ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application ("SCRA") Nos. 342 to 348 / 2013

Date	Order with signature of Judge

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

Applicant:	**Collector, Model Customs,** **Model Customs Collectorate,** **Port Muhammad Bin Qasim, Karachi** **Through Mr. Mirza Nadeem Taqi Advocate.** **Mr. Saddam Bhutto holding brief for Mr. Zulfiqar Ali Khan Advocate.**
Respondents:	**M/s National Feed Limited & Another.**
Date of hearing:	**01.03.2021**
Date of Order:	**01.03.2021**

ORDER

Muhammad Junaid Ghaffar, J: Through these Reference Applications the Applicant Department has impugned order dated 08.07.2013 passed by the Customs Appellate Tribunal at Karachi in Customs Appeal No. K-560 of 2012 and similar / common order dated 5.7.2013 in Customs Appeal Nos.596-597/2012, 632 to 635 of 2012. In all listed Reference Applications following Questions of Law have been proposed:-

> "1) Whether the impugned order passed by the Hon'ble Customs Appellate Tribunal is maintainable under the law, as the issue in respect of benefit of Sales Tax under SRO 727(I)/2011 dated 01.08.2011 has not been concluded?
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> 2) Whether the benefit of exemption of sales tax was available to the Silos in terms of SRO 575(I)/2006 dated 05.06.2006 when the same was withdrawn vide SRO 477(I)/2011 dated 03.06.2011?"

2. Learned Counsel for the Applicant has read out the order and submits that the Tribunal was not justified in allowing Appeals of the Respondents as the exemption of Sales Tax was not available on Silos imported by the Respondents as it does not fall within the definition of machinery; hence, the Questions of Law proposed be answered in

favour of the Applicant. According to him, the clarification relied upon by the Tribunal, though issued by Sales Tax Wing of FBR was not binding on the Customs Authorities as the matter relates to classification of goods.

3. We have heard the learned Counsel for the Applicant and perused the record. At the very outset, we may observe that these Reference Applications are pending since 2013 and till today no case has been made out for issuance of notices to the Respondents. It further appears that as per show cause notice dated 26.5.2012 in SCRA No.342 of 2013 Respondent imported a consignment of Silos (Grain Storage Bin) for Poultry Industry and filed Goods Declaration claiming exemption from Customs Duty and Sales Tax under SRO 575(I)/2006 dated 5.6.2006 ("**575**") and SRO 727(I)/2011 dated 01.08.2011 ("**727**") which were assessed and goods were released extending the benefit of these two SRO's. Thereafter pursuant to some scrutiny as alleged, the benefit of sales tax was not available after issuance of an amending SRO 477(I)/2011 dated 3.6.2011, whereas, in terms of SRO 727 exemption was only available to Plant and Machinery as defined in the said SRO and the explanation thereto does not cover Silos for such benefit. In SCRA 342 of 2013 facts are that after assessment by the respective Collectorate in the same manner, the Director General of Intelligence & Investigation detained the goods on the ground that exemption of Sales Tax under SRO 727 was not available and thereafter, Show Cause Notice was issued. Subsequently, Order-in-Original(s) was passed which was then challenged before the Appellate Tribunal. The learned Tribunal has allowed the Appeals and the relevant findings read as under:-

> "7. A perusal of record and arguments heard by both side on the subject bring forth the fact that Pakistan Poultry Association has taken up this issue with the Federal Board of Revenue who vide its letter C.No. 1(18)S/2005(Pt)/140523/R dated 25.10.2012 has determined it and communicated as:-
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> > "The issue of storage poultry feed Silos has been examined by the Board. It is pointed out that poultry feed Silos are a pre-requisite of poultry industry and are used by Poultry Feed Mills and for the production of eggs and meat. Hence, the benefit of exemption Sales Tax under SRO-727(I)/20911 dated 01.08.2011 is also available to Silos for poultry as well. This issues with concurrence of the Custom wing of the Board. Subsequently, the Custom wing of the FBR on a letter received from Directorate General of Intelligence and Investigation Islamabad took a different position vide its letter C.No.1/369/Mach/2001/10545 dated 20.01.2013 as follows:-

> "……. "Silos; classifiable under PCT 94.06, have never been treated as machinery and equipment, as the term machinery and equipment applies to the items listed in chapter 84 and 85 of PCT. It is for this reason that "Silos" were specifically added in Sr. No. 2 of SRO-575(I)/2006 dated 05.06.2006, otherwise there would have been no need to amend the said SRO. The custom wing thus has not concurred to treating "Silos", (PCT 9406) as machinery and equipment, as it would be against the established policy."

8. Thus the above correspondence of the Customs side had generated a controversy and the instant impugned order is also based on the same clarification in denying the benefit. We observe that the second letter issued by the Custom side of board has given its opinion as to the PCT heading of the "Silos" which is correct, as it is the proper forum for classification of an article. It further says that they never concurred to treating Silos as machinery and equipment. However, the letter of the Board issued by Sales Tax side earlier on still remain inforce, and has not been cancelled. There is a difference of opinion among the two wings of the Federal Board of Revenue and needs a resolution among themselves. As per official procedure, the normal course should be having been that Custom Wing would have approached the Sales Tax Wing and asked for its withdrawal, which has not happened so far. Most importantly, as we understand that it is matter of allowing exemption or concession of Sales Tax on the Import of a particular item for benefit under a notification. The Customs Authorities only collect the Sales Tax on the import stage as a withholding agent allowed under Section 6 of the Sales Tax Act, 1990. Thus the clarification issued by the Sales Tax wing holds goods as the matter pertain to Sales Tax levy and therefore, their domain. The Sales Tax Authorities considered the impugned goods covered under the said notification as machinery and equipment irrespective of its classification. Hence the clarification issued by the Custom side may hold goods to the extent of classification aspect but not relevant to the concession or exemption of Sales Tax on the import of Silos being not the relevant administering authority of Sales Tax till such time the clarification is withdrawn by the Sales Tax side. Importantly, the first clarification also shows the intent of the legislature goods under SRO-727(I)/2011 dated 01.08.2011. This concession of Sales Tax has now been made available specifically by adding another entry to the relevant notification. Even if we presume that exemption or concern was not available at relevant period of import, can the principle of beneficial interpretation qua retrospectively would be applicable. Though under different circumstances, the apex Court vide its judgment in case of *Collector of Customs Lahore versus Mrs. Shahida Anwar* reported as *(2012 SCMR 1698)* has even allowed retrospective benefit in Import Policy order, basing their arguments on reported judgments as 1992 SCMR 1652 and PLD 2001 SC 340.

9. As to the issue of mis-declaration under Section 32(I), 32(2) and 32(3A) of the Customs Act, 1969, it is observed that the issue of interpretation of impugned goods have been contested and has gone before the Federal Board of Revenue for resolution, hence the invocation of penal clauses of mis-declaration under various provisions of Section 32 of the Customs Act, 1969 are uncalled for, and not attracted in the present circumstances of the case. The respondent has failed to put up evidence of malafide except that of claiming of benefit of a notification. The declaration to the description of goods is correct and there could be a difference of opinion whether it falls within meanings of plant and machinery under SRO-727(I)/2011 dated 01.08.2011. A perusal of section 32 of the Act reveals, that in addition to declaration any communication, or answers to questions, put by Customs officers and found wrong in material items, constitute an offence within his framework of the said section. "So, in order to bring an act, or action within the framework of the

word "false", as used in section 32 of the Act, the act should either be a conscious wrong, or culpable negligence and should be untrue either knowingly or negligently. *(Omalsons Corporation V/s. The Deputy Collector of Customs (Adjudication) Karachi-SBLR 2002 Tribunal 57)*. Mala-fide and mens-rea are necessary ingredients for committing any offence including that of smuggling. *(Moon International V/s Collector of Customs (Appraisement) Lahore PCTL 2001 CL 133)*. There are two questions which need to be addressed before invoking section 32 of the Customs Act, 1969, for mis-declaration (a) whether mens-rea which is essential element for the purpose of sub-section (1) of Section 32 has been proved and (b) whether a demand for short recovery can be made under the provisions of sub-section (2) or section 32, without proving any guilty intention, knowledge, or mens-rea on the part of the maker of the statement. If element of mens-rea is not visible and guilty intention is not proved then provisions of Section 32 cannot be invoked as held in the judgments. *Union Sport Playing Cards Co. Vs. Collector 20902 YLR 2651. Al-Hamd Edible Oil Limited V/s. Collector 2003 PTD 552 and A. R. Hosiery Works v/s. Collector of Customs (Export) 2004 PTD 2977.* This celebrated principle of law in customs jurisprudence that mis-declaration charges under Section 32 of the Customs Act, 1969, shall not be invoked has now been well settled in large number of cases, i.e. *Ibrahim Textile Mills Limited V/s. F.O.P. PLD 1989 Lahore 47, Central Board of Revenue V/s. Jalil Sheep Co. 1987 SCMR 630, State Cement Corporation V/s. G.O.P. C.A. No. 43 of 1999 and Cargill Pakistan Seeds (Pvt.) v/s. Tribunal PTCL 2003 CL. 671.*

10. Having been discussed the legal and factual controversies of the case, we observe that impugned order suffer from legal and factual improprieties and is therefore, set aside. The appeals are allowed with above observations."

4. Perusal of the aforesaid findings reflects that the issue has cropped up just because of difference of opinion between two wings of FBR i.e. Customs and Sales Tax. It further appears that the issue was taken up by Pakistan Poultry Association with FBR and the Sales Tax Wing of FBR had issued a clarification dated 25.10.2012 (reproduced in Tribunals order as above) in respect SRO 727 which pertains to exemption from Sales Tax and it has been clarified that storage poultry feed Silos are a pre-requisite of Poultry Industry and are used by the Poultry Feed Mills for the production of eggs and meat; hence, the exemption of sales tax is also available to Silos for poultry, whereas, the said clarification was issued with *concurrence of Customs Wing of FBR*. It further appears that Customs Wing of FBR pursuant to some letter of Director General of Intelligence took a different position and vide Letter dated 24.01.2013 stated that since Silos does not fall under PCT heading 84-85 of the Customs Tariff; hence, is not machinery so as to be entitled for exemption under SRO 575. The Tribunal after considering clarification of both the Departments of FBR has been pleased to allow the Appeals on two grounds. The First is that this

matter pertains to exemption of Sales Tax and the clarification of the Sales Tax Wing at the behest of whom the SRO in respect of Sales Tax was issued shall prevail. Further, even though subsequently the Customs Wing of FBR took a different view; but at the same time, the earlier view of the Sales Tax Wing was never withdrawn by FBR; hence, the same is still in field would apply to the case of the Respondents as the matter pertains to sales tax. Moreover, in the SRO in question the explanation states that for the purposes of this notification, plant and machinery means such plant and machinery as is used in the manufacture or production of goods, and this is not restricted to any heading of chapter 84 or 85 as contended on behalf of the Applicant, which apparently was the case in terms of SRO 575; whereas, here it is an independent SRO 727 which is under consideration. And lastly the Hon'ble Supreme Court in the case of Fauji Fertilizer[1] has been please to allow grant of exemption on catalyst being plant and machinery.

5. Secondly, the Tribunal came to the conclusion that since subsequently, the SRO in question was also amended by putting in a specific exemption of Sales Tax on the import of Silos; hence, notwithstanding, even otherwise, the said notification could be applied retrospectively as per settled law. As a consequence, thereof, lastly, the Tribunal came to the conclusion that this was a matter of interpreting an SRO and the exemption available therein; hence, the matter was never covered under Section 32 of the Customs Act, 1969 so as to initiate proceedings of misdeclaration. After going through the findings of the learned Tribunal we are fully in agreement with such findings and have not been able to persuade ourselves to agree with the arguments of the Applicants Counsel as despite being confronted, he was not able to satisfy as to how the subsequent view

[1] 21.....As mentioned herein above the Catalysts being an integral part of the plant and machinery could not be separated for the purpose of levying customs duty and sales tax being inseparable part of the plant and machinery for the reasons that it is a metallic compound and thus is a part and parcel of the reactors of the plant which converts the nitrogen and hydrogen gases by a chemical reaction into ammonia and without Catalysts it cannot be made functional. Thus it can safely be considered as an integral part of the plant and machinery. It may be added here that ammonia is the basis for nearly all commercial nitrogenous fertilizers and about 85% of industrial ammonia is produced in fertilizers plant. As mentioned herein above the Catalysts being an integral part of the fertilizer plant and machinery shall be exempted from the customs duty and sales tax. The S.R.O.959(I)/89 dated 23-9-1989 made the position abundant clear which indicates that `plant and machinery' not manufactured locally and imported for the expansion of the existing units manufacturing fertilizer shall be exempted from whole of the customs duty and sales tax subject to the conditions specified under S.R.O.515(I)/89 dated 3-6-1989….(**Collector of Customs v Fauji Fertilizer Ltd. (PLD 2005 SC 577**)

of the Customs Wing which had initially concurred with the opinion of the Sales Tax Wing, could be suddenly changed and applied in a case, wherein, the issue pertains to exemption from Sales Tax. Here the matter was never of classification in its strict sense; but of exemption of sales tax to Silos under the SRO issued in terms of the Sales Tax Act, 1990. Therefore, we do not see any reason to interfere with the order of the learned Tribunal.

6. It further appears that the issue of exemption under SRO 575 in respect of storage Silos (though pertaining to another category of Industry) also came before a learned Division Bench of this Court in C.P. No. D-462/2013 and the precise facts involved were similar in nature to the extent of issuance of amending SRO during pendency of the proceedings and its retrospective benefit, and the learned Division Bench vide its Judgment dated 23.11.2018 had allowed the petition with the following conclusion:-

> "Moreover, it is also an admitted position that when SRO ___(I)/2012 dated 23.10.2012 was issued, whereby, the words "including Silos" were added in Column No. 2 after the word "facilities" in the relevant head, the case of Petitioner was pending before the concerned Authorities, therefore, it being a clarificatory and beneficial Notification would otherwise apply to the pending case of Petitioner. Reliance in this regard is placed in the case of *Army Welfare Sugar Mills Limited V. Federation of Pakistan and others (1992 SCMR 1652), Elahi Cotton Mills Limited V. Federation of Pakistan and Others (PLD 1997 SC 582) and M/s. Polyron Limited V. Government of Pakistan and others (PLD 1999 Karachi 238).* In view of hereinabove factual and legal position as emerged in the instant case, we are of the considered view that the case of the Petitioner is covered by the said SROs, hence entitled to exemption."

7. The said judgment was impugned by the Department before the Hon'ble Supreme Court through Civil Petition No. 02-K of 2019 and vide order dated 28.05.2019 the Hon'ble Supreme Court has been pleased to dismiss the Department's Petition for Leave to Appeal in the following terms:-

> "4. We have heard the learned Counsel for the Petitioners and perused the record of the case.
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> 5. The Respondent No. 1 has in respect of the subject consignment sought exemption in terms of SRO 2006 which grants complete exemption from customs duties and sales tax on the importation of "Machinery and equipment for development of grain handling and storage facilities", however, as noted above, the exemption was declined as the consignment according to the Petitioners did not fall within the description of the goods mentioned in the SRO 2006. They contended that the amending SRO is not relevant to the

subject consignment, as the same came after the assessment of the subject consignment, and further that at the time of release of the consignment the Respondent No. 1 has furnished an undertaking to abide by the decision of the respondent No. 3 in the matter.

6. However, in view of the amendment made by SRO___/(I)/2012 dated 23.1-0.2012, the description of the relevant goods mentioned at S. No. 2 of the SRO 2006, read "Machinery and equipment for development of grain handling and storage facilities including Silos", under which description the subject consignment clearly fit in. It is an admitted position that the amending SRO was issued while the question of exemption with regard to the subject consignment was pending decision before respondent No. 3 and thus the benefit of such amendment, which in view of the language of the main as well as the amending notification, and the facts and circumstances of the case, was / is an explanatory and beneficial notification and therefore, should have been extended to the subject importation. An undertaking to abide by the decision of the respondent No. 3 cannot operate to prevent the consignee from seeking his legal remedy against such decision. We therefore, find the impugned judgment to be just, fair and lawful which calls for no interference. The Petition is accordingly dismissed."

8. Accordingly, in view of the above no case is made out on behalf of the Applicant warranting interference in the impugned order of the Tribunal which appears to be correct in law and facts depicting correct legal position as settled by the Superior Courts. The questions of law proposed are not proper; hence, are re-formulated in the following manner;

(a) Whether in the facts and circumstances of the case the Tribunal was justified in holding that clarification given by Sales Tax Wing of FBR was binding upon Customs Wing of FBR in respect of an exemption pertaining to Sales Tax?

(b) Whether in the facts and circumstances of the case the Tribunal was justified in holding that exemption from sales tax was available on the subject goods in terms of SRO 727?

9. Question No.(a) & (b) are answered in the affirmative; against the Applicant and in favor of the Respondents. Let copy of this order be sent to Customs Appellate Tribunal, Karachi, in terms of sub-section (5) of Section 196 of Customs Act, 1969. Office is directed to place copy of this order in all above connected SCRAs.

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Arshad/p