

[Customs Appellate Tribunal]

Before Adnan Ahmed, Member (Judicial-II) and
Ghulam Ahmed, Member (Technical-II)

Messrs ALPHA CORPORATION

versus

COLLECTOR OF CUSTOMS, (APPEALS),
KARACHI and another

Customs Appeal No.K-920 of 2010, decided on 19th June, 2013.

Collector of Customs (Adjudication) and another Customs Reference
Application No.157 of 2008 ref.

Sardar Faisal Zafar for Appellant.

Ghulam Yasin, P.A. for Respondents.

Date of hearing: 7th May, 2013.

ORDER

ADNAN AHMED, MEMBER (JUDICIAL-II).---This order will dispose of Customs Appeal No.K-920/2010 filed by the appellant against the Order-in-Appeal No.4070 of 2010, dated 7-7-2010, passed by Collector of Customs (Appeals), Karachi.

2. Brief facts of the case as reported are that the appellant had imported consignments of Sodium Acid Pyrophosphate and cleared the same under PCT heading 2835.2920 on payment of custom duty @ 5% whereas actually the same were correctly classifiable under PCT heading 2835.3900 chargeable to customs duty @ 10%. The incorrect classification had also resulted in short payment of sales tax and income tax on the aforesaid imports. The appellant was accordingly charged for intentionally and willfully causing a loss of Rs.94,1567 to the Exchequer. A Show-Cause Notice C. No. PCA/205/2009-Audit dated 18-3-2009 was issued to Messrs Abdul Rashid (Alpha Corporation), Shop No.7, Seema Cloth Market, O.T.6/21, Kagzi Bazar, Karachi.

3. The Assistant Collector of Customs, Model Customs Collectorate of PaCCS, Custom House, Karachi, vide Order-in-Original No.13/2010 dated 20-1-2010, mutatis mutandis applied on the present appellant, passed the following order:--

"I have examined the case record and considered the submissions of both the department, Directorate General of Post Clearance Audit Karachi and the importer, and found that "Sodium Acid Pyrophosphate" actually falls under PCT heading 2835.3900 and not covered under the claimed PCT heading 2835.2920. Hence, the importer Messrs Orkila Pakistan (Pvt.) Ltd., (NTN-1309348) Head Office; I-Kokan Housing Society, Shaheed-e-Millat Road, Karachi along with clearing agent Messrs Bhola Brothers (CHAL 777), 21 Ramzan Chambers, 2nd Floor, Dr. Billimoria Street, Off I.I. Chundrigar Road, Karachi, committed offence of mis-classification, mis-declaration and violated provisions of sections 18, 19, 32(1) & (2), 32A, 79 and 80 of the Customs Act, 1969, section 4(c) of the Sales Tax Act, 1990, section 148(1) of the Income Tax Ordinance, 2001, punishable under clauses (H) and (14A) of section 156(1) of the

Customs Act, 1969, sections 33(1)(c) and 36(1) of the Sales Tax Act, 1990 and section 148 of the Income Tax Ordinance, 2001 and relevant penal provisions of allied laws. The charges levelled in the show-cause notice stand established. In exercise of powers conferred under sections 179 and 181 of the Customs Act, 1969, I hereby order that the short paid/evaded amount Rs. 255,035 shall be paid by the importer. A personal penalty of Rs. 25,000 is also imposed on the importer."

4. The appellant being dissatisfied with the Order-in-Original and filed an appeal before the Collector of Customs (Appeals), Karachi vide Order-in-Appeal No.4070/2010 dated 7-7-2010, who passed the order as under:--

"I have examined the entire case record and given careful consideration to the arguments made before me. The principal issue for determination in this case is whether pyrophosphates are polyphosphates or otherwise. If the former are polyphosphates, the same are correctly classifiable under PCT heading 2835.3900 and the literature/evidence (Hawley's Condensed Chemical Dictionary, Eleventh Edition - Page 1071 Ed Europeans Customs Inventory of Chemicals, Brussels, June, 1997, Volume 2 - Page 227) produced by the departmental representative clearly establishes that pyrophosphates are polyphosphates. Therefore, there is no doubt that the goods imported in this case were classifiable under PCT heading 2835.3900 attracting customs duty @ 10%. From the record, it is also evident that the appellant had deliberately and with mala fide intent self-cleared the goods under an irrelevant PCT heading by misusing the system of automated clearances operative under PaCCS whereas other importers were clearing identical goods under correct PCT heading. The learned counsel has not produced any evidence to the effect that the appellant had quoted incorrect HS Code without mala fide intent. Therefore, I have reason to believe that he quoted the irrelevant PCT heading with the intention of defrauding the Exchequer of its legitimate revenue to the tune of Rs.94,156. Moreover, the learned counsel has also not been able to prove that the impugned order is time-barred within the meaning of the time limitation stipulated under section 179 of the Customs Act, 1969. Therefore, I rule that the arguments advanced by the learned counsel do not find any support from the evidence on record and the case-laws quoted by him are not relevant to the facts and circumstances of the instant case. The penal action taken in this case is also in consonance with the gravity of offence committed. Therefore, I hold that the impugned order is correct in law and

on facts and there is no reason to interfere with the same. The appeal is rejected accordingly."

5. Being aggrieved with the Order-in-Appeal No.4070/2010 dated 7-7-2010, passed by the Collector of Customs (Appeals), Karachi, the appellant filed an appeal before this Tribunal on the basis of the following grounds:--

- (1) That the impugned order of the respondents is not authorized by law in as much as it is based on wrong interpretation of law.
- (2) That the impugned order of the respondents is against the prevailing departmental practice and thus the same is discriminatory.
- (3) That the impugned order of the respondents is ab initio, illegal, void, mala fide in as much as the same is influenced by circumstances not permitted by law.
- (4) That the impugned order is based on whimsical ground/mis interpretation without following the spirit of mandatory provision of law/established departmental practice/procedure and due to the said reason/basis same is discriminatory.
- (5) That the impugned order of the respondents without giving a proper opportunity of hearing is tantamount to violation of principles of natural justice as well as ruling of Superior Courts given in identical cases, wherein it is clearly given that no body should be condemned unheard and same is also in violative to ruling of Superior Courts given in identical cases.
- (6) That the impugned order is in violative to ruling of Superior Courts given in identical cases, wherein it is clearly held that penal provision can not be applied as a routine for application of same higher degree proof of wilful involvement is required which the respondents failed to follow while passing a contradictory/harsh impugned order.
- (7) That the impugned order is in violative to directives/criteria of CBR given vide CGO 21/73, CGO 21/89 and para. 74 of CGO 12/2002 wherein it is clearly given that no abrupt change in established practice can be made and a proper criteria for deviation from established practice is given, which the respondents failed to follow which is tantamount to clear negation of section 223 of the Customs Act, operative para of aforesaid directives of para 74 of CGO 12/2002 is reproduced as under:

Departure from existing practice - where there is a question of

departing from existing practice, whether governed by express orders of higher authority, or not, the Collector of Customs should, if the proposed departure is in the direction of an assessment more favourable to the importer, adhere to the existing practice and make a reference to the CBR accepting duty meanwhile from the assessee, under protest if the assessee so requires. Where the Collector contemplates a change to a high assessment then has been the practice, he should not take action upon his view until he has obtained orders, but such orders would not have retrospective effect. *Tariff rulings-Retrospective effect-(i)* When a ruling has been issued by the CBR or the Government in the matter of the interpretation of the tariff and when such ruling shows that the practice of any custom house in the assessment of goods has been incorrect resulting either in the short levy of duty or the levy of excess duty, it must be held that such short levy or excess levy has been due to error or misconstruction on the part of the officers of customs. The Government are, however, pleased to direct that ordinarily no proceedings shall be taken under Section 39 if it appears that duty has been short levied previous to the receipt of the ruling in the custom house is perfectly correct. No doubt the law is not altered but the law has been acted upon in a particular manner through tariff rulings, and in the light of such interpretation, certain duty is charged. The interpretation shall continue till a period it is not altered. As soon as it is altered it shall be effective from the date of hits doing so.

Even otherwise, an innocent person paying duty on goods in a bona fide manner to the satisfaction of the rules, is protected from being further harassed. This practice may lead to complication and revision of the tariff rules may effect innumerable people for no fault of theirs.

- (8) That superior Courts in following identical cases, clearly held that in subsequent to release of the consignment out of the customs premises any dispute regarding value/quantity/description has no legal value and no amendment can be made in CD's as the same will be treated as past and closed transaction, operative para of said section 29 is reproduced as under:--

"Restriction on amendment of bill of entry or bill of export-Except as provided in section 88, no amendment of a bill of entry or bill of export relating to goods assessed for duty on the declared value, quantity or description thereof shall be allowed after such goods have been removed from the customs area".

- (9) That invoking of section 32 on the, basis of any presumptive basis apparently does not find any support from the language of said provision and it is also held by the Superior Courts that once consignments is out of charge after due consideration of relevant facts it becomes a past and closed transaction to the extent of its value and same should not be invoked only on the basis of mere estimates gossips, personal whims or feelings that value could have been enhanced or it could fetch more taxes for the purpose of re valuation of an earlier estimate or adopted figure would require reason to believe and not reason to suspect.
- (10) That as for as application of any presumptive basis is concern especially in the manner that they are being prepared a still estimates if the same are not followed at the time of earlier appraisalment, it can not be used against an importer which has already appraised and has been made out of charge by the customs authorities, Superior Courts also held that addition of word "material particular" in section 32 totally shuts the doors of gossips, estimates, surmises or apprehension. "The phrase reason to believe" and later on in any "material particular" can not give rule to any vague estimates, howsoever strong it may be. It only applies if the documents are furnished and statement have been given knowingly that the same are wrong and incorrect and term reason to believe and material particular has been defined of the Superior Courts in following identical cases, operative para of the same is reproduced as under:

Regarding the phrase "material particular" this again is very restrictive. The term "material" used here means 'pertaining to the subject matter' while 'particular' is synonymous to accurate, appropriate, definite, detailed, distinct, exact etc. the phrase, therefore, can only be used where definite and positive belief can be established with regard to submission of the incorrect documents or wrong statement. The valuation ruling on the basis of which said show-cause notice has been issued does not come up to the said parameters in any form, Ms. S. T Enterprises v. Pakistan, 2009 PTD 467.

- (11) That in case of Messrs Sikandar Enterprises v. Appellate Tribunal, Karachi 2008 PTD 1968 wherein it is clearly given that after clearance of consignment from customs area customs authorities are functus officio to re-open the case again as it become past and closed transaction.
- (12) That the impugned order of the respondents is also in violative to spirit of section 179 of the Customs Act, as the same has been

passed after the lapse of many months from the date of issuance of Audit Observations, which is in violative to spirit of aforesaid provision of law/ruling of Superior Courts given in identical cases, wherein it is clearly held that no liability can be created after the stipulated period given under the mandatory provision of law, which the respondents failed to follow and due to the said reason/basis impugned order which is in disregard to mandatory provision of law/ ruling of Superior Courts is void and have no legal value.

- (13) That the impugned order of the respondents is in violative to ruling of Superior Courts given in identical case. Ms. Genuine Import Impex v. Deputy Collector, 2009 PTD 263 wherein it is clearly held that after the expiry of time limit given under the law no extension can be made, it is also held that extension without recording exceptional circumstances or providing any lawful reason exceptional circumstances in writing which could justify the said extension otherwise any extension as a routine has no legal value.
- (14) That the impugned order of the respondents is highly unjustified and clear misuse of discretionary powers which is in violative to principles of natural justice as well as established department practice/procedure and due to the said reason/basis same is discriminatory and also against the ruling of Supreme Court of Pakistan given in identical case of Ms. Walayat Ali Mir v. PIA Corporation, 1995 SCMR P.650, wherein for proper use of discretion a specific criteria is laid down, operative para of the same is reproduced as under:

---Exercise of--Mode--While exercising discretion, Authority should not act arbitrarily, unreasonably and in complete disregard of relevant rules and regulations--Discretion to be exercised has to be judged and considered in the background of facts and circumstances of each case-Discretion is not be exercised on whims, caprices and mood of Authorities--Exercise of discretion is circumscribed by principles of justice and fairness--Authority exercising discretion should take into consideration and advance aim and object of the enactment, rule or regulation under which it was authorized to act; it should not act in complete negation of the object of such law, rule, regulation or established policy otherwise it would not be fair, reasonable and just exercise of power--Pre-conditions imposed for exercise of discretion should be honoured and respected unless for valid reasons, they have to be discarded.

- (15) That the Honourable Federal Tax (Ombudsman) in identical case of Ms. Nadeem Textile Mills Ltd.'s case 2002 PTD 3087 clearly held that the principles of law enunciated by Supreme Court and High Court is (a) binding force on all the citizen and any defiance from its implementation is tantamount to maladministration.
 - (16) That the impugned order of the respondents is also styero type/ non-speaking and devoid of reason same is not substantiated in as laid down by the Superior Court.
 - (17) That the order of the respondents is bad in law in the light of all available facts of the case and thus liable to be set aside.
 - (18) It is prayed that exparte impugned order of the respondents regarding arbitrary demand and personal penalty of amounting to Rs.25,000 is too harsh/highly unjustified and same has been passed without following the principles of natural justice/ mandatory provision of law/ruling of Superior Courts/Appellate Tribunal and same is also discriminatory in violative to established departmental practice/procedure and also styero type/non-speaking without specific basis and cannot be treated/called a proper order as required under the law and liable to be set aside.
6. The respondents have submitted their counter submissions and para wise comments which are reproduced as under:-
- (1) Before making para-wise comments it is respectfully submitted that according to amended provisions of law i.e. Chapter-XVI-A, sections 79, 80 and 131 of the Act, read with Chapter-XXI of the Customs Rules, 2001, an importer/exporter is now not only responsible for the correct and true declaration of all particulars of the imported/exported goods (which also includes correct self-assessment with correct application of notifications of exemptions) but also responsible for correct payment of revenue through self-assessment to act as an assessor.
 - (2) That in terms of section 195B of the Act, the subject appeal is not maintainable until or unless the appellant should deposit the demanded amount along with surcharge in terms of section 83(2) of the Act. Therefore, it is respectfully prayed to this honourable Tribunal that before proceeding in the matter the appellant may be directed to first pay the demanded amount of Rs.94156 as short levied duties and taxes and penalty of Rs. 25,0007 (total Rs.119156) in the Government treasury along with surcharge in terms of section 83(2) of the Act.

- (3) That as per scheme of Pakistan Customs Tariff the PCT Heading 2835.2920 only covers those Sodium Phosphates which are prepared through pure Sodium whereas as per importer's own declaration in the relevant column of specification the imported goods i.e. Sodium Acid Pyrophosphates (Food Grade) having purity of 96.5%. The imported goods Sodium Acid Pyrophosphate is actually related to the family of Sodium Polyphosphates and the PCT Heading 2835.2920 only covers the Phosphates of pure Sodium without any inclusion of other substance, hence, the Sodium Polyphosphates of all sorts, including the Sodium Acid Pyrophosphates imported by the appellant, therefore the contents of para (3) of the appeal are incorrect, hence, denied and the imported goods are correctly classifiable under PCT Heading 2835.3900. It is pointed out that in identical cases of Sodium Acid Pyrophosphate (Messrs Kashif Chemicals and others) the honorable Appellate Tribunal Bench-III has decided the cases in the favour of the department.

PARAWISE COMMENTS ON FACTS OF THE APPEAL:--

- (1) That the appellant has cleared the goods as per their declaration with wrong self-assessment in terms of section 79(1)(b) of the Act, with inadmissible exemption/concession of sales tax and income tax, resulted into loss of revenue to the tune of Rs.119156 vide G.D. No.(i)1-HC-172685-260107.
- (2) That in the light of submissions made above the contents of para. (2) of the appeal require no further comments. It is, however, respectfully submitted that the short paid amount was Rs.255,035 instead of Rs.176,176.
- (3) That the imported goods Sodium Acid Pyrophosphate is actually related to the family of Sodium Polyphosphates and the PCT Heading 2835.2920 only cover the Phosphates of pure Sodium without any inclusion of other substance, hence, the Sodium Polyphosphates of all sorts, including the Sodium Acid Pyrophosphates imported by the appellant, therefore, the contents of para (3) of the appeal are incorrect, hence, denied and the imported goods are correctly classifiable under PCT Heading 2835.3900.
- (4) That in the light of submissions made above the contents of para. (4) of the appeal require no further comments, hence, denied.
- (5) That in the light of submissions made above the contents of para. (5) of the appeal require no further comments, hence, denied.

PARAWISE COMMENTS ON GROUNDS OF THE APPEAL:--

- (1) That in the light of submissions made above the contents of para. (1) of grounds of the appeal require no further comments, hence, denied.
- (2) That in the light of submissions made above the contents of para. (2) of grounds of the appeal require no further comments, hence, denied.
- (3) That in the light of submissions made above and considering the learned Collector (Appeals)'s observations in para. 6 of the Order-in-Appeal, the contents of para. (3) of grounds of the appeal require no further comments, hence, denied.
- (4) That in the light of submissions made above and considering the learned Collector (Appeals)'s observations in para. 6 of the Order-in-Appeal the contents of para. (4) of grounds of the appeal require no further comments, hence, denied.
- (5) That as stated above the penalty of Rs.25,000 has been imposed due to wrong self-assessment by the appellant in terms of section 79(1)(b) of the Act, therefore, the contents of para. (5) of grounds of the appeal are incorrect, hence, denied. The sighted case-law has no relevance with this case.
- (6) That in the light of submissions made above and considering the learned Collector (Appeals)'s observations in para. 6 of the Order-in-Appeal, the contents of Para (6) of grounds of the appeal require no further comments, hence, denied. The cited case-law has no relevance with this case.
- (7) That in the light of submissions made above and considering the learned Collector (Appeals)'s observations in para. 6 of the Order-in-Appeal, the contents of para. (7) of grounds of the appeal require no further comments, hence, denied. It is mention that CGO 12/2002 is not applicable on the self-assessment clearance system.
- (8) That in the light of submissions made above and considering the learned Collector (Appeals)'s observations in Para (8) of the Order-in-Appeal, the contents of Para (8) of grounds of the appeal require no further comments, hence, denied. The cited case-law's has no relevance with this case.
- (9) That the provisions of section 32 of the Act, clearly says that any short levy can be recovered within five years or three years, as the case may be, therefore, the appellants contention about

"past and closed transaction" is incorrect and rather showing ignorance of law on part of the appellants. Without prejudice to above if the appellant's arguments is accepted in that case the provisions of sections 32, 32-A and 33 of the Act, would become redundant.

- (10) That in the light of submissions made above, the contents of para. (10) of grounds of the appeal require no further comments, hence, denied. The cited case-law's has no relevance with this case.
- (11) That in the light of submissions made above, the contents of para. (11) of grounds of the appeal require no further comments, hence, denied.
- (12) That the provisions of section 32 of the Act, clearly says that any short levy can be recovered within five years or three years, as the case, may be, therefore, the appellants contention about "past and closed transaction" is incorrect and rather showing ignorance of law on part of the appellants. Without prejudice to above if the appellant's arguments is accepted in that case the provisions of sections 32, 32-A and 33 of the Act, would become redundant.
- (13) That in the light of submissions made above, the contents of para. (15) of grounds of the appeal require no further comments, hence, denied. The cited case-law has no relevance with this case.
- (14) That in the light of submissions made above, the contents of para. (14) of grounds of the appeal require no further comments, hence, denied. The cited case-law has no relevance with this case.
- (15) That in the light of submissions made above, the contents of Para (15) of grounds of the appeal require no further comments, hence, denied.
- (16) That in the light of submissions made above, the contents of para. (16) of grounds of the appeal require no further comments, hence, denied.
- (17) That in the light of submissions made above, the contents of para. (17) of grounds of the appeal require no further comments, hence, denied.
- (18) That in the light of submissions made above, the contents of para. (18) of grounds of the appeal require no further comments, hence, denied.

(20) In the light of submissions made above it is respectfully prayed to dismiss the subject appeal.

7. The case was fixed for hearing on 7-5-2013, Sardar Faisal Zafar, Advocate, represented the appellant and Mr. Ghulam Yasin, P.A., represented the respondents.

8. The contention of the appellant is that show-cause notice dated 18-3-2009 which was not issued to the appellant on the first stage while passing an order mutatis mutandis and refer the case (Messrs Pakistan Telephone Cables Ltd. v. Federation of Pakistan) reported in PTD 2011 Page 2849 and Customs Reference Application No.157 of 2008 (S.M. Naqi v. Collector of Customs (Adjudication) and another), where the Honable High Court of Sindh is directing to the Tribunal and Adjudicating Authority to dispose of the matter independently and remand back the case directing to adjudicating authority to pass an order independently stating facts of each case and speaking order pass after giving both parties of opportunity of being heard. The appellant further argue that the order-in-original was not within the stipulated time.

9. Although during hearing of departmental representative Mr. Ghulam Yasin, P.A. has pointed out that paragraph No.6 of the order-in-original where the Federal Board of Revenue has extended the period of limitations vide letter C.No.2(11)S(Legal-IDT)/07 dated 3-12-2009 upto dated 31-1-2010. The counsel has stated that order dated 3-12-2009 is without lawful authority as the same is beyond the period of limitation. The appellant's counsel further argue that the forum below is not passed speaking order and violated section 24-A of the General Clauses Act, 1897 and failed to pass individual deal in accordance with law and prayed for set aside the impugned judgments.

10. On other hand the departmental representative Mr. Ghulam Yasin, P.A., has argued that in terms of section 195B of the Customs Act, 1969, the appeal is not maintainable until or unless the appellant should deposit the demanded amount along with surcharge in terms of section 83(2) of the Customs Act, 1969 the contention of the departmental representative that as per scheme of Pakistan Customs Tariff, the PCT Heading 2835.2920 only covers those Sodium Phosphates which are prepared through pure Sodium whereas as per importer's own declaration in relevant column of specification of the imported goods i.e. Sodium Acid Pyrophosphates (Food Grade) having purity of 96.5%. The imported goods were classified under PCT Heading 2835.3900 and further refer the case of Messrs Kashif Chemical Corporation, Lahore v. Collector of Customs, MCC of PaCCS, Karachi in Customs Appeal No.547 of 2010 where the learned Member has declined to allow the appeal and upheld the order of the forum below. Mr. Ghulam Yasin, P.A. has supplied copy of letter dated 14-11-2009 issued by the competent authority for extension of time for adjudication proceedings of 240 cases where the name of appellant is at Sr. No.159 and the competent authority has exercise their power and extend the time of limitation upto 31-1-2010.

11. In view of above cited judgments of Hon'ble High Court which are binding upon the departments as well as Tribunals. Concurrent judgments of forum below cannot be sustained. Therefore, set aside the impugned order and the case is remanded to the adjudicating authority for afresh decision after affording opportunity of being heard to both parties. In the light of law laid down by the superior courts, the appeal stands allowed accordingly. No order to costs.