ORDER SHEET

IN THE HIGH COURTOF SINDH, KARACHI

Spl Cus. Ref. Application No. 57 of 2012

Present:- Mr. Justice IrfanSaadat Khan
Mr. Justice Muhammad Humayon Khan

1. Forhearing of CMA No.360/12
2. For hearing of main case

Applicant through	:	Mr. S. AbidHussainShirazi Advocate
Respondent through	:	Mr. KashifNazeer Advocate
Date of hearing	:	07.11.2016
Date of Order	:	18.11.2016

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O R D E R

MUHAMMAD HUMAYON KHAN, J: This is a Special Customs Reference Application filed by the applicant against the Order dated 12.12.2011 of the Customs Appellate Tribunal, Bench-III, Karachi, by which the following questions of law have been raised:-

1. *Whether on the facts and circumstances of the case the tribunal has any evidence on record in rejecting the applicant's version viz-a-viz the report submitted by the custom official that the imported raw material and the equipment were in existence and were installed at the factory and taking contrary view to the inspection report of the inspection committee, which was ordered by the Tribunal to verify the stocks?*

2. *Whether the learned Tribunal was in possession of any evidence to hold that the license was issued to the applicant in absence of the mandatory availability of the in-house manufacturing facility?*

3. *Whether the doubt casted upon the report of the Custom Official and the claim of the applicant regarding the availability of imported material and the machinery is justified without having any evidence particularly when the appellant and respondent both have submitted and verified the details and made an inventory of stock available at factory?*

4. *Whether the tribunal was justified in issuing the directions and casted doubt upon the custom official that why the goods were not confiscated and in issuing the direction to enforce order in original and to initiate the recovery proceeding, without deciding the appeal on merit as regard to the cancellation of license prematurely?*

5. *Whether the learned Tribunal was justified is not giving its verdict that the collector has acted illegally in curtailing the period of license from two years to one year and not revalidating the license inspite of the import of raw material and applying for the renewal of license by furnishing the insurance?*

6. *Whether the learned Tribunal was justified in adjudicating the appeal on presumption without considering the law, which permits the licensee/applicant to manufacture and export the goods within a period of two years from the date of import and in discarding the applicant's honest explanation that it suffer with the losses because of vindictive and premature cancellation of license by the collector of custom?*

7. *Whether the applicant is liable to pay custom duty on the goods imported under SRO 327 (1)/ 2008 dated 29-03-2008,when the Raw Material and other goods are lying at*

factory and due to premature cancellation of license the goods are not manufactured and the applicant is ready to manufacture and export the goods?

2. Mr. S. Abid Hussain Shirazi, the learned Advocate for the applicant submitted that the report was submitted by the custom official that the imported raw material and the equipment were in existence and were installed at the factory. He further submitted that the report of the Custom Official and the claim of the applicant regarding the availability of imported material and the machinery is justified without having any evidence particularly when the applicant and respondent both have submitted and verified the details and made an inventory of stock available at factory. He finally submitted that the learned Tribunal was not justified is not giving its verdict that the Collector has acted illegally in curtailing the period of license from two years to one year and not revalidating the license inspite of the import of raw material and applying for the renewal of license by furnishing the insurance. However, the learned Advocate for the applicant has not cited any law or case-law in support of his arguments.

3. Mr. Kashif Nazeer, the learned Advocate for the respondent submitted that the applicant had not applied for renewal of license vide Letter dated 15.06.2009 with revalidated insurance policy and fine fire fighting certificate. He further submitted that the applicant would not be able to utilize the raw materials during the next year, which is beyond the stipulated time frame of the period even if the request for renewal is acceded to and therefore the charges of violation and non-compliance of rules as framed in the show cause

notice thus stands established. He submitted that the applicant has failed to utilize the facility for export of finished goods due to having non-manufacturing technology till the validity of license which remained unutilized subsequently for over 12 months as well, therefore order for cancellation of license as envisaged under Rule (4) of SRO 327(1)/2008 and adjudging recovery was in accordance with provisions of law and has been rightly decided by the lower forums. His last submission was that no question of law arises out of the order passed by the Tribunal, which is based upon pure and simple appreciation of facts only. He invited our attention to Section 196 of the Customs Act, 1969 and argued that as per this section only a question of law could be referred to this Court and the Tribunal is the final authority to decide the factual position.However, the learned Advocate for the respondent has not cited any case-law in support of his arguments.

4. Briefly stated that the applicant was granted a private warehouse license No. PWL-06/2008-EOU on 13.08.2008, which remained valid upto 30.06.2009. The applicant during the validity of license imported several consignments for export oriented unit without payment of customs duty and taxes under SRO-326(I)/2008 dated 29.03.2009 for subsequent exportation. The applicant was registered under Sales Tax Act, 1990 on 15.02.2008 vide Sales Tax Registration No. 17-00-3911-001-19, therefore, as per sub-clause (ii) of Clause (d) in sub-rule 2 of SRO-327 (I) /2008 dated 29.03.2008, the applicant was required to export 100% of its production to other countries. On the contrary, the applicant failed to export any

consignment during last 14 months and a desk audit conducted by the Collectorate revealed that the applicant failed to fulfill the conditions of SRO-327 (I)/2008 dated 29.03.2008 as follows:-

i) No consignment has been exported from the inputs imported by the licensee for 100% export purpose in violation of rule 10 (3) of SRO-327 (I) /2008 dated 29.03.2008;

ii) No application has been filed for analysis certificate so far which constitutes violation of rule 9 (1) of SRO 327 (I) /2008 dated 29.03.2008;

iii) No arrangement for establishing on-line automated system prepared by M/s. PRAL has been made which is infringement of rule 14 (1) of SRO 327 (I) /2008 dated 29.03.2008;

iv) No application for renewal of license, expired on 30.06.2009, has been filed nor did revalidated security documents submit which is violation of rule 6 of SRO 327 (I) /2008 dated 29.03.2008;

Non utilization of license calls for its cancellation under rule 4 of SRO 327 (I)/2008 dated 29.03.2008 and recovery of leviable duties and taxes under sub-rule (5) of rule 14 ibid besides penal action under clause-(1) of Section 156 (1) of the Customs Act, 1969.

In these circumstances, Show-Cause Notice dated 16.11.2009 was issued to the applicant, who submitted its reply vide letter dated 18.12.2009. The Collector of Customs (Exports) Karachi by Order-in-Original No. 06/2009 dated 30.12.2009decided the matter against the applicant and directed the applicant for payment of Rs.5,197,981/- under sub-rule (5) of rule 14 of SRO 327 (I) /2008 dated 29.03.2008 and revocation of license under Rule4 ibid and

penalty of Rs.25,000/- is also imposed upon the applicant under Clause (1) of Section 156 (1) of the Customs Act, 1969. Against this Order, the applicant filed Appeal No. K-113/10 (New No. K-1234/11) before the Customs Appellate Tribunal, Bench-III, Karachi, which was rejected by Order dated 12.12.2011.

5. From the above facts of the instant Special Customs Reference Application, it appears that the applicant has not complied with the SRO mentioned above and hence has exposed himself for appropriate action. The applicant was duly served by the respondent through a show cause notice that since they have not fulfilled the conditions as mentioned in SRO No.327(l)/2008, dated 29.03.2008, why their license No.PWL-06/2008-EOU may not be cancelled. Though a representation in this regard was made by the applicant however the applicant has failed to demonstrate to the respondent that the conditions of the said SRO have duly been fulfilled by them. The respondent only then after duly examining the records and considering the submissions of the applicant came to the conclusion that the conditions mentioned in the SRO have not been fulfilled. Moreover it was further observed by the respondent that the validity of the insurance police too had expired. The observations made by the customs authorities with regard to non-fulfillment of the conditions of the said SRO in our view are findings of fact and thelearned counsel appearing before us has failed to justify that upon non- fulfillment of these conditions whether any question of law worthconsideration has arisen in the present reference application. Moreover before the Tribunal also the applicant has failed to prove with cogent material

and documents that they have complied with the conditions as mentioned in the SRO, fully knowing the fact that the Tribunal is the last fact finding authority.

6. The learned Advocate for the applicant has failed to point out a single legal error or misreading of law in the order passed by the Tribunal rather his entire arguments revolve around the facts which cannot be considered in this reference. We have carefully gone through both the orders of lower forums and came to the conclusion that the findings recorded by both the lower forums are findings of facts based on the evidence available on record and in these circumstances all the seven (7) questions referred to herein above do not qualify as the questions of law within the ambit of Section 196 of the Customs Act, 1969.

7. Admittedly, this reference has been filed under Section 196 of the Customs Act, 1969, which clearly provides that:

> *"(1) Within ninety days of the date on which the aggrieved person or Collector [or Director of Intelligence and Investigation], as the case may be, was served with order of the Appellate Tribunal under sub-section (3) of section 194B, the aggrieved person or any officer of Customs not below the rank of an Additional Collector [or Additional Director], authorized by the Collector [or Director in writing], may prefer an application, in the prescribed form alongwith a statement of the case, to the High Court,* ***stating any question of law arising out of such order.]***
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> ***(2)The statement to the High Court, referred to in sub-section (1), shall set out the facts, the determination of the AppellateTribunal and the question of law, which arises out of such order.***

(3)Where, on an application made under sub-section(1), the ***High Court issatisfied****that a* ***questionof law arises out of the order****, referred to in sub-section (1),* ***it may proceed to hear the case****.*

(4) A reference to the High Court under this section shall be heard by a Bench of not less than two Judges of the High Court and, in respect of the reference, the provisions of section 98 of the Code of Civil Procedure, 1908 (Act V of 1908), shall apply so far as may be, notwithstanding anything contained in any other law for the time being in force.

*(5)****The High Court upon hearing a reference under this section shall decide the question of law raised by the reference and pass judgment thereon*** *specifying the grounds on which such judgment is based……"*

8. The plain reading of the above referred provisions of law clearly demonstrate that reference can be filed before High Court in respect of any question of law only and no issue beyond the mandate of law can be considered in reference for the simple reason that the jurisdiction under Section 196 of the Customs Act, 1969, is advisory in nature and the opinion by the High Court is to be given on the point of law only arising out of an order by the Tribunal and if no question of law has arisen or agitated then the reference is fit to be dismissed on this ground only. Reliance can be placed upon the cases of (i) Ghandhara Nissan Diesel Ltd. Vs. Collector of Customs (PTCL 2007 CL. 472), (ii) Collector of Customs Vs. M/s. Pak Arab Refinery, Karachi (PTCL 2010 CL.1025) (iii) Mr. Fakhar-E-Alam Khan Vs. Federal Board of Revenue, Islamabad and 3 others (PTCL 2012 CL.

524) and (iv) M/s. F.M. Y. Industries Ltd. Vs. Deputy Commissioner Income Tax and another (PTCL 2014 CL. 686).

9. In the light of the above discussion, we do not find any merit in this reference, which is hereby dismissed in limine alongwith the listed application.

JUDGE

JUDGE