IN THE HIGH COURT OF SINDH AT KARACHI

Present
Mr. Justice Irfan Saadat Khan
Mr. Justice Zulfiqar Ahmad Khan

SCRA No.471 of 2019

[The Collector of Customs ……v……Zeeshan]

SCRA No.472 of 2019

[The Collector of Customs ……v……Aminullah]

SCRA No.613 of 2019

[The Collector of Customs ……v……Zeenatullah]

SCRA No.616 of 2019

[The Collector of Customs ……v……Saadat ullah]

SCRA No.618 of 2019

[The Collector of Customs ……v…… Abdul Majeed]

Date of Hearing	:	10.02.2022
Applicant through	:	Mr. Khalid Rajpar, Advocate
Respondents through	:	Mr. Sardar Muhammad Ishaque, Advocate

JUDGMENT

Zulfiqar Ahmad Khan, J:- This bunch comprising of five above-identified SCRAs poses question of law arising out of two independent (but similar) orders of Customs Appellate Tribunal whereby in terms of order dated 04.03.2019, Custom Appeal Nos. K-1307 & 1309 of 2018 were decided in favour of the present respondents namely Zeeshan son of Aziz ur Rehman and Ameenullah son of Rasool Zaman (subject matter of SCRAs No. 471 & 472 of 2019), whilst order dated 06.05.2019 decided Custom Appeal Nos. K-1306, K-1308 & K-1310 of 2018 in favour of Abdul Majeed son of Muqarab Khan, Zeenatullah son

of Zarqias Khan and Sadatullah son of Sher Wali Khan (subject matter of SCRAs No. 613, 616 & 618 of 2019), where the Tribunal chose to allow re-exportation of the vehicles.

2. The common questions of law adopted for hearing from the leading SCRA No. 613 of 2019 for regular hearing in respect of this entire bunch are reproduced hereunder:-

> A. Whether in the light of facts and circumstances of the case, the learned Member (Judicial) of the Appellate Tribunal has not erred in law while allowing re-export of the impugned vehicles which are otherwise not covered under proviso to para-6 of the Appendix E of the Import Policy Order, 2016?
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> B. Whether in the light of facts and circumstances of the case, the learned Appellate Tribunal has not erred in law while allowing re-export of the impugned vehicles having tempered chassis, which are banned and cannot be allowed re-export as it is not a case of items where the import/release denied as enumerated in the proviso to para-19 read with 6 of the IPO, 2016?
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> C. Whether in the light of facts & circumstances of the case and considering the provisions of first proviso to Section 181 of the Customs Act, 1969, read with paragraph 1(d) of SRO 499(I)/2009 dated 13.06.2009, the Appellate Tribunal not erred in law to allow release of the confiscated old and used vehicles?

3. Per learned counsel, facts of the cases are that the private respondents imported used Hino branded truck chassis under the Personal Baggage Scheme and filed Goods Declaration for clearance of those vehicles under Section 79(1) of the Customs Act, 1969 read with Rule 433 of the Customs Rules, 2001. Leviable Customs duty and other taxes were paid in terms of clause “B” of Section 79(1). Particular of the vehicles in WeBOC were given as per law where year of manufacture was shown as 2012. GDs were later on selected for scrutiny in terms of Section 80 of the Act read with Rule 438 of the Rules and were referred to physical examination of the vehicles for confirmation of description, quantity and other physical attributes of

the vehicles. Learned counsel states that examination of the vehicle by the Assistant Inspector General of Police Forensic Division, Sindh, Karachi dated 09.11.2017 resulted in the following forensic test report:

> 1. Chassis Serial (on Right side Chassis Frame): The present Chassis Serial: (JHDFM2PKUCXX10813) is stamped. However no other number has been deciphered under the current chassis number.
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> 2. Chassis Serial (on Left side Chassis Frame): The Chassis Digits (JHDFM2PKUCXXX10813) have been slightly visible after chemical process.

4. Upon issuance of show cause notices on the basis of the above Forensic Report, the respondent importer rebutted to the allegations leveled in the show cause notice in *toto*. The said show cause notice held that the respondent importer had violated para-3 of Appendix-E of Import Policy Order, 2016 that led to the contravention of Section 16 and 32(1)&(2), 79(1) of the Customs Act and Section 33 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001 punishable under clauses (1), (9), (14) of Section 156(1) of the Customs Act, 1969.

5. The matter was referred to the Adjudication Authority as well as the Collector of Customs (Appeals), Karachi, who passed orders declaring that the imported vehicles shown to be of model 2012 had tempered chassis, which were not allowed to be imported in terms of para 9(ii)(5) read with Sr. No.10 of Appendix-C of the Import Policy Order, 2016. Resultantly vehicles were ordered to be confiscated out rightly.

6. Being aggrieved, the respondents preferred appeals before the Custom Appellate Tribunal where the learned counsel for the

Applicants contended that the Applicants were *bonafide* buyer and had relied upon the import documents made available to them *ab initio*, and after materializing imports of the vehicles, they could not be victimized for any errors or discrepancies found as the importers had no intention to violate any provisions of the Act or Import Policy Order, and in these circumstances no *mens-rea* could be attributed against the importers. Their counsel also maintained that none of the import documents were objected by the concerned customs authorities and that allegation of year of manufacturing was raised on the basis of Forensic Test Reports which showed some chassis numbers and that the Importers had already paid duty and taxes to the tune of Rs.12,40,195/- at the time of filing of GD and were ready to discharge further financial liability, and at the same time alternately on account of heavy demurrage charges, requested that the Importers be permitted to re-export the vehicles as per law by placing reliance on the Ministry of Commerce, Office Memorandum No.1(19)2012-Imp-II dated 01.12.2016 and Board's letter No.1(19)/2012-Imp-II dated 11.07.2019, alleging that even no "NOC" was even required for re-export of the vehicles. He also referred to cases already decided in Customs Appeal No.K-1307 of 2019 and K-1309/2019 on 04.03.2019 wherein the Tribunal allowed re-export of vehicles, therefore, the learned counsel prayed the Tribunal to allow the Customs Appeals and declare that the proceedings in the subject cases were infested with inherent infirmities and substantive illegalities, tantamount to violation of the prescribed law, in utter disregard of principle of natural justice and declare the impugned orders as null and void, *ab-initio* by vacating the show cause notice and allow the re-export of vehicle in view of the Ministry of

Commerce Office Memorandum dated 11.07.2017 dated 01.12.2016 as well as para 19 of the IPO 2016 with the issuance of delay and detention certificate and return of the duty and taxes paid by the Applicants at import stage.

7. The Tribunal after hearing the parties and perusal of the record disposed of appeals with the following operating part of the order:-

> "15. The Appellants prayed for re-exportation of the goods in terms of para 19 of the Import Policy Order r/w Boards letter No. 1(19)/2012-Imp-II dated 11.07.2017 as per Import Policy Order. I have observed that Ministry of Commerce vide aforesaid letter has issued general instruction to the effect that para 19 of the Import Policy Order generally allows the re-exportation of goods imported in contravention of Import Policy Order. The letter further says that no NOC of Ministry of Commerce is required in view of a clearly stated policy provision para 19 of the Import Policy which clearly states that goods rejected or denied import shall be allowed to be re-consigned/ returned/re-exported subject to the laws and regulations pertaining to the trade and contrabands goods.
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> 16. In view of the above, the request of the appellant for re-exportation of goods at this stage seems to be reasonable and well under the warrant of law and policy on the subject. Thus the present appeals are disposed off with order that the goods are allowed to be re-exported in view of the Ministry of Commerce Office Memorandum dated 11.07.2017. The respondent No.2 is further directed to issue delay and detention certificate and refund the duty & taxes paid at the import stage immediately with no order as to cost."

8. Mr. Khalid Rajpar, learned counsel for the applicant stated that it was evident from the forensic examination that the vehicle was more than five years old, thus not importable under para-9(ii)(5) of the Import Policy Order, 2016 and para-3 of the Appendix-E read with CGO No. 5/2018 dated 24.05.2018, therefore the act of the importer was in contravention of the provisions of Section 16, 32(1), 32(2) and 79(1) of the Act, 1969 that led to the issuance of show cause notice

which resulted into passing of the Order in Original in terms of which the vehicle was confiscated outrightly for violation of import ban under of para 9(ii)(5) read with Sr. No.10 of Appendix-C of the Import Policy Order, 2016. Being aggrieved the respondent importer filed an Appeal before Collector Appeals which was also rejected on the ground that the respondent importer had no case. However per learned counsel in the presence of these concurrent findings the Appellate Tribunal chose to allow the appeal permitting re-export of the vehicles which were subject of outright confiscation under SRO 566(I) of 2005 dated 06.06.2005. Per learned counsel during the deliberation, the respondents could not answer that why they imported old and "allegedly tampered chassis" vehicles. Learned counsel prayed that the questions be answered in favour of the applicant and against the respondents as this would result in bringing an end to the banned goods imported through misdeclaration in Pakistan. In support of his contention, he placed reliance on the case of *Collector of Customs Peshawar v. Wali Khan* (2017 SCMR 585).

9. Learned counsel for the respondents reiterated grounds detailed in para-6 and 7 supra and stated that the learned Tribunal has passed a detailed and speaking order giving cogent reasons as to why confiscation was not to be permitted and re-export of the vehicles was the best legal course. He denied that the vehicles had tempered chassis and that the importers did not know how the second chassis number surfaced on the chassis.

10. Heard the learned counsel and perused the material on record. The admitted facts are that used Hino truck chassis were imported by the respondents under Personal Baggage Scheme (fully described as

Procedure of Import of Vehicles Under the Personal Baggage, Transfer or Residence & Gift Schemes – Appendix – E to the Import Policy Order, 2016) duly supported by sale certificate, packaging list, bill of lading and PSI certificates. GDs were filed electronically on 30.10.2017 in terms of Section 79 read with Rule 433 of Customs Rules. Duties and taxes were paid in terms of Clause "B" of sub section 1 of Section 79 of the Act. In the WeBOC system, year of manufacture of the vehicle was mentioned as 2012. In order to check as to whether the importer has correctly paid the amount of duties & taxes, GD was selected for scrutiny under Section 80 of the Act and was referred to examination. The examination report revealed two closely similar chassis numbers (one on the right side and on other on the left where only one digit X was different) and out of these two chassis numbers only one could be confirmed using the internet facility available at vindecodr as per the learned counsel for the applicant, however, perusal of the Show Cause Notice and the Order in Original shows that the findings on tempered chassis came from the Forensic Test Report alleging that correct Chassis Number is JHDFM2PKUCXX10813 and the other chassis number JHDFM2PKUCXXX10813 was tempered. How the department reached to this conclusion is neither given in the Forensic Report nor in the Show Case Notice. The Order in Original also does not mention how JHDFM2PKUCXX10813 turned out to be a legit chassis number as compared to JHDFM2PKUCXXX10813. The learned counsel for the applicant has attached along with his statement a copy of computer printout taken from http://www.auto-vin-decoder.com/ on page 27 to show that searches at the said public website has yielded JHDFM2PKUCXX10813 to depict it being a Hino product of the year

2012, which is exactly the same year of manufacture claimed by the respondent importer and shown on the Bill of Lading and in the PSI certificate. The respondent importer seemingly never mentioned that the vehicle had JHDFM2PKUCXXX10813 as chassis number also nor indicated that there were more than one chassis numbers on the vehicle. How the second chassis number appeared on the chassis of the vehicle is a mystery. Seemingly the Examination Report dated 09.11.2017 (page 33 of the Statement) by Office of the Assistant Inspector General of Police Forensic Division, Sindh, Karachi created this anomaly. In Part-II of its Opinion it stated that "The Chassis digits (JHDFM2PKUCXXX10813) have been slightly visible after chemical process". First of all what is the significance of this additional chassis numbers which actually is out of syntax as VIN numbers are supposed to be comprising of 17 characters where JHDFM2PKUCXXX10813 has 18. Even if it was any other number present on the chassis, as long as one of the number given on the chassis matched the VIN code and turned out to be a vehicle of similar make, manufactured in the year designated by the importer, all other numbers found on the chassis become meaningless, and they having been superficially embedded during the examination process is not a farfetched possibility. Why the largest revenue earning department of FBR sends out its consignment for forensic examination to Police Department is a mysterious question to start with. Once goods under examination are sent out to third party's examination, the chain of safe custody is broken and examination reports coming from an alien department (to the controversy) would always be shrouded in doubts and be considered with a pinch of salt. In usual legal processes, such an evidence or incriminating material is

not to be relied upon unless the test is conducted in the presence of the affected party (i.e. the importer in the case at hand), such an outcome also vitiates Article 10-A of the Constitution which provides for transparency and fair trial.

11. Outcome of the above discussion is that the applicant has failed to show bona fide, and whereas the charge of tampering the chassis is evidently ill founded, and in these circumstances if the Tribunal permitted re-export of the vehicles at the request of the importer it was just and in accordance with law. Accordingly, provision of para-6 of the Appendix E of the Import Policy Order, 2016, or proviso to para-19 read with paragraph 6 of the IPO 2016 or SRO 499(I)/2009 dated 13.06.2009 would not be attracted or applicable, which have been posed as questions of law.

12. The case law cited by the learned counsel for the applicant (2017 SCMR 585) pertains to Section 2(s) of the Customs Act, 1969, which is not a case at hand as the goods never left the customs area.

13. Resultantly, the questions posed through these References through our short order dated 10.02.2022 were answered against the applicant and in favor of the respondent importer and these are the reasons of doing so.

JUDGE

JUDGE

Adil/B-K Soomro