

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

CP D 8836 of 2018 : Digicom Trading (Pvt.) Ltd. vs.
Federation of Pakistan & Others

CP D 2494 of 2015 : Digicom Trading (Pvt.) Ltd. vs.
Customs Appellate Tribunal & Others

CP D 8772 of 2018 : Digicom Trading (Pvt.) Ltd. vs.
Federation of Pakistan & Others

SCRA 07 of 2019 : The Collector of Customs vs.
Digicom Trading (Pvt.) Ltd. & Another

SCRA 08 of 2019 : The Collector of Customs vs.
Digicom Trading (Pvt.) Ltd. & Others

For the Petitioners : Mr. Umer Akhund,
Advocate
(CP No.D-8772 of 2018)

Mr. Manzar Hussain Memon,
Advocate

For the Applicant : Mr. Khalid Rajpar,
Advocate

For the Respondents : Mirza Nadeem Taqi,
Advocate

Mr. Kafeel Ahmed Abbasi,
Deputy Attorney General

Date of hearing : 19.02.2021

Date of announcement : 19.02.2021

JUDGMENT

Muhammad Junaid Ghaffar, J.- These petitions (by petitioners) and Special Customs Reference Applications (SCRAs) by the department (“Applicant”) are somewhat connected with each other. Through petitions, the petitioners have prayed that they are entitled for the benefit of SRO 1455(I)/2018 dated 29.11.2018 (SRO 1455), whereby, some amnesty scheme was promulgated in respect of imposition of fine on certain category of goods. The SCRAs have been filed by the

Applicant being aggrieved with a common judgment dated 25.09.2018 in Custom Appeal Nos.K-351, K-352 and K-410 of 2018, passed by the Customs Appellate Tribunal, Karachi, in favour of the petitioners whereby fine and penalty imposed through Order(s) in Original by the authorities below, have been remitted; and have proposed various questions of law. The petitioners have not impugned the said order and now the issue before us is only confined to the question that whether the petitioners are liable for pay and fine and penalty.

2. Learned Counsel for the Applicant has read out the order of the Appellate Tribunal and submits that such order was passed before the promulgation of the amnesty scheme, whereas, the Appellate Tribunal has remitted fine and penalty without any lawful justification; hence, the order is liable to be set aside. Per learned Counsel it is an admitted case of mis-declaration and smuggling, and in the circumstances of the case when duty and taxes have been paid there was no occasion for remitting fine and penalty. He has further argued that insofar as the petitioners are concerned, they are not entitled for the benefit of SRO 1455 (amnesty scheme) in question; hence, the petitions be dismissed.

3. On the other hand, learned Counsel for the petitioners has supported the order of the Appellate Tribunal and submits that the allegation of smuggling was unfounded inasmuch as the goods in question were imported through the notified area duly cleared against Goods Declarations; hence, they could not be termed as smuggled goods. He has further argued that this was a case of wrong shipment, and therefore the Appellate Tribunal was justified in remitting the fine and penalty. As to the petitions, he has argued through order dated 03.06.2019 the prayer in petition has been allowed and has attained finality, whereas, the Appellate Tribunal's order is also in favour, therefore, the amount deposited as security in respect of fine and penalty be ordered to be refunded.

4. We have heard both the learned Counsel and perused the record. It appears that the petitioners imported certain consignments and it was alleged that in the garb of LED lights they had imported Q-mobile/cell phones / tablets after a raid conducted by the Anti-Smuggling Organization pursuant to an information at some place

outside the port area. The goods were seized and thereafter it transpired that the consignment was cleared by the petitioner by declaring the same as LED lights in the Goods Declaration; hence, a show cause notice(s) for violation of Sections 2(s) and 32 and other applicable sections of the Customs Act, 1969 was issued, confronting the petitioner with the allegation of smuggling as well as mis-declaration. The allegation was precisely premised on the ground that the consignment was cleared by misusing the facility of Green Channel which was a privilege given to the petitioner for clearance of their imported goods expeditiously and without examination of the same by the Customs. The subject show cause notice(s) was adjudicated upon against the petitioners and in addition to payment of duty and taxes; goods were confiscated and were directed to be released against payment of fine and penalty. The said Order-in-Original(s) was impugned before the Appellate Tribunal to the extent of imposition of fine and penalty which has been decided in favour of the petitioners as apparently during this period the petitioners paid the amount of duty and taxes to get the goods released from the department. As to the fine and penalty, an ad-interim order was passed by the Tribunal, and the same was also secured with the department subject to final outcome of their Appeals before the Tribunal; however, it was apparently not complied with. After passing of the final order by the Tribunal it further appears that some amnesty scheme was promulgated on 29.11.2018 through SRO 1455. The petitioners came before this court by way of CP Nos.8836 of 2018 and 8772 of 2018 seeking benefit of the amnesty scheme and also for release of the detained goods. On 03.06.2019 the following order was passed by this Court:

“Learned Counsel for the petitioner in C.P No.D-8836 of 2018 has drawn attention of the Court to SRO 1455(I)/2018 dated 29.11.2018 and submits that petitioner’s case is fully covered by the aforesaid SRO, as the consignment of the petitioner was detained/confiscated in the month of October, 2017. Moreover, according to learned Counsel, pursuant to interim order passed by the Customs Appellate Tribunal in Customs Appeal No.K-351/2018 on 03.04.2018, whereby, petitioner was directed to deposit the pay order equal to the differential amount of duty and taxes alongwith fine and personal penalty upon deposit of post-dated cheques for seeking provisional release of the consignment, the petitioner had deposited the aforesaid amount before the concerned Collectorate, hence, entitled to release of the consignment. Per learned Counsel, thereafter, the appeal of the petitioner has been finally decided in favour of the petitioner vide judgment dated 28.09.2018, by the Customs Appellate Tribunal, wherein, it has been held that the goods of the petitioner do not fall within the definition of smuggled goods, therefore, the fine and penalty imposed by the Adjudicating authorities have also been remitted

by the Tribunal. Per learned Counsel, against the order of Tribunal, S.C.R.A. No.07 of 2019 has been filed by the Customs Department, which is pending, however, notices have not been issued in such Reference. Moreover, such Reference otherwise has become infructuous in view of the aforesaid SRO, as the petitioner is entitled to the relief extended by the FBR accordingly.

2. While confronted with hereinabove position, learned Counsel for the respondent has contended that criminal case is registered against the petitioner, which is pending before the Special Judge Customs and Taxation, whereas, the aforesaid SRO does not absolve the petitioner from the criminal proceedings. It has been further contended that unless the criminal case is decided on its own merits, the petitioner is not entitled to the benefit of the aforesaid SRO.

3. We have heard learned Counsel for the parties, perused the record with their assistance and have also examined the language of the SRO. It will be advantageous to reproduce the SRO, which reads as follows:-

“GOVERNMENT OF PAKISTAN
(REVENUE DIVISION)
FEDERAL BOARD OF REVENUE

Islamabad, the 29th November, 2018

NOTIFICATIONS
(CUSTOMS)

S.R.O. 1455(I)/2018.- In exercise of the powers conferred by section 181 of the Customs Act, 1969 (IV of 1969) and notwithstanding anything contained in clause (a) of Notification No. S.R.O. 499(1)/2009, dated the 13th June, 2009, the Federal Board of Revenue is pleased to direct that mobile devices [with SIM or IMEI functionality] brought into Pakistan in violation of the provisions of clause (s) of section 2 of the Customs Act, 1969, which have been seized or voluntarily presented to Customs authorities on or before the 31st December, 2018 shall be allowed release on payment of applicable duty and taxes payable thereon with imposition of zero fine.

S.R.O. 1456(1)/2018.- In exercise of the powers conferred by sub-section (2) of section 179 of the Customs Act, 1969 (IV of 1969), the Federal Board of revenue is pleased to direct that for the adjudication of cases falling under Notification No. S.R.O. 1455 dated the 29th November, 2018, the following officers are authorized namely:-

(a) the Additional Collector of Customs, Model Customs Collectorates is empowered to exercise the powers of the Collector of Customs under clause (i) of sub-section (1) of section 179 of the said Act, and

(b) the Deputy Collector and Assistant Collector of Customs, Model Customs Collectorates is empowered to exercise the powers of the Additional Collector of Customs under clause (ii) of sub-section (1) of section 179 of the said Act.

[C. No.2(16)L&P/2018]

(Muhammad Nayyar Shafiq)
Secretary (Law & Procedure)”

4. From perusal of hereinabove SRO, it appears that reference to SRO 499(I)/2009 dated 13.06.2009 has been given, whereas, the SRO 1455(I)/2018 dated 29.11.2018 has been issued notwithstanding anything contained in SRO 499(I)/2009 dated 13.06.2009, meaning thereby that the provisions of aforesaid SRO will not apply, if the goods of the petitioner are covered in SRO 1455(I)/2018 dated 29.11.2018. It has been further informed by the learned Counsel for the petitioner that

there were four consignments, which were detained by the respondents, out of which, three consignments have already been released by the different Collectorates, including Lahore, Multan as well as Directorate of Intelligence, Customs House, Karachi, whereas, the remaining one consignment is not allowed to be released by Respondent Nos.2 and 3.

5. In view of hereinabove facts and circumstances of the case that the case of petitioner is fully covered under SRO 1456(I)/2018 dated 29.11.201, therefore, we direct the respondents to release the consignment of the petitioner within seven days and submit compliance thereafter within fifteen days. Office is directed to fix all these matters to 21.08.2019, when learned Counsel for the parties are directed to come prepared, and instant petitions and Reference will be disposed of at Katccha Peshi stage. The release of the consignment is however without prejudice to the case of the petitioner pending before the Special Judge, Customs and Taxation, which may be decided on its own merits.”

5. Perusal of the aforesaid order reflects that insofar as the petitioners claim and prayer in respect of SRO 1455 through which the amnesty scheme was promulgated stands accepted and the said order was never challenged. It has therefore attained finality; hence, any challenge to the very applicability of the amnesty scheme on the consignments of the petitioners in question cannot be entertained by us. The petitioners appear to be entitled for the benefit of such scheme, whereby, it was directed that the mobile devices brought into Pakistan in violation of the provisions of Section 2(s) of the Act which have been seized shall be allowed release on payment of duty and taxes with imposition of zero (0%) fine. The said amnesty was applicable to goods against which allegations of smuggling was alleged; and in the show cause notice(s) in hand s.2(s) of the Act has been invoked; hence, no exception can be drawn in this regard. There is no dispute insofar as the duty and taxes are concerned as the petitioners have paid the amount and not disputed the same. Their claim is now to the extent of amount of fine and penalty adjudged against them. By virtue of amnesty scheme and order passed by this Court as above, insofar as the quantum of fine is concerned, that is not payable as the benefit of the above scheme already stands granted; hence, in our considered view, the impugned order of the Tribunal now stands modified to the extent of fine and we need not go into this issue any further. The only issue now left before us is the amount of penalty imposed against the petitioners and as to whether the order of the Tribunal is to be upheld or not. We have gone through the order of the Appellate Tribunal and have not been able to persuade ourselves so as to agree with the findings of the learned Appellate

Tribunal. The Appellate Tribunal has though passed a very detailed order; but in fact it has relied upon settled principles of law by mere reproduction of the same; however, without adverting to the facts of the case and as to what circumstances prevailed upon the Appellate Tribunal to remit the amount of penalty in addition to the fine imposed by the concerned officer. Time and again we have confronted the learned Counsel for the petitioners to assist us from the order of the Appellate Tribunal and the findings so recorded which could persuade us to agree with the learned Appellate Tribunal; however, despite his best efforts, the learned Counsel has not been able to satisfactorily respond. In fact, the entire order does not give any cogent reasons to remit the fine and penalty. The conduct of the petitioners right from the inception of the proceedings and replies furnished by them before the adjudicating authority which is a matter of record, is not convincing and does not show the bonafides on the basis of which it has been prayed that the present case is not of mis-declaration.

Record further reflects that even a request was made by the petitioners vide letters dated 27.12.2017 and 1.1.2018 to accept the duty and taxes and compound the offence under Section 32(B)¹ of the Act (see Para 15 of the Tribunals order), and perhaps was never attended to by the department. In fact, the Tribunal in its final conclusion has also directed to consider the same and decide it accordingly and at the same time has remitted the penalty. How this could be done is not understandable. Section 32B itself does not provide for any exemption or concession in payment of penalty. If accepted, the offence could have been compounded in respect of fine or may be in respect of any criminal proceedings (which is not a subject matter before us), and therefore, when appreciated, the stance of the Petitioners, by itself is in respect of imposition of fine and was never a case in respect of penalty, which they agreed to pay when a request under s.32B *ibid* was made. It further appears that though the petitioners have pleaded that they are entitled for the benefit of the amnesty scheme in question, and at the same time their case is that the

¹ 32B.Compounding of offence.-Notwithstanding anything contained in section 32 and 32A or any other provision of this Act, where any person has committed a duty or tax fraud, the Collector 128[or Director] may, with the prior approval of the Board, either before or after the institution of any proceedings for recovery of duty or tax, compound the offence if such person pays the amount of duty or tax due along with penalty as is determined under the provisions of this Act.

allegation of smuggling is unfounded; however, the amnesty scheme itself is specifically in respect of smuggled goods, whereby, imposition of fine has not been exempted; but has been reduced to zero (0%), which resultantly implies that the goods are to be confiscated; but are to be redeemed against zero (0%) fine. Therefore, in our considered view, the conduct of the petitioners does not merit any consideration warranting remission of fine and penalty as ordered by the learned Appellate Tribunal. It only has to be considered to the extent of fine; but that too, not on merits; but because of the entitlement under the amnesty scheme.

6. In view of hereinabove facts and circumstances of the case, the petitions as well as the SCRA's are disposed of by holding that the petitioners are found entitled for the benefit of amnesty scheme as per order dated 3.6.2019 which has attained finality; but is only confined to the imposition of the fine which is zero (0%); and not in respect of penalty; hence, the order of the Appellate Tribunal stands modified to that extent. The petitioners would be entitled for return of the amount of fine; but are held liable for payment of amount of penalty adjudged against them. The Questions of law proposed are answered accordingly.

7. With these observations, the petitions and the SCRA's stand disposed of in the above terms. Office to send copy of this order to the Customs Appellate Tribunal in terms of s.196(5) of the Act.

JUDGE

JUDGE