GOVERNMENT OF PAKISTAN
CUSTOMS APPELLATE TRIBUNAL, BENCH-III,
2ND FLOOR, JAMIL CHAMBER,
SADDAR, KARACHI

Before: *Ch. Niamatullah, Chairman, Islamabad.*
Mr. Adnan Ahmed, Member Judicial-II, Karachi

Customs Appeal No.II-706 & 707/2009 /3389

M/s. Dewan Farooque Motors Limited,
8th Floor, Block-A, Finance & Trade Center,
Shahrah-e-Faisal, Karachi
Through its Director (Finance),
Mr. Naeemuddin Malik
S/o Saeeduddin Malik. ..... Appellants.

Versus

1. The Additional Collector of Customs,
Custom House, Karachi.

2. The Collector (Appeals),
A/49, SITE Area, Hyderabad. ..... Respondents.

Mr. Darvesh K. Mandhan, Advocate, is present for the appellant
Mr. Abdul Latif Shar, Inspector, is present for the respondent.

Date of Hearing: 30.01.2014
Date of Order: 10.03.2014

ORDER

Mr. Adnan Ahmed, Member Judicial-II, Karachi: By this order we propose to decide Customs Appeal Nos.K-706 & 707/2009 filed by the appellants against the Order-in-Appeal No.12/2009 dated 19.10.2009 passed by the Collector (Appeals), Customs, Sales Tax & Federal Excise, Hyderabad, as common of question of law is involved in both appeals.

2. Brief facts of the case as reported are that that M/s. Dewan Farooque Motors Limited (DFML) is a recognized manufacturer/ assembler of Hyundai Shehzore Trucks 2600cc and Hyundai Santro Cars 1000cc having manufacturing facilities located at Budho Talpur, Sajawal, District

Thatta. The manufacturer is in business since 1998-99 and have been importing CKD Kits of above mentioned vehicles from M/s. Hyundai Motors Korea since 2000 through Collectorate of Customs, Hyderabad.

3. On scrutiny of the record for the period 14th February, 2007 to 30th June, 2007 of the appellant, it has been found that they have not included in the customs value of imported goods the amount of Royalty/Technical fees payable @ US$ 60 against each and every manufactured Hyundai Shahzore Trucks 2600cc and Hyundai Santro Cars 1000cc in terms of Article 5.2 of Technical License Agreement executed in between Hyundai Motor Co., South Korea with Dewan Farooque Motors Ltd on 25th December, 1998. The details are as under:

Model	Period of import (Ex-bonded)	Number of CKD Kits imported (Ex-bonded)	Total amount (in Pak Rupees) of Royalty/ Technical Fee @ US$ 60 per CKD Kit imported (Ex-bonded)	Customs Duty payable against the Royalty amount	Sales Tax payable against the Royalty amount	Income tax payable against the Royalty amount	Total duty and taxes recoverable on Royalty/ Technical Fee
1	2	3	4	5	6	7	8
Hyundai Shahzore Truck 2600cc	Feb, 07 to June, 09	3992	14,361,402	2,972,280	2,675,052	1,230,524	6,877,856
Hyundai Santro Cars 1000cc	-do-	1611	5,997,424	2,099,099	1,214,478	558,660	3,872,237
							10,750,093

4. The appellants were required in terms of clauses (d) and (e) of sub-section (2) of section 25 of the Customs Act, 1969 to include amount of Royalty/ Technical Fee/ License Fee in the customs value of imported CKD Kits. The relevant provisions read as under:

> "(d) there shall also be added to such price, royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable; and
>
> (e) there shall also be added to such price, the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller;"

5. The appellants have no paid duty and taxes amounting to Rs.10,750,093/- as per details given under para 2 of this notice, by not including Royalty/ Technical Fees in Customs value of imported CK Kits.

6. The appellants by way of not including the Royalty/Technical Fees in the declared Customs Value of their CKD Kit have evaded legitimate government levies and have, therefore, willfully and deliberately violated the provisions of clause (d) (e) of subsection (2) of Section 25 read with Section 32(1)(2) of the Customs Act, 1969, Section 3 and 6(1) of the Sales Tax Act, 199 and Section 148 of the Income Tax Ordinance, 2000 punishable under clause (14) of Section 156(1) of the Customs Act, 1969 and Section 33(5) of the Sales Tax Act, 1990 respectively.

7. The Additional Collector, Customs, Sales Tax & Federal Excise, Hyderabad did not agree with the contention / reply of show cause notice by appellant and passed Order-in-Original No.09/2009 dated 22.08.2009 as under:-

> *"I have gone through the record of the case and thoughtful consideration has been given to the contention put forth by both parties, which has led to the following conclusion:*
>
> *(i) The department has relied on the definition of value as contained in clauses and (c) of sub section 2 of section 25 of the Customs Act, 1969. For the ease of reference both clauses are reproduced hereunder:*
>
> *"(d) there shall also be added to such price, royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable; and*
>
> *(e) there shall also be added to such price, the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller;"*

(ii) On the other hand the defendant is of the view that the issue of royalty has been decided through the Hon'ble Appellate Tribunal's decision in Appeals No.K-512/06, K-80106 and H-161/2008.

(iii) In the above mentioned orders the Hon'ble Appellate Tribunal has concluded that:

"In the light of what has been stated it is evident that royalty payments dispute are not related with the import being made by the appellant and as such they did not fall within the mischief of Section 25, sub-section 2(d)(e) of the Customs Act, 1969, hence the demand raised by the respondent was misconceived and the same is not tenable as the royalties are being paid on goods which are locally produced and have no relationship with the goods being imported by them. The demand so raised is, therefore, illegal and the appellant is not liable to include the amount of royalty in the transactional value of the imported goods."

(iv) The decision dated 09.04.2008 of the Hon'ble Tribunal in Appeals No.K512/06, K- 80/06 and H-161/2008 has been appealed against before the Hon'ble Sindh High Court by the Collectorate of Customs Hyderabad by filing appeal in July, 2008. As the matter is subjudice, therefore, the comments on this account shall not be proper. However, whatever the decision is made by the Superior Courts shall be followed by all concerned including the Customs Department in its true spirit.

(v) Coming to the instant case there are sufficient reasons to concur with the viewpoint of the department. As the department's case is based on the express and explicit law enacted by the Parliament of the country as incorporated in sub clause (d) wherein it has been expressly mentioned that their shall be added to the price royalty and license fees. Therefore, I do hold that the royalties are part and parcel of the value. Therefore, the amount of royalty should be included in the value for the assessment of custom duty and other taxes as ordained by the law. Consequently it is ordered that M/s Dewan Farooque Motors Ltd, Sujawal, District Thatta, should pay Custom Duty and Taxes to the tune of Rs.10,750,093/- in terms of Section 32(I) and (2) of the Customs Act, 1969, Section 36(1) of the Sales Tax Act, 1990 and Section 148 of the Income tax Ordinance, 2000 alongwith default surcharge (to be calculated at the time of payment of principal amount) in terms of Section 34 of the Sales Tax Act, 1990. Besides, penalty equivalent to one time of the value of the goods in terms of clause (14) of Section 156(1) of the

Customs Act, 1969 and five percent of the amount of sales tax involved in terms of clause (5) of Section 33 of the Sales Tax Act, 1990 are also imposed upon the taxpayer.

This order shall apply to the case relating to the Show Cause Notice dated 20.07.2009 issued under C.No.04-CusDFML/Adj/ADC/2009/1781 dated 20.07.2009 and relating to the same Unit, mutatis mutandis as the identical facts and questions of law are involved in this case also."

8. The appellant aggrieved and dissatisfied with the Order in Original No.09/2009 dated 22.08.2009 passed by the learned Additional Collector, Customs, Sales Tax & Federal Excise, Hyderabad and filed 1st Appeal before the Collector (Appeals), Customs, Sales Tax & Federal Excise, Hyderabad, who passed order as under:-

I have examined the appeal case record and considered arguments of the rival parties made before me and observed that the Customs, Sales Tax and Federal Excise, Appellate Tribunal, Bench, Karachi had passed an order in Customs Appeal No.512/2006 and H-161/2008 dated 09.04.2006 allowed their appeal filed before said forum and set aside the impugned order No.576/2006, passed by the Collector (Appeal), Karachi, involving identical points of laws and facts, whereas the respondent Collectorate has reiterated their original stand that express provisions of section 25(d) & (e) of the Customs Act, 1969 clearly provides that royalties or technical fee paid directly or indirectly under agreement called Technical Assistance Agreement executed and singed between the appellants and their respective joint venture partners should have been added to the customs value. Thus, by not including the amounts of royalties in the customs value at the time of import of the goods, the appellants committed the offence of mis-declaration as defined under section 32(1) and (2) of the Customs Act, 1969. The Collectorate has also stated in their arguments that there are glaring evidence of payment of royalty, License Fee and Technical fee at the time of assessment of value of the imported goods for the purpose of payment of Customs Duty and allied taxes by M/s. Pak Suzuki Motors, M/s. Hinopak, M/s. Ghandhara, Nissan Ltd., an M/s. Dawoo Yamaha Ltd., whose operation is in the same line of manufacturing and working under similar technical assistance agreements. The arguments contained in the memo of Appeal dated 17.09.2009 are not supported by the evidence available on record. I, accordingly hold that impugned order No.09/2009 dated 22.08.2009, passed by the learned adjudicating officer is correct in law and on facts and therefore, there is no reason to interfere with the same. The appeal is rejected accordingly."

Since the identical law points, facts, grounds and evidence, this order shall also apply mutates mutandis to the following appeal cases, which also stands disposed of accordingly.

S.No.	Name of Appellant	Appeal No.	Order-in-Original
01.	M/s. Dewan Motors Ltd., Karachi	Appeal No.(10)/2009	O-in-O No.09/2009 dated 22.08.2009"

9. The appellant aggrieved and dissatisfied with the Order-in-Appeal No.12/2009 dated 19.10.2009, passed by the Collector (appeals), Customs Sales Tax & Federal Excise, Hyderabad and filed this appeal before this Tribunal on the grounds incorporated in the memo of appeals.

10. The case was fixed for hearing on 30.01.2014. Mr. Darvesh K. Mandhan, Advocate, appeared on behalf of the appellant and Mr. Abdul Latif Shar, Inspector, represented the respondent.

11. The learned counsel for the appellants while argued and seek permission for filing of written arguments as well as which was allowed. The contention raised by the learned counsel for the appellant Mr. Darvesh that the show cause notice under section 32 (1) and (2) of the Customs Act, 1969 was issued by the customs authority with mala fide intention and ulterior motive and alleged mis-declaration of value as prima facie the narration of facts does not corroborate with their allegations. He further submitted that all consignments were released by the customs authority without any objection. The adjudicating authority was issued the show cause notice under section 32(3) of the Customs Act, 1969 and not under section 32 (1) and (2) of the Customs Act, 1969, thus show cause notice was without any authority and jurisdiction.

12. Mr. Darvesh has contended that the respondent was not authorized to impose any fine and penalty on the appellants for violation of provisions of the Customs Act. He further argued that the show cause notice was issued on the recommendation of the Assistant Collector, Hyderabad which is violation of provisions under section 195 of the Customs Act, 1969. The show cause notice was *issued without confirming and confronting the appellant, thus violated the principle*

of audi alteram partem. The learned adjudicating authority in the first place grossly add in correlating the goods with royalties, technical fees and license fee under section 25 (2) (d) of the Customs Act, 1969 and such payment is liable to pay by the buyer directly or indirectly as a condition of sale of goods. He further argued that the sales tax liability passed to the consumers and there would be no liability left out on the vehicles sold out. The learned Appellate Tribunal has already passed different judgments against the respondent in different dates which is a matter is on record and same is recorded by the counsel for the appellants. The learned counsel for the appellant has argued that the respondent's department has no jurisdiction in the matter since in post-importation matter is vested in the valuation department only to issue show cause notice under section 32 and refer the judgment reported as 2006 PTD 2237. The appellant are engaged in a local manufacturing activities is done under technical assistance agreements. The learned counsel for the appellant has referred the different judgments on the point of jurisdiction issue, the principle of audi alteram partem, principle of natural justice, principle of Qanun-e-Shahdat and following Judgments of Full Bench are binding upon Division Bench. PLD 1959 Supreme Court (Pak.), PTCL 1996 CL 1, PTCL 2005 CL 93, PTCL 2003 CL 362, PTCL 2006 CL 486, PTCL 2007 CL 36, PTCL 2007 CL 472, 2001 SCMR 838, PTCL 2008 CL 320, PTCL 1999 CL 119, PTCL 2009 CL 330, PTCL 2009 CL 470, (2001 135 ELT 1034 at Page 135 (Tri. Mumbai) India, 2001 PTD 661, Custom Apl No.K512/06, K-80/06, H-161/2008, 2004 PTD (Trib) 2712, PTCL 2007 CL 472/473, PTCL 2009 CL 470/471, S.T. Appeal No.H-188/2006, 2009 PTD (Trib.) 500, 2009 PTD (Trib.) 2074, 2002 MLD 180 (Kar HC), PLD 1963 SC 322, 1992 SCMR 1898, (1991) 3 WLR 153 (Privy Council), (2008) 97 Tax 156, (2009) 99 Tax 35, PLD 1959 SC 45, PLD 1964 KAR 478 (FB), PLD 1964 SC 673, PLD 1966 SC 536, 1994 SCMR 1299, 1985 SCMR 1516, PLD 1987 SC 304, 1994 SCMR 2232, 2004 SCMR 158, 2006, SCMR 1023, 2007 SCMR 1451, (1992) 66 Taxation 89 Lhr HC, (1997) 76 Taxation 111 (Trib), PTCL 1985 CL 100, PTCL 2005 CL 93, PLD 1962 (WP) Karachi 895, PTCL 1986 CL 46 Vol. IV, 2004 SCMR 456, PTCL 2001 CL 627, 2005 PTD 1984, 2005 PTD 1978, 2005 PTD 1953, 2003 PTD 1445, 2004 PTD 2771, PLJ 1979 Quetta 66, 71 & 72, 1986 CLC

745 Kar, 1986 CLC 1408 Kar, 1993 SCMR 662, 1991 MLD 1243, (1974) 94 ITR 1, (1984) 146 ITR 140 and (1985) 53 Taxation 1 (Trib.). The counsel for the appellant has prayed that this Hon'ble court may be pleased to pass an order in favour of the appellants as prayed in the memo of appeal.

13. Mr. Abdul Latif Shar, Inspector has vehemently opposed the contentions of the learned counsel for the appellant and stated that the show cause notice was correctly issued to the appellants and denied the advance arguments of the appellant's counsel. He stated that the appellant was required under section 25 sub-section (2) (d) & (e) of the Customs Act to include the amount of Royalty/ Technical Fees/ License Fee paid by them to hire principle in the customs value of imported CKD Kits in terms of Article 5.2 of Technical License Agreement. The appellants have evaded legitimate government levies and have therefore, willfully and deliberately violated the provisions of section 25 sub-section (2) (d) & (e) of the Customs Act, 1969. The department being aggrieved as sue against the Collector of Customs (Appeals), Hyderabad which was referred by the appellant's counsel and prayed for dismissal of the appeal of the appellant with special costs.

14. We have heard the learned counsel/ representative as above, examined the record with assistance and considered the case law relied upon and come in conclusion that the department relied the definition of value as contained in section 25 sub-section 2 (d) & (e) of the Customs Act, 1969. The appellant's counsel has argued the issue of Royalty which was decided by the Appellate Tribunal vide Appeals No.K-512/2006, K-80/2006 and H-169/2008. The learned representative of the respondents has stated that the appeal was impugned before Hon'ble High Court of Sindh but failed to submit any order passed by the superior courts against such findings which are already reproduced by the forum below.

15. We are fully satisfied with above mentioned reliance/ citations submitted by the learned counsel for the appellants on the point of jurisdiction issue and evidence which he produced. The demand raised by the respondents is illegal and the appellants are not liable to include the amount of Royalty in the transactional imported goods. This view was held by the Customs Appellate Tribunal, Bench-I in their judgment in Customs Appeal No.K-512/2006. The impugned order-in-appeal passed by the respondent No.2 and applied mutatis mutandis to the case and failed to pass an order separately although the Hon'ble High Court has already directed the adjudicating authority to pass a speaking order giving reasoning separately of each case. The Hon'ble High Court in reported case 2011 PTD 2849 of M/s. Pakistan Telephone Cables Vs. Federation of Pakistan has already given direction to the adjudicating authority to decide the matter separately accordingly.

16. We observe that the impugned orders suffer from legal and factual in improprieties, therefore, fact of the show cause notice and impugned orders are, therefore, set aside. The subject appeals are accordingly allowed as prayed with above observations as no order to cost.

17. Order passed accordingly.

Sd/-

(Adnan Ahmed)
Member Judicial-II
Karachi

Sd/-

(Ch. Niamatullah)
Chairman/Member Judicial-I
Islamabad