IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Applications Nos. **176 to 199 of 2013**

Date	Order with signature of Judge

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

Applicant(s):	**The Deputy Collector of Customs Through Mr. Muhabbat Hussain Awan, Advocate.**
Respondents:	**M/s. Pakistan Office Product & 23 others. Through Mr. Pervez Iqbal Kasi, Advocate.**
Date of hearing:	**01.02.2021.**
Date of Order:	**01.02.2021.**

O R D E R

Muhammad Junaid Ghaffar, J: Through these Reference Applications, the Applicant Department has impugned separate but identical Order(s) dated 28.01.2013 passed by the Customs Appellate Tribunal, at Karachi. These are in fact two different set of References (12 each) inasmuch as SCRA Nos. 176 to 180 of 20133 are against orders in Customs Appeal Nos. K-852 to 856 of 2011 (**Pakistan Office Products v Collector of Customs-5 Appeals**), SCRA Nos.181 to 187 of 2013 against order in Customs Appeals Nos.K-857 to 863 of 2011 (**Marsons USA Corporation v Collector of Customs-7 Appeals**), SCRA Nos.188 to 193 of 2013 in Customs Appeal Nos. K-864 to 868 of 2011 (**Collector of Customs v Pakistan Office Products -5 Appeals**), SCRA Nos. 193 to 199 of 2013 in Customs Appeals Nos.K-869 to 875 of 2011 (**Collector of Customs v Marsons USA Corporation - 7 Appeals**), [**total 24 cases**]. The first set is in respect of the impugned order being decided in favour of the Respondents, whereas, the second set is in respect of some adverse remarks of Collector of Customs (Appeals) against the officers of the Applicant, which the Tribunal has not dealt with or decided in the impugned order. The Applicant has proposed the following questions of law purportedly arising out of the impugned order:-

1) Whether in the facts and circumstances of the case where importers and date of imports are different the appellant tribunal erred in law to dispose of all appeals with a common order?

2) Whether in the facts and circumstances of the case the appellate Tribunal erred law to hold the assessment is time barred in terms of Section-81 subsection 2 of the Customs Act 1969 and observed that the substantial compliance of law has not been made through the Show Cause Notice?

3) Whether in the light of facts and circumstances of the case the matter was different of duty within the meaning of section of 21 of the Act, that pending decision/clarification of the FBR which issued and clearance is available as per Explanatory Notes of Brussels Nomenclature?

4) Whether in view of the explicit undertaking submitted by the importer at the time of release of the goods the case before the Tribunal was the breach of contractual obligation instead of provisional assessment of Section 81 (1) or Section 32 of the Customs Act?

5) Whether in the light of facts and circumstances of the case the appellate Tribunal erred by given overriding effect to the under assessed GDs over the law?

6) Whether the findings of the Tribunal the Tribunal are not perverse for non-reading and misreading of the record available and argued before the Tribunal?

2. Learned Counsel for the Applicant has read out the order and submits that this was never a case of Assessment under section 81 but under Section 80 of the Customs Act, 1969 ("**Act**") and has relied upon para-8 of the Order-in-Original dated 22.3.2011 and submits that this case falls under Section 32 of the Customs Act, 1969, and therefore, the Appellate Tribunal was not justified in allowing the Appeals of the respondents. He has further argued that a mutatis mutandis order has been passed which is against the law settled by this Court. According to him in terms of s.81 of the Act, only a bank guarantee or pay order is obtained for the differential amount of duty and taxes, whereas, in this case a post-dated cheque was given, and therefore, this also shows that assessment in question was not made provisionally under s.81 ibid. He has alternatively prayed to remand the matter to the Tribunal.

3. On the other hand, learned Counsel for the respondents has supported the impugned order and submits that all along the assessments were made provisionally in terms of s.81 of the Act which were never finalised within the limitation period and has referred to Letter dated 15.06.2007 issued by the then Central Board of Revenue, whereby, directions were given to the department to allow provisional release of the consignments in question as an issue had arisen pursuant to implementation of HS 2007 Version of

classification of imported goods. According to him this establishes that all assessments were made provisionally in terms of s.81 of the Act and were never finalised in accordance with law.

4. We have heard both the learned Counsel and perused the record. First we would like to deal with the first set of References filed against the Respondents. Precisely, the legal issue before us is that whether assessments in question were made provisionally under s.81 of the Act; or were final assessment in terms of s.80 of the Act. If they were made provisionally under s.81, then admittedly no final assessment has been made within the limitation as provided therein and to that extent there is no dispute. From perusal of the record it appears that the Respondents had imported computer processors and claimed classification of the same under PCT Heading 8473.3090 chargeable to duty @ 0%, whereas, after implementation of HS 2007 Version of Classification, the department's case was that correct assessment is under PCT Heading 8542.3100 chargeable to 5% customs duty. The consignments were released by the department after obtaining undertaking and post-dated cheques, and to that extent, there is no dispute. However, the department's case is that the said assessment was made at the request of the respondents and instead of cash payment, recovery of duty was deferred till the matter is finally decided by CBR. This according to the Applicant was an assessment in terms of s.80 of the Act. It would be advantageous to refer to the finding of the Adjudicating Officer contained at Para-8 which is a response to the claim of the respondents that it was an assessment under Section 81 and the time to finalize the same had already expired. The relevant finding reads as under:-

> "8 The record of case shows that the clearance of subject goods were not made under section 81 of Customs Act, 1969 as the Good !Declarations vide Machine Nos.55866 dated 07.03.2008, 55443 dated 06.03.2008, 55873 dated 07.03.2008 & 55431 dated 06.03.2008 were finalized under Heading 8542.3100 @ 5% of customs duty. However, on insistence of the importer, the payment of duty & taxes was deferred till clarification on issue by the Board. The department was clear on levy Customs Duty @ 5% on import of processor classified under PCT Heading 8542.3100. Therefore, the assessment was made under section 80 of Customs Act, 1969 against the declaration of item by importer. However, the payment of duty and taxes were deferred against the undertaking submitted by importer that they will abide by the decision by the Board will pay the differential amount of duty & taxes if so determined by the Federal Board of Revenue at any later stage. To secure government revenue Post Dated Cheques were received from them. Board vide letter C.No. 1(42)Mach./82 dated 15.10.2010 clarified that the item i.e. Computer

> Processors is classifiable under PCT 8542.3100 attracting the rate of customs duty @ 5% when the post-dated cheques provided by M/s. Pakistan Office Product were sent to bank which were dishonoured with remarks that "Account blocked". The above position shows that the importer was not ready to pay the amount of duty & taxes since inception i.e. from the day of import of the goods which attracts the section 32(2) of the Customs Act, 1969 punishable under clause-14 of section 156(1) of the Customs Act, 1969.It is clear that the item i.e. Processor imported by M/s. Pakistan Office Products, are dutiable attracting 5% of customs duty, 17% sales tax and 1% income tax. Therefore, I, order recovery of amount of Rs.255,293/- on account of duties & taxes on import of goods in subject Goods Declaration. A penalty of Rs.25,000/- is also on importer under clause-14 of section 156(1) of the Customs Act, 1969."

5. Perusal of the aforesaid finding clearly reflects that the Adjudication Officer has made an attempt to come to a conclusion that assessment was made under Section 80 of the Act, notwithstanding securing / obtaining the differential amount of duty and taxes through a pay order / undertaking. We have not been assisted in any manner that if the assessment was made under s.80 of the Act, then as to why post-dated cheques and Undertakings were obtained. The argument that these were obtained for deferred payment is not substantiated by the law, as S.80 does not provide any such procedure. The assessment is either final assessment (s.80) or a provisional assessment (s.81). There is nothing in between as deferred payment. At least we have not been assisted with any such provision of law; except a fallacious argument that it is a normal practice of the department. To this we may observe that a practice which is not supported by the law; or is against the law, cannot be allowed to be followed in this manner. As to the argument that since there is no provision of making a provisional assessment against a post-dated cheque; hence, this was an assessment under s.80 is also misconceived inasmuch the law at the relevant time did cater for such an instrument as a security. It is only after 2013 that the word post-dated cheque was omitted from the 2nd proviso to sub-section (1) of s.81.

6. On the other hand reliance on Letter dated 15.06.2007 issued by CBR supports the arguments that assessment in question was made under Section 81 and not under Section 80 of the Act, as the said letter was addressed to all Collector of Customs and relevant part reads as under:-

> "2. The Collectorate have pointed out that necessary changes in this regard have also not been made in Sales Tax and Income Tax notifications which is hampering the clearance of goods in PaCCS and One Customs. In order to address the above situation and to facilitate the flow of trade following has been decided:-
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> (i) ……..
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> (ii) Previously, computer monitors were classifiable under PCT Code 84.71 and were exempt from duty vide SRO 567(I)/2006. Now, as per HS 2007 version the monitors are classifiable under PCT code 85.28 where these have become liable to duty @ 25%. It has been decided to provisionally release computer monitors at 0% duty which were exempt from duty under SRO 567(I)/2006. Likewise, computer parts which were exempt under SRO 567(I)/2006 shall also be released provisionally at 0% duty if already no allowed at zero duty in Finance Bill 2007. Final decision in this regard shall follow shortly.
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> (iii) ……."

7. Perusal of the aforesaid directions reflects that CBR by itself directed for provisional release of computer monitors as well as computer parts under relevant SRO at the rate of 0% duty, whereas, the issue was to be decided finally at a later stage. In the light of these undeniable facts, the Tribunal was fully justified in holding that assessment(s) in question were made under Section 81 and not under s.80, whereas, there is no denial of the fact that if that be so, no final assessments were ever made within time and it is only after certain directions of CBR that show cause notices were issued belatedly under s.32(4) of the Act. Here, the goods having been provisionally released, subject to post importation check, and corresponding order having been passed by the competent authority under section 81 of the Act, the release of the goods could be under such section 81 alone and neither subsection (2) nor, subsection (3) of section 32 would be applicable. These subsections of section 32 in the Customs Act, which contemplate absence of levy or short levy or erroneous refund of any duty or charge, are attracted only and notices under one or the other of the subsections are issuable exclusively, when a final assessment either wrongfully or erroneously has been made. If a case is not covered by section 32(2) or 32(3) no notices under those provisions can arise[1]. It is settled law that the provisional assessment was to be treated as final assessment and the petitioners were entitled to release of the bank guarantee furnished by them in favour of the Collector of Customs[2]. In other words, when no final assessment is made in terms of subsection (2) to section 81, the provisional assessment will become final on declared value of

[1] Abdul Aziz Ayob v Assistant Collector of Customs (PLD 1990 Karachi 378)
[2] Hassan Trading Company V. Central Board of Revenue, (2004 PTD 1979)

goods by the assessee, and disbursement of additional amount or guarantee furnished by the importer/exporter, in terms of subsection (3) to section 81, will be regulated on such premises[3]. In the above circumstances we are of the considered opinion that no final assessment order has been made under section 80 of the Customs Act, therefore, by virtue of the provisions contained in section 81(4) of the Customs Act, the provisional assessment made under section 81(1) has attained finality[4]. Consequently, the provisional assessment made by the Custom Authorities on the basis of declared value has attained finality. The ad hoc amount to meet the differential in case of final assessment thus became refundable to the appellant[5].

8. It is also a matter of surprise to note that initially, the show cause notice was issued under Section 32(4) of the Act, whereas, the order has been passed under Section 32(2) and even penalty has been imposed. How this could be done is not clear, or perhaps is an effort to establish a case of mis-declaration and to bring the same within the contemplation of Section 32 (ibid). However, in our considered view per admitted facts as noted above, this was an exercise without any lawful authority and just to overcome and enlarge limitation. The assessments in question were provisional in nature in terms of s.81 of the Act, as there is no concept of a deferred payment in terms of s.80 of the Act. As to the argument that Tribunal has passed a mutatis mutandis order, the same is also belated and misconceived inasmuch as the Adjudicating Officer has by himself done so; hence, if accepted, this would also result in setting aside the Order in Original on which the entire case of the department is premised upon. Secondly, in this case since identical facts are involved and only one legal question was involved; hence, we are not persuaded to entertain this objection as according to us the Tribunal was justified in doing so, notwithstanding the fact that separate order(s) have already been passed in respect of same importers.

9. As to the second set of References are concerned (SCRA No. 188 to 199 of 2013), they arise out of some findings given by the Collector Appeals

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[3] Collector of Customs (Appraisement) v Auto Mobile Corporation of Pakistan, Karachi (2005 PTD 2116)
[4] M/s Wall Master V Collector of Customs and Others (2005 PTD 2573).
[5] Dewan Farooq Motors Ltd v Customs Tribunal (2006 PTD 1276)

against the Government Officials who had allowed release of the consignment in question, whereby, disciplinary action was directed to be initiated and such findings were challenged before the Tribunal by way of separate Appeals by the Department bearing Appeals No. K-864 to 875 of 2011. Since we have already held that the assessments in question were under Section 81 of the Act, and not under Section 80; hence, the findings of the Collector Appeals to this extent is hereby set aside.

10. We have noted that the questions proposed are not properly drafted; therefore, we deem it appropriate to rephrase the questions in the following manner:

i. Whether the assessment(s) in these matters were made under Section 81 of the Customs Act, 1969?

ii. Whether the assessments were finalized within the limitation as provided under Section 81 of the Customs Act, 1969?

iii. Whether a show cause notice could have been issued under Section 32 of the Act, wherein, admittedly an assessment has made under Section 80 of the Act?

iv Whether the order of Collector (Appeals) [upheld by the Tribunal] was justified in directing disciplinary action against concerned officials of the Applicant for having allowed release of the consignments in question after obtaining post-dated cheques and undertaking?

11. Question No. (i) is answered in the affirmative against the Applicant and in favour of the Respondents; Question No.(ii) is answered in negative, against the Applicant and in favour of the respondents; and again Question No.(iii) is also answered in negative against the Applicant and in favour of the respondents. SCRA Nos.176 to 187 of 2013 are dismissed.

Insofar as question No.(iv) is concerned the same is answered in negative, in favour of the Applicant. Accordingly, SCRA Nos. 188 to 199 of 2013 are allowed. Let copy of this Order be sent to Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969. Office to place copy of this order in connected Reference applications as above.

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