreement or contract between the importer and ZKTECO with regard to purchase of the impugned goods. On the other hand the record shows that an agreement was made between the importer and Decent with regard to the purchase of the impugned goods, which was duly supported by import documents, commercial invoices, Bill of Lading and other necessary documents etc. required for the import. The CAT while passing the order has also thrashed out this aspect with regard to co-relation of the purchases made by the importer from Decent, whereas no co-relation has either been proved or substantiated or any effort was made by the department so as to confirm the purchase of the goods from ZKTECO.

13. We are mindful of the fact that in the cases where invoice is retrieved from any container, as per the provisions of Section 25A of the Act, the value is to be taken as per the invoice retrieved from the consignment but the important fact which has to be kept into consideration is the co-relation between the retrieved invoice, the importer and the exporter mentioned in the invoice. In our view in case any invoice is retrieved it is incumbent upon the department to substantiate their assessment by making confirmation from the shipper or to ascertain its market value or to examine the value declared by similar consignments as in absence of these parameters the retrieved invoice loses its significance when the goods declaration and other

documents produced by the importer are found to be genuine and original and are backed by other necessary documents. No doubt in the cases where retrieved invoice is found to be genuine and the goods declaration of the importer is found to be fake then in such circumstances not only the importer is liable to be assessed on the basis of retrieved invoice but is also guilty of mis-declaration of the imported consignment and concealment of material facts and in such situation the provisions of Section 32 of the Act are fully attracted.

14. Now coming back to the case in hand, since in the instant matter CAT has categorically observed that the department has not brought on record any cogent material to substantiate its assessment and that the department has failed to take into account the documents furnished by the importer and that those documents were not found to be fake and forged, therefore, in our view, no adverse inference in this regard could be drawn against the respondent. The decisions relied upon by Ms. Masooda Siraj are found to be distinguishable from the facts obtaining in the instant matter, whereas the decisions relied upon by the learned counsel for the respondent /importer are found to be supporting his stance. Thus the answer to the question raised in the instant matter, therefore, is given in 'Negative' i.e. in favour of the respondent (importer) and against the department. Since the answer to the question has been given against the department, they are directed to release the consignment of the petitioner (importer) within 15 days' from the date of receipt of this order and are also directed to issue delay detention certificate in favour of the petitioner in accordance with law. With these directions, the instant SCRA as well as the CP,

along with the listed /pending application(s), stand disposed of. There shall however be no order as to cost.

JUDGE

JUDGE