

3. The Complainant was called upon to explain maintainability of the complaint. In the meanwhile the Collector (Appeals) vide Order-in-Appeal dated 21.07.2010 accepted the appeal, remitting the redemption fine and penalty and ordering the goods to be released on the basis of the declared value.

4. After passing of the Order-in-Appeal, the Complainant filed application claiming compensation of Rs. 2.0 million contending that on account of illegal action of the Department he had suffered losses. As the matter was no more subjudice before any court or authority, the complaint was registered and notice was issued to the Secretary, Revenue Division, Islamabad. However, before filing of reply by the Department the Complainant requested for withdrawal of the complaint with permission to file the same afresh. The Hon'ble FTO allowed the request vide Findings/Recommendations dated 16.09.2010.

5. The Complainant filed this complaint with the plea that the consignment was firstly detained on the charge of violation of Rule 389 of the Customs Rules, 2001, and a penalty of Rs.5,000/- was imposed. According to the Complainant, the adjudicating officer, Mr. Muhammad Ashfaq, Deputy Collector, acting on the instigation of the Complainant's competitors, and in violation of the provisions of the Constitution of Pakistan, Customs Act, General Clauses Act, Criminal Procedure Code and Qanoon-e-Shahadat, issued a second show cause notice which was duly replied to but the plea of the Complainant was ignored and Order-in-Original dated 15.06.2010 issued on malafide grounds, which was later set-aside by the Collector (Appeals).

6. The Complainant labeling the action of the adjudicating officer as hostile based on personal vendetta has prayed as follows:-

-That this Hon'ble Forum may kindly grant compensation to the Complainant for amount of Rs.2,000,000 (Rupees Two Million only) for suffering additional

expenses on account of demurrages and container rent for blocking the goods and suffering mental torture and shatterment of the goodwill in the market and disturbance in the business.

- Take disciplinary action against the Deputy Collector Customs namely Mr. Muhammad Ashfaq for his act of delinquency and violation of the constitutional and other rights of the Complainant.

- Cost of the complaint may also be granted.

7. The notice of the complaint was issued to the Secretary, Revenue Division, Islamabad. In response, Mr. Muhammad Ashfaq, Deputy Collector, filed parawise comments raising preliminary objection that in view of Section 216 of Customs Act, the complaint was not maintainable. According to the Department, in the first complaint no case of maladministration was made out, and so the second complaint was not maintainable.

8. On merits the Department pleaded that in the first show cause notice the charge was of violation of Rule-389 of the Customs Rules and the second show cause notice was on the charge of mis-declaration. According to the Department the action was covered within four corners of law. There was enough evidence about clearance of commodity on higher value which was not placed before Collector (Appeals). The Department denied that the adjudicating officer acted in a malafide manner. According to the Department, the action was taken in good faith on the basis of available evidence, and was justified. It was further pleaded that clearance of earlier consignments on lesser value could not create any right for release of future consignments on the same value.

9. The Complainant was provided copy of para-wise comments, but he did not opt to file a rejoinder. The matter was fixed for hearing on 21.10.2010 which was attended by Munir Uddin Khan, Advocate,

accompanied by the Complainant, while Mr. Muhammad Ashfaq, Deputy Collector, represented the Customs.

10. The AR filed written arguments with copies of GDs about clearance of earlier consignments of same commodity on the value declared by the Complainant. The AR contended that the malafide of the adjudicating officer was proved by issuance of recovery notice dated 26.07.2010 despite of the fact that the Order-in-Original on the basis of which recovery was sought was set-aside on 21.07.2010.

11. The DR was provided copy of written arguments filed by the AR. He rebutted the plea of the AR about any malafide in the affair. It was pleaded by the DR that evidence about higher value was available hence the Department was under legal obligation to apply the same. He supported his plea by filing copies of three GDs about import of sulphur powder (Midas SP-325) which were cleared by applying HS Code 2802.0010. The DR argued that the Collector (Appeals) neither called for Department's comments nor asked to submit the available evidence of higher value. The DR contended that in the stated circumstances the Departmental action could neither be termed as illegal nor declared to be based on malafide. "All actions taken in good faith are protected under Section 216 & 217 of the Customs Act and no action taken in good faith amounts to maladministration," he asserted.

12. Submissions made by the parties have been considered, and the record of the case perused minutely. The record reflects that during processing of the GD the examination staff made following examination report:-

"Container No.BMOU-2269428. CRN 10HC-142552/101610. Documents not found. Examined the goods jointly with R & D staff. Declared Description: Yellow Sulphur clay: Found Description: Midas SP 325 (Sulphur Powder) 99.9% pure up in PP bags, yellow powder form. Brand Miwan Commercial Co Ltd. I/O Korea. (Printed on each bag). Qty 800 bags x 25kg net each bags. Total net wt 20000kgs. Rep sample drawn and forwarded to CH lab through R & D for test to confirm description, grade composition, and classification. 100% wt checked vide KICT wt slip

No.165718 dated 05.06.2010 and found 20010 kg. The consignment comprising 06 containers. The report pertains to the above container. Wt slip scanned. Images attached.”

13. On the basis of the examination report, a show cause notice dated 08.06.2010 was issued on the charge of violation of Rule 389 of the Customs Rules for failure to place the requisite import documents in the container. The Complainant did not contest the charge and opted to pay fine of Rs. 5,000. Accordingly the matter was disposed of by adopting the option exercised by the Complainant. In such view of the matter, any objection at a later stage by the Complainant against the action by the Department for violation of Rule 389 of Customs Rule cannot be held as valid.

14. The record also reflects that the Complainant paid the duty and taxes on the declared value but before release of the consignment the Deputy Collector namely Muhammad Ashfaq selected the GD for scrutiny under Section 80 of the Customs Act. The Complainant was issued show cause notice dated 16.06.2010 alleging mis-declaration as Sulphur Clay was liable to be assessed at around \$ 0.10/kg instead of actual description Midas SP 325 (Sulphur Powder) valued at \$ 0.3060/kg. The charge was statedly based on the examination report

15. The Complainant contested the charge, arguing that sulphur being imported by tyre industry had additives and it was also oil coated. As such the sulphur imported by the Complainant could not be compared with the sulphur imported by the tyre industry. The Complainant requested the Department to provide evidence of value of similar quality sulphur. The Complainant pleaded that as the GD had already been released under Section 80 of the Customs Act, the re-assessment was not permissible under the law.

16. The Adjudicating officer considering the reply unsatisfactory proceeded with the adjudication and passed the Order-in-Original dated 21.06.2010. The operative para reads as under:-

“I have gone through the record of the case and examined the details of the contravention carefully. Offence within the meaning of Section 32(1), in the light of examination report, is established which is sufficient to adjudicate the case against the importers as per reported facts. The contention of the Respondent is incorrect as he tried to evade duty and taxes through mis-declaration of description and through declaring clay instead of powder, they tried to conceal the purity of the goods, hence the value of the goods as well. I, therefore, in exercise of the powers conferred under Section 179 and 181 read with Section 32(1) and 156(1) clauses 9, 14 and 45 of the Customs Act 1969 order for the confiscation of the impugned goods of the list of contravened items. However, taking a lenient view of the fact that the goods are freely importable, the importer is given an option to have the goods released on payment of redemption fine @ 35% of the customs value of impugned goods i.e. Rs. 109,795 under Sr. NO.1 (c) of the table to SRO 499/09 dated 13th June, 2009, in addition to the payment of leviable duties and taxes assessed by the Group. Furthermore, a personal penalty of Rs.50,000/- is also imposed against the importers”.

17. The Complainant feeling dissatisfied by the above order filed appeal before the Collector (Appeals) which was allowed vide Order-in-Appeal dated 21.07.2010 in the following terms:-

“I have thoroughly examined the case record and given consideration to the arguments advanced before me. There is nothing on record that the description declared by the appellant related to any goods other than the ones imported in this case: it is evident that words Midas SP 325 (Sulphur Powder) refer to the grade of the goods whereas the declared description Yellow Sulphur Clay refers to the name by which the commodity is generally known. That is why the HS Code of the goods has remained unchanged. I, therefore, rule that the charge of mis-declaring description of the goods has not been established against the appellant. Moreover, the department has not been able to submit any evidence, within the meaning of Section 25 of the Act read with the Customs Rules, 2001, to the effect that the Customs value of the goods imported in this case was US\$ 0.3060/Kg and not US \$ 0.10/Kg as declared. Therefore, enhancement of the value of the goods from US \$ 0.10/KG to US\$ 0.3060/Kg is unlawful and not maintainable in law. For the foregoing reasons. I remit the redemption fine and penalty imposed on the goods and the appellant respectively and order release/assessment of the goods on the basis of the declared transaction value in terms of sub-section (1) of Section 25 of the Act. The appeal is allowed in the above terms”.

18. It would be relevant to point out that the examination report referred above did not contain any allegation about mis-declaration. According to the examination report, a sample was drawn from the consignment which was forwarded to Lab to confirm description, grade,

composition and classification. The record is silent about receiving of any report from the Lab. In absence of report from Lab, issuance of show cause notice on the charge of mis-declaration on the basis of examination report was obviously not just. Furthermore, the Complainant in reply to the show cause notice denied the charge. He distinguished his imported sulphur from the sulphur imported by the tyre industry and asked for supply of evidence of higher value. The adjudication officer neither supplied the evidence to the Complainant nor mentioned it in the Order-in-Original. The Department for the first time made reference to the evidence of higher value in parawise comments and filed copies of three GDs which relate to period subsequent to the import made by the Complainant. Besides the GDs relate to tyre industry. In such view of the matter, the GDs which were not available at the relevant time could not support the Department to justify issuance of show cause notice. In the stated circumstances when sample of the substance was referred to the Lab, issuance of show cause and adjudication without availability of any evidence or report from the Lab was departure from the established practice and procedure. In such a situation, provision of Section 81 of the Customs Act could be applied to avert delay in release of goods and avoid port and container charges and also to save the Complainant from any loss on account of detention of goods. However after determining the specification of the substance and applicability of the HS Code proceedings could be initiated if the Complainant was found to have mis-declared the goods with motive to evade duty and taxes.

19. The action taken by the adjudicating officer though was declared to be invalid by Collector (Appeals), but it did delay release of the consignment and the Complainant had to pay demurrage charges and container rent.

20. The Department cannot be absolved of the liability on the ground that the action taken in good faith is protected under Section 216 & 217 of the Customs Act and that it does not constitute maladministration. It would suffice to observe that colorful exercise of powers without any valid justification cannot be termed as bonafide.

FINDINGS:

21. From the foregoing discussion it is evident that the adjudicating officer, Muhammad Ashfaq did resort to acts of commission and omission that amounted to maladministration as defined under section 2(3)(i)(ii) of the Federal Tax Ombudsman Ordinance, 2000.

RECOMMENDATIONS:

21. FBR to –

- (i) direct the adjudicating officer, Muhammad Ashfaq to furnish explanation, within 15 days, as to why the loss caused to the Complainant may not be recovered from him in addition to appropriate compensation and cost under Section 22 of FTO Ordinance;
- (ii) direct to arrange for refund of demurrage and container charges to the Complainant; and
- (iii) report compliance within 21 days.

(Dr. Muhammad Shoaib Suddle)
Federal Tax Ombudsman

Dated: _12-11-2010

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