

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH KARACHI**

**Special Custom Reference Application No. 09 / 2015 a/w**  
**SCRA NO. 10 to 14, 45 to 54, 204 to 295, 1161 to 1216, 1239 to**  
**1338, 1389 to 1488, 1662 to 1710, 2188 to 2287, 2290 to 2389,**  
**2394 to 2493, 2510 to 2609, 2618 to 2717, 2721 to 2791/2015**  
**SCRA NO. 559 to 792/2017**

Date

Order with signature of Judge

Present: *Mr. Justice Muhammad Junaid Ghaffar*  
*Mr. Justice Agha Faisal*

**Applicant:** National Logistics Cell,  
Through Mr. Kashif Hamiduddin  
a/w, Mr. Abdul Majeed Advocates.

**Respondents:** The Collector of Customs &  
Another  
Through Mr. Khalid Rajpar  
Advocate.  
Mr. Kafeel Ahmed Abbasi DAG.

**Date of hearing:** 24.11.2020.

**Date of Order:** 24.11.2020.

**ORDER**

**Muhammad Junaid Ghaffar J.-** In all these connected Reference Applications, the Applicant has impugned orders of the Customs Appellate Tribunal dated 12.08.2014 passed in Customs Appeal No. K-146, 148 to 196/2012 and other connected matters. Similar orders have been passed against the Applicant in other Reference Applications; however, the controversy is identical. The Applicant had proposed various Questions of Law; however, vide order dated 15.05.2015 notice was ordered on the following Questions of Law: -

- “1) Whether the learned Appellate Tribunal and the Collector of Customs are justified in holding that it is the responsibility of NLC under the Custom Rules extends beyond Custom Exit points at Chaman / Amangarh?
- 2) Was it the responsibility of NLC to transit goods across Pakistan through designated routes i.e. either via Spin-Boldak (Chaman) or the Torkham borders?
- 3) Is the production of cross border certificate the responsibility of the appellant (NLC) under Public Notice No. 16/2000?

- 4) Is the production of cross border certificate under Public Notice No. 05/2003, the responsibility of NLC?
- 5) Whether the issue of show cause notices without containing material to establish pilferage en route or incriminating material or evidence, fulfil the necessary ingredients of show cause notice?
- 6) Whether given the long time in issuing show cause notices and passing orders in original, it is to be treated as past and closed transactions being time barred?"

Learned Counsel for the Applicant has read out the order of the Tribunal and has argued that it was never the responsibility of the Applicant to arrange and submit Cross Border Certificates ("CBC") as wrongly held by the forums below; including the Tribunal and therefore, the impugned order is bad in law and is liable to be set aside. He has further argued that pursuant to directions of FBR through a letter, the Applicant who is otherwise an approved Bonded Carrier was permitted to transport containers of Afghan Transit Trade; hence, no illegality has been committed, whereas, the responsibility of the Applicant was only to the extent of delivering the containers at respective yards in Amangarh and Chaman and was never required under the law to ensure crossing of the containers through the border to Afghanistan. He has also referred to Para 7 of Public Notice No. 5/2003 (PQ) dated 06.11.2003 and Office Order dated 10.09.2008 to support his contention. In view of these submission he has prayed for answering the proposed questions of law in favour of the Applicant.

Learned Counsel for the Respondent Department has supported the impugned order of the Tribunal and submits that despite so many chances, the Applicant all along has failed to produce any receiving of the containers at the respective yards / borders; nor any other material so as to discharge their burden as a Bonded Carrier and licensee of the Customs Department. He has prayed for dismissal of these Reference Applications.

We have heard both the learned Counsel and perused the record. It appears that the precise allegation as reported in the Show Cause Notice<sup>1</sup> against the Applicant is that after processing of the documents and sealing of the containers the consignments were

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<sup>1</sup> Dated 30.07.2011 in SCRA 09/2015

handed over to the Applicant, who being a carrier was legally under obligation to ensure safe and secure transportation of the transit cargo to the notified point of exit at Peshawar via the transit route. Learned Counsel for the Applicant has laid much stress on the argument that in terms of Public Notice(s) and the procedure<sup>2</sup> prescribed by the FBR as well as the Department; the Applicant was not required in law to obtain CBC. To that extent even if we accept this argument, it appears that this would not suffice. The learned Tribunal while deciding the Appeal has considered this aspect of the matter, and it would be advantageous to refer to the relevant findings of the learned Tribunal in this regard which reads as under: -

“11. After receiving the custody, the appellant was legally bound to ensure the safe and secure transportation up to the destination because it was the sole responsibility of the national Carrier to safely transit the goods across Pakistan through designated route i.e. either via Spin-Boldak (Chaman) or the Torkhanm border.

12. The stance of the appellant's side that they delivered the consignments safely at the destination has no reality because despite repeated directions, the appellant could not produce even an iota of evidence in support of their version that they had delivered the consignments at destination. The appellant neither could produce the cross border certificate nor any document that they had delivered the consignments at the destination. Thus the core issue involved is that whether the instant impugned goods imported for onward transit to Afghanistan had actually crossed over into the Afghanistan border and reached at its final destination in Afghanistan or otherwise. IN order to appreciate the issue in its legal perspective, primary legal instruments available are Afghan Transit Trade Agreement, 1965 signed between Pakistan and Afghan Government on 2<sup>nd</sup> march, 1965 and Public Notice No. 05/2003 dated 18.11.2003 issued by MCC Port Qasim read with Public Notice No. 16/2000(A) dated 30.09.2000. Article 1(3), 1(4) and 195) of the Annexure on the Customs another procedures to the Afghan Transit Trade Agreement, 1965 specifies that the duplicate and triplicate copies of Afghan Transit Trade Invoice (ATTI) will be dispatched to the respective Afghan Customs at Spin Boldak or Torkham. On receipt of the ATTI form the Pakistan Customs, the Afghan Customs at Spin Boldak or Torkhanm as the case may be, will retain the duplicate and return the triplicate copy of ATTI to the respective Custom House of dispatch in Pakistan with appropriate endorsement certifying the arrival of goods. This triplicate copy of the ATTI, with appropriate endorsements by the respective Afghan Customs, is termed as the Cross Border Certificate. Para (7) of the Public Notice No. 05/2003 (PQ) dated 06.11.2003 also inter alia, specifies that the respective custom station at the border will send the cross border certificate confirming that the goods have crossed over to Afghanistan, within 45 days of the dispatch of the ATTI from Karachi. The appellants failed to provide legal proof of actual transit of the subject consignment to Afghanistan. No cross border certificate as required under Public Notice No. 05/2003 (PQ), Public Notice No. 16/2000(A) read with the provisions of Section 129 of the Customs Act, 1969 and Afghan Transit Trade Agreement, 1965 was provide. Move over, the relevant computerized data maintained for scaling / de-scaling of Afghan Transit Trade containers under Customs General order No. 4/2007 shows that the instant consignment was not de-sealed at its destination i.e. Chaman.

<sup>2</sup> Para 7 of Public Notice No. 5/2003 (PQ) dated 06.11.2003 and Office Order dated 10.09.2008 and CGO No.04/2007

13. It is pertinent to mention here that during the pendency of appeals, on 22.04.2013, the NLC submitted applications in all pending appeals along with photocopies of transit detail report and prayed that since consignments have reached their destination, appellant be exonerated from the charge of misappropriation, pilfering and smuggling of impugned goods.

14. During the final arguments, learned counsel for the appellant once again supplied the same photocopies of TDR before this Larger Bench and repeated the same prayer. This was done, after the Larger Bench had repeatedly demanded of the NLC to produce any documentary evidence to the effect that they had delivered the impugned consignments at the destination. After perusal of the photo copies of Transit detail reports, this Larger Bench is of considered view that NLC could not take any benefit from the photocopies of TDR because all the said photocopies were issued by the NLC, which confirmed that the NLC containers were loaded checked, sealed and were handed over to NLC. Consignments were Afghanistan destined transit cargo. Therefore, the NLC was legally under obligations to ensure safe and secure transportation of the transit goods to the notified point of exit i.e. Chaman or Torkham but the delivery part of TDR is silent in this respect and as already observed, in the column of delivery of goods there are straight or curved lines, with the same hand writing and mostly with the same pen. NLC cannot derive any benefit from the photocopies of TDR. The photocopies of documents bear the monogram of National Logistic Cell, GHQ, Rawalpindi issue on various dates, confirming that the goods were loaded on the container, sealed and delivered into the custody of the NLC but there is no cogent proof as to whom the goods were delivered, the place of delivery and who received the same. The perusal of documents further reveals, as stated above, in the column of delivery of goods, in most of the documents, instead of signature, there is a straight or curved line, which could not be treated to be a signature. In most of the columns of delivery of goods, lines have been drawn with one pen by apparently one person. It is pertinent to mention here that the matter was adjudicated before the adjudicating officer on 02.08.2011, the Order in Original was passed on 15.11.2011. The first appellant forum / Collector decided the appeals on 20.02.2012. Appeals against the order of Collector were filed before this Tribunal on 20.04.2012 but till 22.04.2013 none of above documents were produced. This Tribunal has no hesitation to declare on the basis of above findings that the transit detail report submitted by the appellant to the extent of delivery of goods column are forged and fabricated.

15. During the arguments the appellant raised very funny objection that it is the Customs Authorities who should prove that at which place the goods were smuggled, misappropriated or pilfered. This question / objection has no footing, because the appellants / NLC has verbally as well as through documents (TDR) has admitted a number of times, that the goods were loaded on the containers, the containers were sealed and handed over to the NLC/the National Carrier for further transportation to the destination.

16. Admittedly, these consignments did not reach the destination. In this view of the matter, the onus to provide that the National Carrier delivered the goods at the destination shifts on the NLC because definitely the goods were misappropriated but the containers, trucks, the drivers, co-drivers, conductors and their other associates are in Pakistan; they were neither smuggled nor kidnapped. However, none of them was ever produced by the NLC before this forum or forums below. It is also important to mention here that most of the NLC drivers and other co-drivers, etc, are ex-army persons.

17. It is also very interesting that during the arguments, Lt. Col. (R) Mushtaq Ahmed Khan, the representative of NLC contended, that goods were also misappropriated from Pakistan Railways during transit but no penal action was taken against the Pakistan Railways. The NLC be given the same treatment. The above statement of representative of NLC amounts to admission.

18. The upshot of above discussion is that there is no denial that the goods were loaded in the NLC containers at Karachi Port in presence of Customs Offices, clearing agents, drivers, co-drivers, conductors and others concerned, sealed and were handed over to the appellant, the national Carrier. There is no documentary evidence or other evince available on the files that the goods reached the destination. Verification made from the data provided by the Afghanistan Government also confirmed that consignments did not cross over into Afghanistan. It is also upheld by this Larger Bench that the appellant actively facilitated the misappropriation, pilferage and smuggling of transit goods for their personal gain. No cross order certificate as required under the law were produced by the appellant at any stage of proceedings. The relevant computerized data maintained for sealing, de-sealing of Afghan Transit Trade containers shows that the consignments were not de-sealed at its destination. The importer is not a Pakistani citizen. However, under the Pak Afghan Transit Trade Agreement (ATTA) of 1965, he has been granted nation al treatment i.e. he shall not be discriminated vis-à-vis. importers of Pakistani citizenship. This privilege is, however, subject to observance of economic and legal sovereignty of Pakistan within its borders. Importing goods in the garb of Transit Trade and then disposing them of within Pakistan not only violates the letter of the ATTA of 1965, but is also an assault on Pakistani's economy. The crime was committed within Pakistan's territory, hence all the committers, abettors and beneficiaries of the crime are accountable here.

19. In the circumstances, this Tribunal (Larger Bench) is of the considered unanimous view that the appeals are without merit. No interference is called for. The appellant, The importers and border agents are individually and collectively responsible for making payment determined by adjudicating officer in all the cases.

20. Order passed accordingly." **(Emphasis supplied)**

Perusal of the aforesaid findings of the Tribunal firstly reflect that most of these findings are findings of facts and this Court under its Reference Jurisdiction exercised in terms of Section 196 of the Customs Act, 1969 cannot dilate upon it, except on a Question of Law arising out of the order of the Tribunal. Secondly, it has been noted by the learned Tribunal that during arguments the Applicant's Counsel time and again made attempts to place on record photocopies of Trip Details Report (TDR); however, even such documents could not satisfy the learned Tribunal so as to admit the same as a documentary evidence confirming delivery of the consignment(s) in question at destination. Even today, out of courtesy we have also asked the learned Counsel for the Applicant to show us from record as to at what place these containers were delivered by the Applicant as contended; but the Counsel could not refer or assist us with any document to this effect. Though he sought time to consult the Applicant; however, these proceedings being in the nature of a Reference Application are only confined to a Question of Law; hence, no new document which was not before the forums below (being final fact finding forums), can be looked into by us; and therefore, such request was declined. Though there is force in the argument of the learned Counsel for the Applicant that production of

CBC was not the responsibility of the Applicant; however, as pleaded<sup>3</sup> and contended that the Applicant being a Bonded Carrier was assigned transportation of these containers from Karachi Port / Port Muhammad Bin Qasim either to Chaman and or Amangarh / Peshawar, and not to the exit border till Afghanistan; then at least they were required to manage safe transportation of the containers in sealed condition from the Port area till the place of destination. It is not in dispute that they were acting as Bonded Carriers and took the delivery of the consignment(s) in question in sealed condition along with all necessary documents, and thereafter, it was under their custody for which they were required to discharge the burden as to the delivery of these containers at place(s) for which they were authorized. If the case of the Applicant is that they were not required to transport these containers up to Afghanistan and submit CBC's to this effect; but to deliver them at Customs Container yards at Chaman or Amangrah / Peshawar, then at least an acknowledgment to that effect ought to have been placed on record so as to discharge the burden and the allegations in the show cause notice(s). This is not the case. They have not done so; rather have failed to discharge this burden. In terms of Chapter III (A & B), they were assigned certain responsibilities including delivering the container(s) in sealed condition to the destination. They cannot take advantage of the fact that since CBC was not required to be produced by them; hence, they were not responsible and as a consequence cannot be held liable. This is not well founded. The onus was upon them to show and discharge the burden that they had delivered these containers at the respective yards for which they had been engaged and had entered into the transaction out of their own volition. It is further pleaded<sup>4</sup> that in its capacity as carrier hired mechanical transport ("HMT") from the market and provided it to the Importers of Afghan goods for the purposes of transit only and the role of NLC with regard to HMT transport was that of statutory / legal and not that of business contract. Well this is what the case of the department is; that it was the legal and statutory duty of the Applicant to ensure safe transportation of these containers. Moreover, what we gather from this statement is that the Applicant in addition to transportation of containers on its own Vehicles being a Bonded Carrier and a public section Company<sup>5</sup> hired Transport Vehicles from private sector and handed over the transit

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<sup>3</sup> Para-1 of statement of their case in SCRA No.09/2015

<sup>4</sup> Para 3 of the statement of case in SCRA No.09 of 2015

<sup>5</sup> nlc.com.pk (NLC, the most dynamic public sector transportation organization...)

cargo to them. If that be the case (which apparently is from the pleadings), then how come now, the Applicant argues that safe transportation of these containers was not its responsibility.

Finally, it further appears that one Lt. Col. (R) Mushtaq Ahmed Khan<sup>6</sup>, appeared before the learned Tribunal as the representative of the Applicant and contended that goods were also mis-appropriated from Pakistan Railways during transit but no penal action was taken against the Pakistan Railways and therefore, the Applicant be given the same treatment. In our view, this could hardly be justified as a defence; rather is an admission that containers were mis-appropriated. Such an argument from the Applicant is not only ill-founded but reflects a very sad state of affairs from a public sector organization. We do not want to make a comment on the observations of the Tribunal that the Applicants staff was in connivance in this pilferage; but definitely we may observe that it is a case of gross negligence on the part of the Applicant which could surely be have been avoided with due diligence and professional management and handling of the containers.

In view of hereinabove facts and circumstances of this case, in our considered opinion the learned Tribunal has arrived at a just and fair conclusion by dismissing the Appeals of the Applicant and we are not inclined to interfere in these findings. Though notice was ordered in these reference applications on certain questions of law; however, they need to be rephrased in the following manner;

“1) Whether in the facts and circumstances of the case the Applicant being a Bonded Carrier and a Licensee of Customs / FBR had failed to discharge and perform its statutory and legal duty in safe transportation of the Containers of Afghan Transit as contemplated vide Chapter III (A & B) of CGO No.04 of 2007 dated 21.3.2007?

2) Whether in the facts and circumstances of the case the Customs Tribunal was justified in upholding the order of the Adjudicating Authority?

Both these questions are answered in the affirmative against the Applicant and in favour of the Respondents. As a consequence, all these Reference Applications are dismissed. Let copy of this order be sent to Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969.

**J U D G E**

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<sup>6</sup> Para 17 of the impugned order.

**J U D G E**

Arshad/