ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application Nos. 387 to 413 of 2016
Along with
Special Customs Reference Application No. 122 of 2016

Date	*Order with signature of Judge*

Hearing Case (Priority)
1.For order on office objection Nos. 17 & 21.
2.For Hearing of main case.
3.For hearing of CMA No. 2356/2016.

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

Applicant : Collector of Customs through
Mr. Iqbal M. Khurram, Advocate

Respondents : M/S Junaid Traders etc.
None present though notice issued.

Date of hearing: 01.03.2021.

Date of Order : 01.03.2021.

O R D E R

Muhammad Junaid Ghaffar, J.:- Through these Special Customs Reference Applications, the Applicant/department has impugned order dated 24.02.2016 passed by the Customs Appellate Tribunal at Karachi in Customs Appeal No. K-1516 of 2015 and identical orders in all other connected Appeals. Initially various questions of law were proposed; however, pursuant to order dated 3.12.2020 through statement dated 14.12.2020 the following questions of law were proposed for adjudication by this Court:

1. Whether the respondent importer, who has neither filed any appeal under section 193 of the Act, nor filed any "Review Application" under section 25-D of the Act, can avail the benefit of an order dated (11.09.2013) passed on an appeal (No.K-1166f/2010) filed by some other importer (Haji Janded Khan Shinwari), for the consignments, the assessment of which attained finally?

2. Whether without prejudice to the above, without discharging the onus of Section 19-A & 33 of the Act, an importer can be entitled for refund of such an amount, the incidence of which has been passed on to the end consumer?

3. Whether in the light and circumstances of the case the Appellate Tribunal erred in law and did not taken into consideration Section 19-A & Section 81 of the Customs Act, 1869, by claiming in admissible refund for which the statutory requirements were not fulfilled.

2. Learned Counsel for the Applicant has read out the impugned order of the Tribunal and submits that the same is based on misreading of facts inasmuch as the assessment made by the department was never under section 81 of the Customs Act, 1969 ("**Act**") and in support he has referred to the Assessment Order No. 01/2015 dated 18.05.2015. According to him the comments filed by the Applicant before the Tribunal have been reproduced in the impugned order which does not reflects that any admission was made to the extent that the assessment in question was made under section 81 of the Act. He has prayed for answering the questions in favor of the Applicant.

3. We have heard the learned Counsel for the Applicant and perused the record. Notice was ordered and bailiff's report reflects that respondent is no more available at the given address; hence no further notice is required.

4. It reflects that the respondent imported goods in question (glass beads) which were assessed pursuant to a Valuation Ruling No. 239 dated 31.10.2010 and paid duty and taxes wherafter the goods were released. Though in the impugned order of the Tribunal it has been recorded that the respondent then filed Revision Application before the Director General Valuation under section 25-D of the Act, which was dismissed, against which an Appeal (K-1166/2010) was preferred before the Customs Appellate Tribunal which was decided vide order dated 11.09.2013 in favour of the respondent. However, on perusal of the order of the Tribunal as above, it appears that it was not passed in respect of the Respondent before us; but in fact the Appellant was *Haji Janded Khan Shenwari*. It seems that based on that order which was incidentally in relation to the same Valuation Ruling, the respondent approached the department for refund of the duty and taxes paid pursuant to the assessment made on the basis of impugned Valuation Ruling. The department was not satisfied as to the fulfillment as required under section 19-A of the Act; as apparently the incidence of duty and taxes had been passed on to the buyer; hence a show cause notice was issued and as per record available, no satisfactory response was furnished and the orders for rejection of refund were passed. The respondent approached the Collector of Customs (Appeals) and the said appeals were dismissed vide a common order dated 3.8.2015 and the operative part of said order reads as under:

> "5. I have examined the case record. The appellants goods were assessed on the basis of Valuation Ruling 239 dated

> 31.03.2010. The appellants paid duty and taxes accordingly. The same importer however assailed the Valuation Ruling, first in review before Director General Valuation which was unsuccessful and later before Customs Appellate Tribunal which was successful. Consequently he applied for refund of duty and taxes paid earlier. The appellant was asked to establish that he had not passed on the incidence of duty / taxes to the end consumer. He could not do so at the original stage. During the hearing proceedings, the appellant produced copies of agreements, purporting sale of goods by M/s. Jandad Khan to Mr. Yasin Khan and Mr. Hashmatullah imported vide impugned GDs. As per agreement the purchase price includes the amount of duty and taxes paid in accordance with Valuation Ruling, however the said amount will be refunded to the purchaser by appellant if he succeeds in getting refund. The agreement is found to be unreliable on various counts such as, the agreement is not signed by either party. The appellant tried to sign during the hearing. The agreement is not witnessed. The buying party in all agreements is same, which cannot be regarded as end consumer. I therefore concur with the original authority that the appellant has not suffered any loss as burden of duty / taxes has been passed on to end consumes. The Importer / appellant is not entitled to undue enrichment. The appeal being without merit fails."

5. The said order of the Collector of Customs Appeal was then impugned before the Tribunal and the Appeal of the respondent has been allowed by the Tribunal on the ground that the assessments were made under section 81 of the Act and s.19A of the Act would not apply; hence the respondent was entitled for refund and or return of security. When the order of the learned Tribunal is perused, it reflects that insofar as the comments of the respondent before the Tribunal (**Applicant before us**) are concerned, it nowhere states or admits that assessments in question were made under section 81 of the Act. However, the Tribunal at para 7 of the impugned order has observed as follows:

> "7. I have meticulously gone through the available record, heard both the parties and considered the arguments advanced by the Counsel of the appellant and representative of the respondent department as well. The basic controversy involved in this case revolves around the fact whether the goods of the Appellant were assessed under Section 80 of the Customs Act, 1969 and the tax was pad on the basis of Valuation Ruling No. 239 dated 31.02.2010 or goods were provisionally released in terms of Section 81 of the Act. On perusal of grounds of appeal before the Collector of Customs (Appeals), Karachi and before this Tribunal filed by the Appellant, the Appellant has categorically contended that his goods were allowed to be released under Section 81 f the Customs Act, 1969 after provisional determination. The learned Collector Customs (Appeals) has not given any finding on the said contention of the Appellant, therefore, the question of fact regarding the release of goods under Section 81 of the Act remained unanswered. It has also been observed that in the parawise comments on facts of the appeal filed by the Respondent

> Department it has not been denied that the goods of the Appellant were released under Section 81 of the Act. To further verify the above fact, the Deputy Collector appearing on behalf of the Respondent Department was asked about said fact and she replied in affirmative that the goods of the appellant were released under Section 81 of the Act. Now after appreciating the fact that the case of the Appellant has to be dealt with under Section 81 of the Act, the applicability of Section 33 read with Section 19A has to be determined under the law and for that purpose provision of Section 81 and Section 33 of the Act (as at the relevant time) are reproduced hereunder:"

6. Perusal of the above finding of the Tribunal reflects that the Tribunal has placed reliance on para-wise comments and has come to the conclusion that the assessment was made under section 81 of the Act as such fact has not been denied by the respondent / applicant. However, the entire record placed before us, including the assessment order and the order of the Tribunal in the first round of litigation, wherein the Valuation Ruling was challenged, does not reflect that the assessments in question were made provisionally under section 81 of the Act. It further appears that respondent had never challenged the Valuation Ruling by itself in terms of s.25D of the Act, and in fact had relied upon the order of Tribunal dated 11.09.2013 passed in respect of some other importer and claimed refund of duty and taxes. This was perhaps done due to the fact that the order of the Tribunal dated 11.9.2013 was not challenged any further before this Court. Nonetheless, such conduct of the Respondent negates the contention that the assessment was made under section 81 of the Act.

7. Moreover, it has come on the record from the order of rejection of refund and order of Collector (Appeals) that the respondent made an unsuccessful attempt to discharge its burden to meet the objection regarding section 19-A of the Act by placing reliance on agreement of sale and purchase which were never signed and witnessed; hence, were accordingly discarded. Such conduct of the respondent, however, justifies that refund was being claimed and the respondent failed to fulfill the requirements of section 19-A of the Act, whereas, it was not the case that since an assessment was made in terms of s.81 ibid, therefore, s.19A of the Act was not applicable. The learned Tribunal has miserably failed to take note of these facts and has seriously erred in passing the impugned order in favor of the Respondent.

8. In the circumstances, we are of view that the order passed by the learned Appellate Tribunal is based on misreading of facts and without considering the crucial aspect that the respondent had never challenged the Valuation Ruling as required in law, whereas, even on merits had failed to discharge the burden as contemplated under s.19A of the Act. Accordingly, question Nos. 1 & 2 are

answered in negative; in favour of Applicant and against the respondent; whereas answer to question No.3 is not required.

9. Consequently, the impugned order of the Tribunal is set aside and all these Special Customs Reference Applications are hereby allowed. Let copy of this order be sent to the Customs Appellate Tribunal as required under section 196 (5) of the Act; whereas office is directed to place copy in all connected Special Customs Reference Applications listed at Serial No. 14 of today's cause list.

J U D G E

Aamir, PS *J U D G E*