IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application No. **42 to 59 of 2018**

Date	Order with signature of Judge

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

Applicant:	**The Collector of Customs,** **Through Additional Collector of Customs (Law), Model Customs Collectorate of Appraisement (West), Custom House, Karachi.** **Through Mr. M. Khalil Dogar, Advocate**
Respondent:	**M/s. Faisal Associates.**
Date of hearing:	**26.03.2021.**
Date of Order:	**26.03.2021.**

O R D E R

Muhammad Junaid Ghaffar, J: These Reference Applications have been filed impugning a common Order dated 15.07.2017 passed by the Customs Appellate Tribunal in Customs Appeal No. K-1474 of 2015 to K-1482 of 2015, and Appeals filed by the Department bearing Customs Appeal Nos.K-1486 of 2015 to K-1494 of 2015 proposing the following Questions of Law:-

> "1) Whether on the basis of facts and circumstances of the case the learned Appellate Tribunal erred in law that Respondent without discharging the onus of Section 19-A and 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?
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> 2) Whether the learned Appellate Tribunal erred in law by not considering that under Section 194-A(1) of the Act, the Appellate Tribunal has no authority to assume the jurisdiction of the appropriate authority of Section 33 of the Act and set aside an order passed thereon?
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> 3) Whether in the facts and circumstances of the case, the learned Appellate Tribunal has erred in law by not considering the admitted position that the Respondents has failed to substantiate with any calculation / corroborative documents, that the duty amount, claimed as refund, has not been passed on to the end consumer?

4) Whether in the light of the facts / circumstances of the case learned Appellate Tribunal has not erred in law by not considering that the fluctuation of prices in the international market do not have an overriding effect over the provision of Section 19-A & 33 of the Act?

5) Whether the learned Appellate Tribunal has erred in law by not considering law settled by the Honourable Supreme Court of Pakistan in the Facto Belarus (reported as 2005 PLD SC Pages 605), M/s Pak Suzuki Motor Co. Ltd. (2007 PTC 426) and M/s. Orient Colour Lab (2001 PCT 1594) while allowing refund to the Respondent that the incidence of duty and taxes had not been passed on to the end consumer?

6) Whether the Appellate Tribunal's findings are not perverse and a result of non-reading / mis-reading of record?

2. Learned Counsel for the Applicant has read out the relevant part of the impugned order as well as the order of the Collector (Appeals) and submits that the refund(s) claimed by the Respondents were time barred in terms of Section 33 of the Customs Act, 1969 and therefore, the Tribunal was not justified in setting aside Para 7 of the order passed by the Collector Appeals. He has prayed for setting aside the impugned order.

3. We have heard the learned Counsel for the Applicant and perused the record. For reasons to follow we are not inclined even to issue pre-admission notice to the Respondents. It appears that on allegation of under invoicing pursuant to a raid conducted on the office of an Indenter of paper and paperboard the Respondents were compelled to pay a lump sum of 15% of the alleged short levied amount of customs duty and taxes on the basis of a demand notice. The Respondents then impugned the same by way of Suit No.472/2003 wherein, the Department had withdrawn the demand notices by taking a plea that appropriate Show Cause Notice(s) would be issued. Thereafter, Show Cause Notices were issued and the proceedings culminated by way of orders in favour of the Respondents by the Tribunal. It is a matter of record that separate orders were passed by the Tribunal from 2007 to 2010. The Respondents then approached the Department for refund in June 2011 and such refund applications were dismissed as being time barred which order was maintained by the Collector (Appeals) on the

ground that the claims were time barred[1]. However, in the same order the Collector (Appeals) also gave a finding that insofar as the claim of refund on merits is concerned, the Respondents were entitled for it[2]. Both parties further appealed and learned Tribunal has been pleased to dismiss the Appeals of the Department to the extent of Para 6 thereon and has allowed the Appeals of the Respondents to the extent of Para 7. The said findings of the Collector Appeals reads as under:-

> "6. The record shows that the impugned amount was deposited in pursuance of some demand notices and as a consequence of understanding between the Paper Merchant Association, Karachi Chamber of Commerce and the respondent Collectorate. The said demand notices were later withdrawn as per order in Suit 472/2003 before High Court and substituted with fresh show cause notices. The show cause notices finally failed the test of adjudication and appeals as discussed above. It is abundantly clear that no final authority legitimized the said demanded amount. The perusal of mode of payment shows that it is a lump sum amount @ 15% of the demanded amount, rounded off, paid vide green sheet extra duty bill. There is no co-relation to any particular GD and there is no break up of amount into custom duty, sales tax, withholding tax etc. The payment were realized under one head of account. Therefore be it may a payment made voluntarily, or paid under duress or payment for comfort or called by any other name, the same was not due to the exchequer. As such this amount is liable to be returned to appellant. Owing to the same reasons the amount is not relatable to any particular consignment imported present, past or future, therefore, it is incorporation into selling price and passing on incidence to end consumer is not conceivable and does not appeal to logic. I accordingly hold that the said amount does not qualify as liveable duty or taxes under the law and has been recovered without backing of any legal sanction, therefore, refundable to the appellant.
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> 7. Now the next question arises, that is limitation to seek refund. Although the said amount was not liveable as duty and tax, yet there is no other legal instrument under the Customs Act, 1969, to seek refund except under Section 33 ibid. Accordingly, time lines provided under section 33 are applicable. In the first instance the amount stood refundable immediately upon withdrawal of demand notices in terms of order in Suit 472 of 2003. The appellants kept on waiting till the show cause notice was decided by the Customs Appellate Tribunal. Even the orders by Tribunal were issued as early as in the year 2006, however refund was not sought until June 2011. The appellants have not been able to provide cogent reasons for this inordinate delay. Accordingly, it is held that the refund claim is bared by limitation under section 33 of the Act. The appeal accordingly fails."

4. The relevant findings of the Tribunal in respect of limitation as contained in Para 12 onwards in the impugned order reads as under:-

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[1] Para 7 of the order
[2] Para 6 of the order

> "12. Under the aforesaid observations, we found it pertinent to discuss the provision of Section 33 of the Customs Act, 1969 to be read as whole, in order to appreciate the letter and spirit of its purpose and scope by a proviso to Section 33(1) of the Customs Act, 1969 generally is an exemption to or qualifies the main provision of law to which it is attached. Its purpose is to qualify or modify the scope or ambit of the matter dealt with in the main provision, and its effect is restricted to the particular situation specified in the proviso itself. Further, it is a settled cannon of interpretation that a proviso is to be strictly construed and that it applies only the particular provision to which it is appended. Whilst holding that a proviso is limited to the provision which immediately precedes it. Therefore, the proviso to Section 33 has to be confined to the particular subsection to which it is attached i.e. subsection (1) and if the case does not fall within the purview of such subsection in that the custom duty was not paid as a result of inadvertence, error or misconstruction then obviously the proviso would not be relevant. Before a proviso can have any application, the section itself must apply. A holistic reading of Section 33 of the Act, particularly the provisions of subsection (3), clarified that where a refund becomes due as a result of any decision or judgment passed by a customs officer. Appellant Tribunal etc. the proviso to subsection (1) would not be applicable because no such proviso is attached to subsection (3), meaning thereby that, the refund has to be made notwithstanding the fact that the incidence of customs duty had been passed onto the customer and therefore, section 19A of the Act would not be attracted. Same position is decided by the Hon'ble Supreme Court of Pakistan in case 2017 SCMR 339.
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> 13. In view of the aforesaid observations, it is also important to observe here that if the duties paid under protest and not due to inadvertence or mis-consideration the limitation period under section 33 is not applicable (reference) PTCL 1985 CL 1 and PTL 1991 CL 332.
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> 14. Being custodian of law, the courts are required to maintain the norms of justice and equity, litigants are to be respected not on account of court's power to legalize injustice on technical grounds but to remove injustice. By doing so, and in respectful agreement with above findings and ratio decidendi, observed by the Apex Courts and our own additions including the reasons quoted above. We are of the considered view that orders passed by the Collector of Customs (Appeals) needs no interference upto the observations given in Para 6 of the impugned Order-in-Original Nos. 10505 to 10513 / 2015 dated 17.08.2015 and set aside the observation given in Para 7 of the impugned Order-in-Appeal No. K-1474 to 1482 of 2015 are hereby disposed off accordingly with no order as to cost and cross appeals bearing Nos. K-1486 to K-`1494 of 2015 filed against Order-in-Appeal Nos. 10505 to 10513 / 2015 dated 17.08.2015 are without any substance, fails its merits as devoid from law, hereby rejected with no order as to cost."

5. The only issue before us is that whether the claims of refund(s) were time barred or not. Admittedly, it is not the case of the Applicant that they had any lawful justification to recover the amount in the mode and manner they did. It was lump sum and without adjudication, and may have been voluntary; but nonetheless, finally, the issue stands decided against the Applicant. They themselves withdrew their demand notices before this Court and issued proper show cause notices, which were finally decided by the Tribunal in

favour of the Respondents. Thereafter they filed refund applications which were dismissed on various grounds including that of applicability of section 19A of the Customs Act, 1969 and the claims being time barred in terms of section 33 ibid. The other ground as recorded in the order of the original authority is that since the department has filed SCRA's against the order of the Tribunal, therefore, even otherwise the refunds cannot be allowed. It is a matter of fact then now the said SCRA's stand dismissed by this Court vide order dated 21.1.2021.

6. Insofar as the objection of limitation is concerned the same is misconceived as the provision of section 33 of the Act would not apply in this matter. It is clear from the language of section 33(1)[3] that refund in terms thereof is to be allowed only where/if customs duty has been paid as a result of some *inadvertence, error or misconstruction*, which is not the case in hand. There was no inadvertence, error or misconstruction involved in these cases, whereas, finally it has been held that the recovery was illegal. In fact it is a case fully covered by section 33(3) as above, and in that case it would be a recurring cause as the matter now finally stands decided by this Court in the SCRA's as above. Even if it is assumed that the refund claims filed in 2011 were time barred; they could still be filed pursuant to s.33 (3) as now the Reference Applications have been dismissed. Therefore, no case of a time barred claim is made out. Moreover, the provision of s.19A is also not applicable in this case as the same stands decided by the Hon'ble Supreme Court[4]. Lastly, it has been settled by the Hon'ble

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[3] **"33. Refund to be claimed within one year**.---(1) No refund of any customs-duties or charges claimed to have been paid or over-paid through inadvertence, error or misconstruction shall be allowed, unless such claim is made within one year of the date of payment:

Provided that no refund shall be allowed under this section if the sanctioning authority is satisfied that incidence of customs duty and other levies has been passed on to the buyer or consumer.

(2) In the case of provisional payments made under section 81, the said period of one year shall be reckoned from the date of the adjustment of duty after its final assessment.

(3) In the case where the refund has become due in consequence of any decision or judgment by any appropriate officer of Customs of the Board or the Appellate Tribunal or the Court, the said period of one year shall be reckoned from the date of such decision or judgment, as the case may be."

[4] 2017 S C M R 339 COLLECTOR OF CUSTOMS V GUL REHMAN,

Supreme Court in its celebrated judgment in Pfizer[5] case that if any duty has been realized by the state being outside its statutory authority, then the limitation as provided in section 33 would not apply.

7. Therefore, in the given facts and circumstances of the case in hand, we are of the view that no exception can be drawn to the order of the Tribunal. Accordingly, all Questions are answered against the Applicant and in favour of the Respondents and order of the Tribunal is maintained. All Reference Applications are dismissed in limine. 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 is directed to place copy of this order in all above connected SCRAs.

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[5] PLD 1998 SC 64