

GOVERNMENT OF PAKISTAN
COLLECTORATE OF CUSTOMS (APPEALS)
81-C, BLOCK-6, P.E.C.H.S,
KARACHI

Dated:- 16/05/2024

PASSED BY: - NYMA BATOOL,
COLLECTOR OF CUSTOMS (APPEALS),
KARACHI.

No. Cus/3974/2023/A-West | 563

ORDER-IN-APPEAL No. 913 /2024

- i. This copy is granted free of charge for the private use of the person to whom it is issued.
- ii. An appeal against this order lies to the Customs, Appellate Tribunal, Karachi, within sixty days from the date of receipt of this order. An appeal should bear a Court Fee Stamp of Rs.1000/-(Rupees one thousand) only as prescribed under Schedule-II, Item 22 of the Court Fee Act, 1870 and must be accompanied by a copy of this order.
- iii. An extra copy of appeal, if filed, should simultaneously be sent to this office for information and record.
- iv. If an appeal is filed, the Appellant should state whether he desires to be heard in person or through an Advocate.

**Subject: - APPEAL UNDER SECTION 193 OF THE CUSTOMS ACT, 1969
AGAINST THE ORDER-IN-ORIGINAL NO. 1843699 DATED
24.11.2023.**

-
1. Appellant : M/s. Friesland Campina Engro Pakistan Ltd.
 2. Respondent : Collectorate of Customs, Appraisement-West,
Custom House, Karachi.
 3. Date(s) of Hearing : 02.02.2024, 13.02.2024, 20.02.2024 and
08.04.2024.
 4. Date(s) of Judgment : 16.05.2024.
 5. Present : a) For the Appellant: Mr. M. Adnan Moton,
Legal Counsel.
: b) For the Respondent: Mr. Farhan Mehdi,
Appraising Officer.

This Appeal has been filed against the Order-in-Original No. 1843699 dated 24.11.2023 passed by the Principal Appraiser, Collectorate of Customs, (Adjudication), Appraisement-West, Custom House, Karachi

(2). Brief facts of the case are that the Importer, M/s. Engro Foods (Pvt.) Limited (NTN-2285414) electronically filed Goods Declaration No. KAPW-HC60946-26-10-2023 through clearing agent M/s; SM. Asgar (Pvt.) Ltd (CHAL No. 714) and declared to contain (1) Milk Chocolate, Total No. of Qty: 8000 Kgs under PCI Heading 1806.2090 at a declared Invoice value of US \$ 52400.00. The importer determined his liability of payment of applicable duties & taxes in terms of Section 79(1) of the Customs Act, 1969.

(3). In order to check as to whether the importer has correctly paid the legitimate amount of duties and taxes, the under reference GD was selected for scrutiny in terms of Section 80 of the Customs Act, 1969 and was referred to Examination for confirmation of description, quantity and other physical attribute of the goods. For ease of reference examination report is re-produced as under:-

CONTAINER NO: WHLU7401182 KAPW-HC-60946-26-10-2023 NO INVOICE AND PACKING LIST FOUND INSIDE THE CONTAINER SHOWING VALUE USD 52400/-. THE CONSIGNMENT DETAIL AS UNDER. DESCRIPTION: MILK CHOCOLATE (MIN COCOA 40.5%) IN BLUK PACKING] MPG DATE 12/01/2023, EXP DATE 12/07/2024, LOT NO. 230125400, EACH CTN NET 25 KG X 320 CTNSI NET WEIGHT: 8000 KGS APPROX, BRAND: BARRY CALLEBAUT, ORIGIN: CHINA. INGREDIENTS IN URDU & HALAL LOGO NOT MENTION ON CTNS. CHECK WEIGHT 100% FOUND 8410 KGS VIDE KICT SLIP NO: 1829854 DATED: 27.10.2023. ATTACHED IMAGES ARE INTEGRAL PART OF EXAMINATION REPORT. GROUP IS REQUESTED TO CHECK ALL LEGAL ASPECTS INCLUDING CLASSIFICATION, IMPORTABILITY AS PER IPO & IPR CONDITON.

(4) Perusal of the examination report / uploaded images of the goods, it revealed that the imported goods have short shelf life which is less than 66%. The goods are banned as per S. No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022. In the light of above] the goods are liable to be confiscated.

(5) This act of the importer and his clearing agent attracts the violation of Section 16, 209(3) of the Customs Act] 1969 punishable under clause (9) of Section 156(1) of the Customs Act, 1969.

(6) The Adjudicating Officer held that the charges against the Appellant had been proved. The Operative Part of the Impugned Order reads as under:-

"I have gone through the case record and given due consideration to the submissions made by the importer. The goods have a shelf life of less than 66% which is banned as per S. No. 4 (iii) of Appendix-B, Part-I of the Import Policy Order, 2022. The importer could not fulfill the mandatory requirement of Import Policy Order, 2022. In exercise of the powers conferred under Section 179 of the Customs Act, 1969 punishable under clause 9 of Section 156 of the Customs Act, 1969, I hereby order to confiscate the impugned goods and a penalty of Rs 14,827,378/- is imposed on the importer. The case is disposed of accordingly."

(7). An Appeal was filed against the Subject Order-in-Original before this forum by M/S. Friesland Campina Engro Pakistan Ltd. The main contents of the Memo of Appeal are reproduced below:

(i) The appellant submitted his written reply to the learned Respondent No. (1) along with documents and the case was defended by the Appellant. Unfortunately, the learned Respondent No. (01) without the application of his prudent mind, translated the Show Cause Notice into impugned Order-in-Original No.1843699 dated 24-11-2023 mechanically, without adhering to the principles of quasi-judicial proceedings. Being aggrieved and dissatisfied with the perfunctory, non-speaking, arbitrary, patently illegal and ultra vires Order-in-Original No.1843699 dated 24-11-2023 passed under section 179 without legal judiciousness wherein the Respondent deliberately refrained to take into consideration crucial facts of the case and ignored many legal aspects, the Appellant above-named prefers the instant Appeal under Section 193 of the Customs Act, 1969 (hereinafter referred to 'Act, ibid') before this Hon'ble Appellate Forum with a request to set-aside the impugned order after examining legality, propriety and correctness inter-alia, on the facts and grounds set out herein below.

(ii) The appellant submitted its reply to the learned Respondent along with documents and the case was defended by the Appellant in an efficacious manner. However, unfortunately, the learned Respondent without application of his prudent mind, pronounced the impugned Order-in-Original mechanically, without adhering to the principles of quasi-judicial proceedings. Therefore, the Petitioner being aggrieved with the perfunctory, non-speaking order of the Respondent, preferred Appeal under Section 193 of the Customs Act, 1969.

(A) PRELIMINARY OBJECTIONS

(i) That the impugned Order-in-Original No.1843699 dated 24-11-2023 is passed by the Adjudicating Officer by twisting and mis-presenting the facts and mis-interpreting the law. Hence, the same should be set aside because, if not set aside, it shall be a grave legal lacuna, and set perilous precedence with wider and far-fetching negative effects. The subject order is passed on a clear misinterpretation of the spirit of the relevant provision of the Customs Act, 1969, hence, liable to be set aside in the largest interest of justice.

- (ii) It is fervently submitted that charges levelled under sections 16, 209(3) and 79 of the Act read with serial No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022 are denied in its totality the appellant has never committed an offence under aforesaid sections and provisions of law. The appellant being a multinational company and being cognizant of legal obligation under the laws of Pakistan has never indulged in any kind of mis-declaration or evasion of legitimate revenue of the national exchequer. On the other hand, the appellant contributes a huge amount to the national kitty in the shape of duties and taxes.
- (iii) The fact of the matter is that impugned goods "Milk Chocolate" are imported in bulk packing for own in-house consumption in the appellant's industrial unit and not for further retail selling. In addition to that imported goods are to be further processed before being used in the manufacturing of bulk ice cream. Apart from that imported goods are not supposed to be ingested/eaten in imported/present condition rather same is mixed with other ingredients to form an altogether new product meaning thereby that the ultimate product will be ice cream rather than milk chocolate. It is also splendidly essential to mention that once mixed/dissolved with other ingredients, imported goods shall lose their original/present state. Foregoing in view, it can be safely concluded that impugned goods cannot be subjected, *stricto sensu*, to 66% shelf life enunciated vide serial No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022 which is specifically incorporated for only those goods which are either sold in retail packing or used directly in imported condition.
- (iv) The Adjudicating Officer while passing the impugned Order-in-Original No.1843699 dated 24-11-2023 failed to appreciate that imported goods are to be used in ice cream and subsequently, ice cream is frozen meaning thereby that once frozen shelf life of imported goods shall be enhanced manifold without any iota of doubt. Hence, keeping this factor under consideration, it would suffice to say that the condition of 66% shelf life enshrined vide serial No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022 can not be forcibly stretched to imported goods in question.
- (v) Besides that appellant M/s Friesland Campina Engro Pakistan Ltd has a global presence and market leader in various countries including but not limited to Pakistan. To achieve this milestone, M/s Friesland Campina Engro Pakistan Ltd has complied with various international quality standards and devised its own very stringent set of SOPs to ensure the highest standard of quality for our consumers. However, the Adjudicating Officer did not even care to consider these pivotal factors while pronouncing impugned Order-in-Original No.1843699 dated 24-11-2023.
- (vi) Without prejudice to the above, section 179 of the Customs Act, 1969 has entrusted the power of adjudication with various officers of Customs in accordance with the hierarchy and respective monetary value of goods. For ease of reference section 179 of Act, *ibid* is reproduced verbatim herein below:-

"179. Power of adjudication. [(1) Subject to sub-section (2), in cases involving confiscation of goods or recovery of duty and other taxes not

levied, short levied or erroneously refunded, imposition of penalty or any other contravention under this Act or the rules made thereunder, the jurisdiction and powers of the officers of Customs in terms of amount of duties and other taxes involved, excluding the conveyance, shall be as follows, namely:-

- (i) Collector no limit
- (ii) (ii) Additional Collector not exceeding [five] million rupees
- (iii)(iii) Deputy Collector not exceeding [two] million rupees
- (iv)(iv) [Omitted] (v) Superintendent not exceeding [one hundred] thousand rupees.
- (v) (vi) Principal Appraiser not exceeding [one hundred] thousand rupees."

It is obvious from clause (v) of section 179(1) of the Act, *ibid* that the principal Appraiser is allowed to adjudicate only those cases wherein the monetary value of goods is *upto one million rupees or less*. Whereas in the instant case, the Adjudicating Officer i.e. *Principle Appraiser* adjudged goods having declared value USD 52,400/- (Rs 14million approximately) otherwise *adjudge-able by the Collector (Adjudication)*. Hence, impugned Order-in-Original is void-ab-initio, coram non-judice and without any legal sanctity rendering entire proceedings infructuous.

Reliance is placed upon the landmark judgment of the Hon'ble Supreme Court of Pakistan in the case titled *Khyber Tractor Pvt Ltd V/S FOP through Ministry of Finance* whereof Hon'ble Supreme Court of Pakistan deliberated upon the issue of jurisdiction in the following illuminated words:

"Question of jurisdiction of a forum is always considered to be very important and any order passed by the Court or a forum, having no jurisdiction, even if it is found to be correct on merits, is not sustainable jurisdiction of a Court lays down a foundation stone for a judicial or quasi-judicial functionary to exercise its powers/ authority and no sooner the question of jurisdiction is determined in negative, the whole edifice, built on such defective proceedings, is bound to crumble down."

Likewise, the Honorable Justice Yahya Afridi as judge of Peshawar High Court in Customs Reference No. 11 of 2015 involving the identical issue of jurisdiction has deliberated on the issue of jurisdiction of Customs under section 179 of the Customs Act, 1969:-

"The pecuniary limit, expressly provided under subsection (1) of section 179 of the Act, would remain applicable to all Officers of Customs, irrespective of whether they were in the Adjudication Collectorate or other Collectorates, such as Preventive or

Intelligence, unless the same was varied by FBR under subsection 2 of section 179 of the Act."

"In view of the above legal discourse, this Court opines that the Assistant Collector Dry Port, Peshawar, who had issued the impugned Show Cause Notice lacked the pecuniary jurisdiction to issue the same. Hence, all the impugned orders based thereon were without lawful authority, as the very 'foundation' of the Revenue's case was illegal, then the entire superstructure built thereon must also fall. Accordingly, the impugned decisions are set aside, and the Collector Customs, Peshawar, may proceed in the matter in accordance with law, as discussed hereinabove":

- vii) That the learned Adjudicating Officer has proceeded in the matter in a perfunctory, hurried and subjective manner in utter discharge of law. Hence, the verdict made out against the appellant and in favour of the respondent Collectorate has rendered the whole proceeding as illegal, malafide tainted with colourful exercise besides being the classic example of unfair discretion and is liable to be set aside.
- (B) FACTS OF THE CASE:
- (i) That the above-named appellant is a bonafide registered business entity engaged in the import of various food items including but not limited to raw Milk Chocolate from worldwide sources. The Appellant enjoys an unblemished reputation in the market, having a spotless record towards payment of the government's legitimate revenues in accordance with law and is also a regular taxpayer/filer & operative on the Active Taxpayer List of FBR.
- (ii) Brief facts of the case are that the appellant M/s. Engro Foods (Pvt.) Limited (NTN-2285414) filed Goods Declaration No. KAPW-HC- 60946-26-10-2023 through clearing agent M/s. S.M. Asghar (Pvt.) Ltd (CHAL No. 714) under section 79(1) of the Customs Act, 1969 and Rule 433 of Subchapter III of Chapter XXI of Customs Rules, 2001. The description of goods "(1) Milk Chocolate, Total No. of Qty: 8000 Kgs under PCT Heading 1806.2090 at a declared Invoice value of US \$ 52400.
- (iii) That the goods were selected by the customs officer for examination provided in terms of section 80, 198 and rule 435 of the Customs Act/Rules. The Customs staff reported that the imported goods have a short shelf life which is less than 66%. The goods are banned as per S. No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022. Thence, the goods are liable to be confiscated. Furthermore, this act of the importer and his clearing agent attracts the violation of Section 16, 209(3) of the Customs Act, 1969 punishable under clause (9) of Section 156(1) of the Customs Act, 1969.
- (iv) That the Adjudicating Officer (Principal Appraiser) vide **Order-in-Original No.1843699** dated 24-11-2023 held that the charges against the appellants are established; moreover, imposed personal penalty worth **Rs 14,827,378/-**. The

operative part of the impugned order is reproduced verbatim herein below for reference purposes:-

"I have gone through the case record and given due consideration to the submissions made by the importer. The goods have a shelf life of less than 66% which is banned as per S. No. 4 (iii) of Appendix-B, Part-I of the Import Policy Order, 2022. The importer could not fulfill the mandatory requirement of Import Policy Order, 2022. In exercise of the powers conferred under Section 179 of the Customs Act, 1969 punishable under clause 9 of Section 156 of the Customs Act, 1969, I hereby order to confiscate the impugned goods and a penalty of Rs 14,827,378/- is imposed on the importer. The case is disposed of accordingly."

- (v) It is submitted that impugned goods have a shelf-life up to 12th July 2024 which means approximately 7 months are still available before impugned goods lose their edibility. It is also relevant to mention upcoming season is summer whereof goods such as icecream are high in demand and their sale increases manifold, hence, there are extremely high probability that imported goods shall be consumed much before attaining their expiry date.
- (vi) It is also crucial to mention that the imported goods shall require further processing and will be dissolved in other ingredients to constitute an absolutely different product; hence, the aforementioned condition of 66% shelf life does not necessarily apply to instant goods.
- (vii) The appellant approached the Adjudicating Officer through letter Ref# MS 4046 dated 17-11-2023 and clarified the matter with lucid and logical justification as to how the impugned goods do not attract the serial No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022 but to no avail as the Adjudicating Officer was adamant to impose its self-serving interpretation of the aforementioned condition of Import Policy Order, 2022. Resultantly, the Adjudicating Officer passed the legally infructuous **Order-in-Original No.1843699 dated 24-11-2023**.
- (viii) The Adjudicating Officer while passing the impugned **Order-in-Original No.1843699 dated 24-11-2023** failed to appreciate that imported goods are to used in ice cream and subsequently, ice cream is frozen meaning thereby that once frozen shelf life of imported goods shall be enhanced manifold without any iota of doubt. Hence, keeping this factor under consideration, it would suffice to say that the condition of 66% shelf life enshrined vide serial No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022 can not be forcibly stretched to imported goods in question.
- (ix) Actually, it is the first time that we encountered this shelf-life issue otherwise our previous consignments had a full shelf-life and we specifically ordered fresh goods, however, we are in touch with our exporter to ascertain whether this time due to a mistake or error, fresh goods could not be sent or otherwise.
- (x) Besides that appellant M/s Friesland Campina Engro Pakistan Ltd has a global presence and market leader in various countries including but not limited to

Pakistan. To achieve this milestone, M/s Friesland Campina Engro Pakistan Ltd has complied with various international quality standards and devised its own very stringent set of SOPs to ensure the highest standard of quality for our consumers. However, the Adjudicating Officer did not even care to consider these pivotal factors while pronouncing impugned **Order-in-Original No.1843699 dated 24-11-2023**.

(xi) The learned Principal Appraiser (Adjudication) has dealt with the issue rather callously and passed the impugned order in a slipshod manner without ascribing any legal reasoning. It is a settled principle of law that while passing a quasi-judicial order, detailed reasoning for arriving at a conclusion should be recorded, otherwise, the proceedings shall be rendered legally fractured, illusionary and an exercise in futility.

(xii) That being aggrieved and dissatisfied with the above **Order-in-Original No.1843699 dated 24-11-2023**, the appellant would like to prefer this appeal in the time specified in sub-section (3) of section 194A *ibid* on the grounds advanced as follows:-

(C) THE GROUNDS OF CASE

(i) That the entire Show Cause Notice, Order in Original and allegations embedded therein are based upon misrepresentation of facts, misinterpretation of law and in derogation to actual nature and composition of goods under dispute.

(ii) That the impugned **Order-in-Original No.1843699 dated 24-11-2023** passed by the learned Adjudicating Officer is arbitrary, illegal and void having no merits in the eyes of the law. The subject order-in-original is a clear misinterpretation of the spirit of the relevant provision of the Customs Act, 1969, hence, liable to be set aside in the largest interest of justice.

(iii) That the **Order-in-Original No.1843699 dated 24-11-2023** which is merely based upon respective parties' contentions without showing any assessment of evidence on record cannot be deemed a safe legal decision maintainable under the law.

(iv) That the learned Respondent No. 1 failed to appreciate that impugned goods "Milk Chocolate" are imported in bulk packing for own in-house consumption in the appellant's industrial unit and not for further retail selling. In addition to that imported goods are to be further processed before being used in the manufacturing of bulk ice cream. Apart from that imported goods are not supposed to be ingested/eaten in imported/present condition rather same is mixed with other ingredients to form an altogether new product meaning thereby that the ultimate product will be ice cream rather than milk chocolate. It is also splendidly essential to mention that once mixed/dissolved with other ingredients, imported goods shall lose their original/present state. Foregoing in view, it can be safely concluded that impugned goods cannot be subjected, *strictosenso*, to condition of 66% shelf life enunciated vide serial No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022 which is specifically

incorporated for only those goods which are either sold in retail packing or used directly in imported condition.

- (v) Without prejudice to the above, section 179 of the Customs Act, 1969 has entrusted the power of adjudication with various officers of Customs in accordance with the hierarchy and respective monetary value of goods. For ease of reference section 179 of Act, *ibid* is reproduced verbatim herein below:-

"179. Power of adjudication. [(1) Subject to sub-section (2), in cases involving confiscation of goods or recovery of duty and other taxes not levied, short levied or erroneously refunded, imposition of penalty or any other contravention under this Act or the rules made thereunder, the jurisdiction and powers of the officers of Customs in terms of amount of duties and other taxes involved, excluding the conveyance, shall be as follows, namely:-

(vi) Collector no limit

(vii) (ii) Additional Collector not exceeding [five] million rupees

(viii) (iii) Deputy Collector not exceeding [two] million rupees

(ix) (iv) [Omitted] (v) Superintendent not exceeding [one hundred] thousand rupees.

(x) (vi) Principal Appraiser not exceeding [one hundred] thousand rupees."

It is obvious from clause (v) of section 179(1) of the Act, *ibid* that the principal Appraiser is allowed to adjudicate only those cases wherein the monetary value of goods is *upto one million rupees or less*. Whereas in the instant case, the Adjudicating Officer i.e. *Principle Appraiser adjudged goods having declared value USD 52,400/- (Rs 14 million approximately) otherwise adjudge-able by the Collector (Adjudication)*. Hence, impugned Order-in-Original is void-ab-initio, coram non-judice and without any legal sanctity rendering entire proceedings infructuous.

Reliance is placed upon the landmark judgment of the Hon'ble Supreme Court of Pakistan in the case titled *Khyber Tractor Pvt Ltd V/S FOP through Ministry of Finance* whereof Hon'ble Supreme Court of Pakistan deliberated upon the issue of jurisdiction in the following illuminated words:

"Question of jurisdiction of a forum is always considered to be very important and any order passed by the Court or a forum, having no jurisdiction, even if it is found to be correct on merits, is not sustainable jurisdiction of a Court lays down a foundation stone for a judicial or quasi-judicial functionary to exercise its powers/ authority and no sooner the question of jurisdiction is

determined in negative, the whole edifice, built on such defective proceedings, is bound to crumble down."

Likewise, the Honorable Justice Yahya Afridi as judge of Peshawar High Court in Customs Reference No. 11 of 2015 involving the identical issue of jurisdiction has deliberated on the issue of jurisdiction of Customs under section 179 of the Customs Act, 1969:-

"The pecuniary limit, expressly provided under subsection (1) of section 179 of the Act, would remain applicable to all Officers of Customs, irrespective of whether they were in the Adjudication Collectorate or other Collectorates, such as Preventive or Intelligence, unless the same was varied by FBR under subsection 2 of section 179 of the Act."

"In view of the above legal discourse, this Court opines that the Assistant Collector Dry Port, Peshawar, who had issued the impugned Show Cause Notice lacked the pecuniary jurisdiction to issue the same. Hence, all the impugned orders based thereon were without lawful authority, as the very 'foundation' of the Revenue's case was illegal, then the entire superstructure built thereon must also fall. Accordingly, the impugned decisions are set aside, and the Collector Customs, Peshawar, may proceed in the matter in accordance with law, as discussed hereinabove".

(vi) It is also relevant to state that the Adjudicating Officer Principle Appraiser lacked jurisdiction to issue a Show-Cause-Notice in the instant case whereof *declared value was USD 52,400/- (Rs 14 million approximately) otherwise adjudge-able by Collector (Adjudication)*. Hence, the show-cause notice was defective and deficient, as a consequence, the whole proceeding became null & void including the impugned order-in-original, as such same is liable to be set aside on this ground as reported vide hallmark judgment of Honourable High Court of Sindh at Karachi vide PLD 1996 Karachi 68 [M/s Kamran Industries V/s Collector of customs.

(vii) Likewise, invoking of penal provisions of section 156(9) are also not tenable as there is no "Mens Rea" [Guilty intention] on the part of the appellant. It is an established law that penal provisions could only be invoked if there is an element of 'Mens Rea'[Guilty intention] present, indicating a deliberate and conscious violation of law. Circumstantial evidences quite apparent from the facts of this case clearly establish the absence of 'Mens Rea'[Guilty intention]. The Appellants would like to cite the judgments of the superior Judicial Fora wherein it has categorically been held that penalty can only be imposed where the deliberate intention of the taxpayer is established to evade any tax. For instance, the Honorable Supreme Court of Pakistan in the case of M/s DG Khan Cement Company Limited v/s Federation of Pakistan (reported as 2004 SCMR 456) held that:-

"Hence in view of the above, we do not find any element of mens rea in the subject case and hold that the imposition of a penalty of PKR 1,000,000/- is unjustified, illegal and is remitted in toto. The penalty amount has already been deposited/paid by the Appellant in respect of consignment bearing GD No. KPPI-HC-68731-11-03-2021, therefore, the same is required to be refunded to the Appellant".

Further reliance is placed upon the judgment in the case Collector of Customs v/s Shaikh Shakeel Ahmed 2011 PTD 495 and Collector of Customs Karachi v/s Power Electronic Pakistan (Pvt.) Limited Lahore 2011 PTD 2837.

"It is not that it always be a case of mens rea and imposition of fine and penalty".

- viii) Apart from that as per clause B of section 101 of CGO 12/2002 issued FBR dated 15-06-2002 'Mens Rea'[Guilty intention] is essential for invoking section 32 of Customs Act, 1969 which is patently non-existent in the instant case. For reference purposes, clause B of section 101 of CGO 12/2002 is reproduced herein below;

(101)(B) Question of taking cognizance of misdeclarations of description, value and PCT headings.--For invoking provisions of mis-declaration under section 32 of the Customs Act, 1969 prima facie, an element of "mens rea" should be present i.e. there should be an attempt of wilful and deliberate false declaration. The importers may not be charged for mis-declaration under Section 32 of the Customs Act, 1969.

(ix) That the learned Adjudicating Officer has passed the impugned order in original without proper application of mind, given un-due favour to the respondent Collectorate which is against the spirit of the natural justice and vacated the show cause notice even to the extent of previously cleared consignments.

(x) That the learned Adjudicating Officer erred in the law by forcibly stretching the interpretation of customs jurisprudence, especially the condition of 66% shelf life enunciated vide serial No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022 and by selectively interpreting the section 15 of Customs Act, 1969 to the sole benefit of a clearance Collectorate and scrapping the down the case thereupon without touching the merits of the case as against the well-settled principle of law that *"No lawful action can be scraped or annulled on technicalities"* upheld by the Hon'ble Supreme Court of Pakistan in the case titled as *Collector of Sales Tax & Central Excise, Lahore v/s Zamindara Paper & Board Mills, etc 2008 SCMR 615?*

- (xi) Providing such a gigantic impermissible relief is against the well-established *"doctrine of unjust enrichment"* and enrichment that too at the cost of the appellant's money without application of independent and judicious mind is untenable and equates with miscarriage of justice. The impugned order was pronounced in a hurried and slipshod manner without analyzing the peculiar merits of the case.

- i) Furthermore, the sole function of the Custom House Agent is to prepare the Goods Declaration on the basis of import documents showing the description of goods, quantities, value, PCT Headings etc. and file the GD under Section-79(1) of the Customs Act, 1969. Such duties and functions have correctly been discharged in the instant matter. In fact, there is no mis-declaration of value, description, PCT, rate of duty etc. on the part of the Clearing Agent hence the Clearing Agent can not be charged for any alleged violation of section 15 of the Customs Act, 1969.

Reliance is placed upon the landmark judgment in the case of M/s Sikandar and Co. Karachi Vs. collector of Customs [2018 PTD 1225] and Arif Associates Vs. Principal Appraiser [2018 PTD 5111] wherein it was held that:-

"The Clearing Agent cannot be penalized under the general provisions of Customs Act, 1969, unless he violates the governing conditions of license."

- (xiii) The impugned Order-in-Original imposing a penalty, thereto, is also violative of the ruling of Superior Courts, wherein it was clearly held that penal provision cannot be applied as a routine and for application of some higher degree of proof regarding mens-rea / willful default/involvement is required otherwise the application of the penal provision is without lawful authority which is absent in the subject case and has no legal value. In cases of PLD 1996 Khi. 68, PTCL 1995 CL. 415, PTCL 1992 CL 23, it was held that "*penalty proceedings are criminal in nature requiring a higher standard of proof and can bear the stamp of legality only if independent and cogent evidence is led*".

- (xiv) The impugned Order-in-Original decided the case in favour of the importer without delineating detailed reasons or Incontrovertible, compelling, substantive evidence as required by section 24-A of the General Clauses Act, 1898. Moreover, the learned Customs Appellate Tribunal relied upon technicalities rather than the merits of the case. hence, the order is in total contrast to the pre-requisite for making such an order as per section 24-A of the General Clauses Act, 1897. Relevant excerpts are reproduced herein below for reference purposes:-

24A. Exercise of power under enactments. – (2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall so far as necessary or appropriate, give reasons for making the order or as the case may be for issuing the direction and shall provide a copy of the order or as the case may be the direction to the person affected prejudicially.

Reliance is placed upon the judgments in the cases titled as Ehsan Ullah Chaudhry VS State 2023 PLD 233 Lahore High Court and ZamZam (pvt.) Limited vs Federation of Pakistan 2023 PTD 649 Sindh High Court respectively.

“Section 24-A of general clauses act, 1897, casts an affirmative duty upon Court/Authority/Forum to pass an order or judgment with reason by giving all the parties an opportunity to present their submissions---Petition was allowed and impugned order was set side”.

“S.24A---Speaking order---Scope---Parameters as enshrined under S.24A of general clauses act, 1897, with regard to exercise of discretion by an executive authority for giving reasons for its decision are mandatory---Any action taken by an executive authority in violation of such principle is liable to be struck down”

- xv) That the impugned order of the respondents is also stereotype/non-speaking and devoid of reason same is not maintainable in law as laid down by the Superior Court in the following identical cases:

>Adamjee Jute Mills Ltd. Vs. The Province of East Pakistan, PLD 1959 SC.2721
 >Gowanea Mohan Sikdar Vs. Controller Import & Export, PLD 1970 SC.158
 >MollahEjaha Ali Vs. Government of East Pakistan, PLD 1970 SC.173
 > Ms. Muhammad Ibrahim Khan Vs. Ministry of Labor, SCMR 1984 P.1014.

- (xvi) That the Honourable Federal Tax (Ombudsman) in the identical case of **M/s Nadeem Textile Mills Ltd., SBLR 2002 Tri.79**, clearly held that the principles of law enunciated by the Supreme Court & High Court is (a) binding force on all the citizen and any defiance from its implementation are tantamount to maladministration.

- (xvii) That the above grounds are independent and /or alternative and do not affect each other.

- (xviii) The appellant appeals to grant permission to urge further arguments at the time of the hearing of the appeal.

(D) PRAYER

In the light of above said factual and legal position it is prayed that the Worthy Collector of Customs (Appeals) may graciously be pleased to declare that the impugned **Order-in-Original No.1843699 dated 24-11-2023** passed by the learned Principal Appraiser is illegal, unjust, unreasonable and void having no merit in the eyes of law and set aside. It is further prayed to suspend the operation

of the impugned order till the final disposal of this appeal. Any other relief, which this Worthy Collector of Customs (Appeals) may deem fit and proper under the circumstances of the case may also be granted.

- a) Grant any other and/or better relief as may be deemed appropriate in the circumstances of the case.
- b) Prayed in the larger interest of justice to meet all corners of the law.

(8). In response to the Grounds of Appeal reproduced above, the Departmental Representative submitted the following comments / arguments:-

(A) PRELIMINARY SUBMISSIONS / OBJECTIONS:-

- (i). At the outset, it is submitted that each and every assertion contained in the Memo of Appeal except as specifically accepted herein, is denied as being incorrect, misleading, concocted, and contrary to the fact. The appellant filed the subject appeal with misrepresentation of the facts and misinterpretation of the law.
- (ii). It is also pertinent to mention here that the WeBOC system is based on self-assessment in which the importer is endowed with the responsibility of filing a true and correct Goods Declaration, strictly in accordance with the law. However, if the importer and / or his authorized clearing agent fails to discharge aforesaid duties and responsibilities then the law will set a course of mis-declaration whereby the importer shall be charged with violation of various sections of Customs Act, *ibid* and Customs Rules framed there to including but not limited to sections 32 and 32-A, 79, 209 of Act, *ibid* and Rules 90, 101, & 108 Customs Rules, 2001 respectively.

Reliance is placed upon the case of M/o. Baba Khan V/S Collector of Customs reported as 2000 SCMR 688 where the Hon'ble Supreme Court of Pakistan while perusing Section 32 (1) along with Section 79 came to the conclusion that:-

“if any person in connection with any matter of Customs makes any declaration or statement which is untrue in any material particular, he is guilty of an offence under Section 32 (1), hence, the plea taken by the appellant being devoid of merit is liable to be dismissed”.

(B) BRIEF FACTS OF THE CASE:-

- (i). Brief facts of the case are that the appellant M/s. Engro Foods (Pvt.) Limited (NTN-2285414) electronically filed Goods Declaration No. KAPW-HC60946-26-10-2023 through clearing agent M/s. S. M. Asghar (Pvt.) Ltd (CHAL No. 714) and declared to contain (1) Milk Chocolate, Total No. of Qty: 8000 Kgs under PCT Heading 1806.2090 at a declared Invoice value of US \$ 52400. The

Appellant importer determined his liability of payment of applicable duties & taxes in terms of Section 79(1) of the Customs Act, 1969. That the goods were selected by the customs officer for examination provided in terms of section 80, 98 and rule 435. of the Customs Act/Rules. The Customs staff reported that the imported goods have a short shelf life which is less than 66%. The goods are banned as per S. No. 4 of Appendix- B, Part-I, of the Import Policy Order, 2022. Thence, the goods are liable to be confiscated. Furthermore, this act of the importer and his clearing agent attracts the violation of Section 16, 209(3) of the Customs Act, 1969 punishable under clause (9) of Section 156(1) of the Customs Act, 1969.

That the Adjudicating Officer (Principal Appraiser) vide Order-in-Original No. 1843699 dated 24-11-2023 held that the charges against the appellants are established; moreover, imposed personal penalty worth Rs 14,827,378/-. The operative part of the impugned order is reproduced verbatim herein below for reference purposes:-

“I have gone through the case record and given due consideration to the submissions made by the importer. The goods have a shelf life of less than 66% which is banned as per S. No. 4 (iii) of Appendix-B, Part-I of the Import Policy Order, 2022. The importer could not fulfill the mandatory requirement of Import Policy Order, 2022. In exercise of the powers conferred under Section 179 of the Customs Act, 1969 punishable under clause 9 of Section 156 of the Customs Act, 1969, I hereby order to confiscate the impugned goods and a penalty of Ra 14,827,378/- is imposed on the / importer. The case 23 disposed of accordingly.

i) That being aggrieved and dissatisfied with the above Order-in-Original No. 1843699 dated 24-11-2023, the appellant importer approached this August forum and filed an instant appeal.

c) PARA-WISE COMMENTS ON THE FACTS OF THE CASE

Besides the above-stated preliminary objections/submission and factual position, the following are comments in chronological order vis-à-vis facts contained in the memo of appeal:

- i). That the contents of Para (1-5) are merely highlighting the profile of the company of the importer; thus, introductory/self-explanatory in nature; thus, warrants no specific comments from the respondent.
- ii). Contents of Para (6-8) fail the test of logic hence denied. It is proved beyond an iota of doubt that impugned goods have shorter shelf life than 66%; hence, goods are banned as per S. No, 4 of Appendix-B, Part-I, of the Import Policy Order, 2022. Thence, the goods are liable to be confiscated. The appellant has failed to put on record any concrete evidence or plausible justification to point out any infirmity or lacuna in the Show-cause notice and subsequent Order-in-Original passed by the learned Adjudication Officer. The impugned Order-in-Original was self-speaking, well-reasoned, judicious, impartial, lucid, and strictly in accordance

with the law. In the instant case, the order was passed after thoroughly examining all facts, aspects, and circumstances of the case and providing the opportunity for a personal hearing to both parties. It is, therefore, requested that the same may be upheld terming it "Intra-Vires".

- (iii). Contents of Para (09-12) are denied as being irrational, inconsistent, and misleading. The appellant instead of justifying his position is taking absolutely flimsy pleas which are not tenable under the law. The appellant has immensely failed to substantiate its narrative by providing any Incontrovertible, compelling and substantive evidence to bolster its contention. Therefore, the contention of the appellant does not hold ground; hence, is indefensible and untenable in the eyes of the law.

Reliance is placed upon the similar case of M/s. Baba Khan v/s Collector of Customs reported as 2000 SCMR 688 wherein the Hon'ble Supreme Court of Pakistan while perusing Section 32 (1) along with Section 79 came to the conclusion that:

"if any person in connection with any matter of Customs makes any declaration or statement which is untrue in any material particular, he is guilty of an offence under Section 32 (1) hence, the plea taken by the appellant being devoid of merit is liable to be dismissed".

- (iv). Contents of Para (11-15) are denied as being flimsy, fabricated, and frivolous. The appellant is invoking technicalities/intricacies to diver the attention of this Hon'ble Court from actual controversy. Without prejudice to that, it is respectfully submitted that the Honourable Supreme Court of Pakistan holds that the case should be decided on an overall merit basis instead of technical grounds in its landmark judgment in the case of Muhammad Hanif Bukhari v/s. President, National Bank of Pakistan (2004 PLC (CS) 1014).

- (v). Contents of Para (16-18) are vehemently denied as being grossly misleading, patently incorrect, and contrary to the facts of the case. The impugned order does reflect the deliberations made upon the various contentions of the appellant, and also delineated the reasons for making such an order; hence, is in total conformity with the pre-requisites for making such order as per section 24-A of the General Clauses Act 1897.

- (vi). Contents of Para (19-22) are prayers of the appellant before the Hon'ble judicial forum; hence, warrant no specific comments from the respondent Collectorate.
- (vii). That the above grounds are independent and / or alternative and do not affect each other.
- (viii). Respondent appeals to grant leave to urge further and / or adduce other arguments at the time of the hearing of the appeal.

(D) PRAYER

In the light of law points and judgments of the Hon'ble Superior Fora as stated herein above, it is humbly prayed that this Worthy Collector of Customs (Appeals) may please declare that the Act of the respondent Collectorate and Order-in-Original passed by the Adjudicating officer are strictly in accordance with law and no interference is warranted. Furthermore, the subject Appeal No. K-3974/2023 filed by the appellant being devoid of merits / law and without any substance is not maintainable in the eyes of the law.

(ii). Besides, the appellants Appeal is without substance; thus, indefensible in the eyes of the law and liable to be dismissed in Limine Litis.

(a) Grant any other and / or better relief as may be deemed appropriate in the circumstances of the case.

(b) Prayed in the larger interest of justice, to meet all corners of the law.

(9) The hearings in the case were fixed and held on 02.02.2024, 13.02.2024 and 20.02.2024 and 08.04.2024. Mr. Muhammad Adnan Moton, Legal Counsel appeared on behalf of the Appellant and Mr. Farhan Mehdi, Appraising Officer, appeared on behalf of the Respondents. The case was argued at length. However, both the parties reiterated much the same arguments as advanced by them in their written submissions.

(10). During the final hearing proceeding the Appellate Authority framed following Issues, which are as follows:-

- i) Whether goods were hit section 16 209(3) of the Customs Act, 1969?
- ii) Whether goods were banned as per serial no. 4 Appendix IX B, part I of IPO 2022?
- iii) Whether penalty of Rs 14.8 m is justified in case a short shelf life?
- iv) Whether this was a consignment with proper LC and a contract made prior to the ban on imports?
- v) Whether the short life a result of the fact that LC could not be opened because of the new IPO and ban on imports of which FCEPL was unaware at the time of the contract?
- vi) Is there any loss of revenue to the Govt. to this particular case?
- vii) Whether bona fide of the importer is evident from the fact that taxpayer profile and the fact that duty/taxes were already paid?

viii) Whether taxpayer's proper profile indicate clearance through green/yellow or red channel?

(11) The Appellant Counsel submitted the following Comments on the issues frame in Respect of Appeals:-

Question: Whether goods were hit section 16 209(3) of the Customs Act, 1969?

Answer: The clearing agent acted in bona-fide manner and filed a goods declaration as per import documents.

Question: Whether goods were banned as per serial no. 4 Appendix IX B, part I of IPO 2022?

Answer: Impugned goods "Milk Chocolate" are imported in bulk packing for own in-house consumption in the appellant's industrial unit and not for further retail selling. In addition to that imported goods are to be further processed before being used in the manufacturing of bulk ice cream. Apart from that imported goods are not supposed to be ingested/eaten in imported/present conditions rather same is mixed with other ingredients to form an altogether new product meaning thereby that the ultimate product will be ice cream rather than milk chocolate. It is also splendidly essential to mention that once mixed/dissolved with other ingredients, imported goods shall lose their original/present state. Foregoing in view, it can be safely concluded that impugned goods cannot be subjected, *stricto sensu*, to 66% shelf life enunciated vide serial No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022 which is specifically incorporated for only those goods which are either sold in retail packing or used directly in imported condition.

Question: Whether penalty of Rs 14.8 m is justified in case a short shelf life?

Answer: Absolutely Not: The penalty of Rs 14.8 million is not commensurate in any manner to the gravity of the case. Rather same was exorbitantly exaggerated and unjustified. Furthermore, It is obvious from clause (v) of section 179(1) of the Act, *ibid* that the principal Appraiser is allowed to adjudicate only those cases wherein the monetary value of goods is up to one million rupees or less. Whereas in the instant case, the Adjudicating Officer i.e. Principle Appraiser adjudged goods having declared value USD 52,400/- (Rs 14 million approximately) otherwise adjudge-able by the Collector (Adjudication). Hence, impugned Order-in-Original is void-ab-initio, *coram non-judice* and without any legal sanctity rendering entire proceedings infructuous.

Question: Whether this was a consignment with proper LC and a contract made prior to the ban on imports?

Answer: Impugned consignment was ordered and LC was opened prior to the ban on imports:

Question: Whether the short life a result of the fact that LC could not be opened because of the new IPO and ban on imports of which FCEPL was unaware at the time of the contract?

Answer: Admittedly, the short life was a result of the unforeseen fact that LC could not be matured because of the new IPO and ban on imports which FCEPL had not expected and taken into account at the time of contract.

Question: Is there any loss of revenue to the Govt. to this particular case?

Answer: No loss of any sort is incurred in the instant consignment. Rather, revenue worth millions in terms of duties and taxes is accrued to the national exchequer in these testing times whether government is running short of revenue to sustain its normal functioning.

Question: Whether bona fide of the importer is evident from the fact that taxpayer profile and the fact that duty/taxes were already paid?

Answer: It is proved beyond an iota of doubt that the importer had acted in an utmost bonafide manner with zero "Mens Rea (guilty intention)". The unblemished track record and past clearance history bear testimony to this fact.

Question: Whether taxpayer's proper profile indicate clearance through green/yellow or red channel?

Answer: Consignments are handled by Pakistan Customs automated clearance system whereof some consignments are marked to green channel and some are marked to yellow channel as per protocols and algorithm of automated clearance system installed by department.

(12). I have examined the case record and the arguments of both the sides and have given careful consideration to the facts of the case. Briefly stated the appellant Company i.e. M/s. Friesland Campina Engro Pakistan Ltd (NTN-2285414) is a reputable food manufacturer / supplier in Pakistan. They imported a consignment of food stuff namely(1) Milk Chocolate, Total No. of Qty: 8000 Kgs vide Goods Declaration No. KAPW-HC60946-26-10-2023 through clearing agent M/s. S.M. Asghar (Pvt.) Ltd (CHAL No. 714) and declared under PCT Heading 1806.2090 at a declared Invoice value of US \$ 52400.00. But on examination it revealed that the imported goods have short shelf life which is less than 66%. The goods are banned as per S. No. 4 of Appendix-B, Part-I, of the Import Policy Order, 2022. Therefore, the case was referred for adjudication

and the adjudicating authority ordered for confiscation of the subject goods under clause (9) of the Section 156(1) of the Customs Act, 1969 read with Section 3(3) of the Import & Export (Control) Act, 1950 due to the bear placed vide proviso (c) to the clause 20 of the Import Policy Order, 2020 which clearly states that the "goods on restricted list which are of sub-standard quality affecting public health including short shelf life, medicines or Pharmaceutical raw materials or edible products imported in contravention of this order shall be destroyed within a period of six months without offering any release". The request of the appellants that if the import was not possible to be allowed then the re-export of the subject goods back to the exporter under para 20(d) of the Import Policy Order, 2020 was also rejected which clearly states that "goods rejected or denied import shall be allowed to be re-consigned or returned to the foreign exporters subject to the laws and regulations pertaining to the trade of contraband goods".

(13). There is no denying the fact that appellant is a well reputed food supplier in the Pakistan retail market which made an agreement with the China firm to import the subject goods with the sufficient shelf life remaining till the expiry date i.e. 12.07.2024. The contract was made and goods ordered before notification of ban of Imports issued by relevant department. The shipment finally arrived in Pakistan in October, 2023 after ban on import of goods had been lifted by then the remaining shelf life has been reduced to less than the 66% of the prescribed threshold under Import Policy Order for import of such goods. Apparently there seemed no attempt on the part of appellant to deceive any authority as no misrepresentation of facts has been attributed. The customs authorities ascertained the shelf life percentage from the documents provided by the appellant and he did not conceal any fact. In such a situation when under Import Policy Order import of the subject goods could not be allowed as per Sr. No. 10 of Part-I of the Appendix-B of the Import Policy Order, 2020 then the importer's request to re-export the consignment back to the foreign exporter should have been entertained under Para 20(d) of the Import Policy Order, 2020 to save the importer from complete loss of his property. However, the adjudicating authority preferred to confiscate the subject goods in the light of para 20(c) of the Import Policy Order, 2020 which is applicable on such cases where all the options have been exhausted and goods need to be disposed off. This is so because the clause (d) of Para 20 of Import Policy Order will become redundant if any goods imported in violation of Import Policy Order, 2020 are to be immediately confiscated and then

destroyed. The legislature has intentionally provided this safety measures to mitigate the suffering of the importers of such goods. Therefore, it is held that the treatment meted out to the appellant vide Order-in-Original No.1843699 dated 24.11.2023 is quite harsh and unjustified. Due to the reasons cited above the subject Order-in-Original is set aside and the importer is allowed to re-export the subject consignment to its original supplier in terms of para 20(d) of the Import Policy Order, 2020 in accordance with the laws and regulations applicable on this subject and subject to realization of foreign exchange involved in re-exportation and all the expenses regarding re-exportation shall be born by the importer. However, as the appellant was denied his right to re-export, which resulted in stucking up of the consignment, therefore, a delay and detention certificate issuance by the Collectorate under Section 14-A(2) of the Customs Act, 1969 be given to mitigate their hardship. Since, there was no willful misrepresentation of the facts / documents, therefore, imposition of personal penalty is not justified and hence is remitted.

(14). This Order consists of (21) pages and each page bears my initials and office seal.



Registered A/D.

**M/S. FRIESLAND CAMPINA ENGRO PAKISTAN LTD,
C/O MUHAMMAD ADNAN MOTON, ADVOCATE,
R/O HOUSE NO. 13-B, 6TH STREET,
ZAMZAMA, CLIFTON,
KARACHI.**



(NYMA BATOOL)
Collector

Copy to:-

1. The Member (Legal & Accounting-Customs), Federal Board of Revenue, Islamabad.
2. The Collector of Customs, Collectorate of Customs, Appraisement-West, Custom House, Karachi.
3. Guard file.



(NYMA BATOOL)
Collector