

IN THE HIGH COURT OF SINDH, KARACHISpecial Customs Reference Applications Nos. **67 & 68 OF 2016**

Date	Order with signature of Judge
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Present: *Mr. Justice Muhammad Junaid Ghaffar*
Mr. Justice Agha Faisal

Applicant(s):	Collector of Customs Through Ms. Masooda Siraj, Advocate.
Respondent(s):	M/s. Haris Trading Co.
Date of hearing:	07.04.2021.
Date of Order:	07.04.2021.

ORDER

Muhammad Junaid Ghaffar, J: Through these Reference Applications, the Applicant has impugned Order dated 17.11.2015, passed by the Customs Appellate Tribunal in Customs Appeal Nos. K-928 to K-930/2014, proposing the following questions of law:-

- i. Whether in terms of Para 3 of the Export Policy Order read with Chapter-XXII of the Foreign Exchange Regulation and goods can be exported without any valid authorization about transaction of sale proceeds (foreign exchange)?
- ii. Whether in the absence of any Form "E" the respondent exporter's declaration about uploading of Form "E" cannot be termed as an act of false statement within the meaning of Section 32(1) and 32-A(1) of the Act?
- iii. Whether in terms of Section 131(1)(c) of the Act the appropriate customs officer, during checking, is not empower to satisfy himself about the correctness of the material particulars of the declaration and the documents, submitted by an exporter, in terms of Section 131(1)(a) of the Act read with Para 3 of the Export Policy order and Chapter XXII of the Foreign Exchange Regulation?
- iv. Whether the leaned Appellate Tribunal erred in law by holding that the provisions of Section 32(1) of the Act cannot be invoked independently and it can only be applied in conjunction with Section 32 (2) of the Act?

- v. Whether in the light of facts and circumstances of the case the Appellate Tribunal's findings are incorrect, perverse and based on mis-reading / non-reading of record?

2. Learned Counsel for the Applicant has read out the order and submits that it was a case of mis-declaration within the contemplation of Section 32 of the Customs Act, 1969 as the Respondent had failed to produce Form "E" as required in law for export purposes; hence the question be answered in favor of the Applicant.

3. We have heard the learned Counsel for the Applicant and perused the record and for reasons to follow we are not even inclined to order pre-admission notices. It appears that on the allegation that no original Form "E" was uploaded along with export documents, the respondent was issued a Show Cause Notice in terms of Section 32(1)(C), 32A(1) A, and 155-M(1/a) of the Customs Act 1969 read with section 131 (1/a) of the Customs Act, 1969, further read within section 22 of the Foreign Exchange Regulation Act, 1947, punishable under clauses 14, 14A, 66 & 77 of section 156 (1) of Customs Act, 1969 read with section 23 of the Foreign Exchange Regulation Act, 1947 and the matter was adjudicated by the Adjudicating Authority in the following terms:-

"5. I have gone through the case record. Nonappearance of the exporter or his clearing agent shows that they have nothing to say in their defense and, hence, charges leveled in the show cause notice stand established. I therefore impose penalty of Rs.50000 on the exporter. Moreover, the Assistant Collector of Customs (Examination) is hereby directed to get the form E as per assessed value from the exporter and get it verified from the bank. In case of non-prosecution of form E of the revised value, the particulars of form E already mentioned in GD be got verified from the concerned bank and in case of non-verification from the bank, the matter may immediately be referred to the Export Intelligence Branch of the Collectorate for further proceedings."

4. Being aggrieved the respondent preferred Appeal against the said Order before the Customs Appellate Tribunal, which was allowed through impugned Order and the relevant finding reads as under:-

“8. I have examined the record of the case and heard the arguments of counsel of the appellant as well as the representative of the respondent MCC (Exports), Karachi. After hearing the arguments of the both parties and going through the complete record of the case I am convinced that this is a classical case handled by the respondent in an extreme haste, unprofessional manner, without application of mind by the Adjudicating Officer, totally ignoring the legal provisions including various judgments of the Superior Courts on the subject. The Customs Authorities have invoked clause (c) of sub-section 1 of Section 32, clause (a) of sub-section 1 of Section 32A, clause (a) of sub-section 1 of Section 155(a), Section 131 of the Customs Act, 1969 read with Section 22 of the Foreign Exchange Regulation Act, 1947. A plain reading of clause (c) of sub-section 1 of Section 32(a) says:

"32. [False] Statement, error, etc:- (1) If any person, in connection with any matter of customs,-

(a) makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or”

9. This provision cannot be applied in isolation. It has to be read and applied in conjunction with sub-section (2) of Section 32, which provides, where by reason of any documents or statement as aforesaid or by reason by some conclusion, any duty ¹⁰⁹ [,taxes] or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within ⁷³[five] years of the relevant date, requiring him to show cause why he should not pay the amount specified in the notice. Considering this provision in law and that in the instant case no duty, tax or charge leviable has been short levied or not paid. Invoking of clause (a) of sub-section 1 of Section 32 of the Customs Act, 1969 becomes irrelevant.

10. Coming to clause (a) of sub-section (1) of Section 32(A), this provision deals with a situation where a person causes to submit documents including those filed electronically, which are concocted, altered, mutilated, false, forged, tempered or counterfeit to a functionary of customs. In the instant case the exporter has not committed any of these crimes rather he has submitted or electronically uploaded Form 'E'. Therefore, question of invoking this provision of the Customs Act, 1969 does not arise.

11. As far as invoking Section 131 of the Customs Act, 1969 is concerned the exporter in the instant case has uploaded the Form "E" in the system. Since the appellant has submitted the GD alongwith the required documents as prescribed by the Board as such invoking Section 131 of the Customs Act, 1969 in the instant case becomes irrelevant.

12. Coming to clause (a) of sub-section (1) of Section 155(a) of the Customs Act, 1969, I agree that the law provide appropriate Customs Officers to require for inspection certain documents or record. In the instant case all relevant documents required at the time of export a consignment have been

provided by the appellant to the Customs Authorities. Thus, invoking this Section with reference to the subject case also becomes irrelevant.

13. As far as the provision of Foreign Exchange Regulation Act, 1947 which the Adjudicating Officer has exercised, a question arises as to whether the Adjudicating Officer is empowered by the legislation or sub-ordinate legislation to exercise the same? The best course of action could have been to refer the matter to State Bank of Pakistan for taking the cognizance of the situation. In view of the above observations and discussions I am convinced that the Show Cause Notice No.CN-192855-21032014 dated 08.05.2014 and the Order-in-Original No.249279-16082014 dated 16.08.2014 suffer from serious legal infirmities. Accordingly, the Show Cause Notice No. CN-192855-21032014 dated 08.05.2014 is vacated and the Order-in-Original No.249279-16082014 dated 16.08.2014 is set-aside and the appeals are accepted with no order as to cost.

14. Order passed and announced accordingly.”

5. Perusal of the aforesaid Order-in-Original clearly reflects that the same does not appear to be an order of the Adjudicating Authority, who had assumed jurisdiction under various provisions of the Customs Act and the Foreign Exchange Act, 1947. It has only imposed a penalty without making reference to any of the said provisions as mentioned in the show cause notice; and thereafter, certain directions have been given as an Executive Officer; but not as an officer acting as a Quasi-Judicial authority. We have confronted the learned Counsel for the Applicant as to the said Order-in-Original and she has not been able to satisfactory respond. Be that as it may, the matter went to the Tribunal and we are of the considered view that the Tribunal has passed a well-reasoned and justifiable order by holding that it was never a case, which could be proceeded under Section 32 of the Customs Act, 1969. It is not a case, wherein, any short levy or recovery was alleged and was only to the extent that the respondent had failed to upload E-Form properly in the computer system and on this action was initiated. It is settled law that provision of S.32(1) of Customs Act, 1969, would be attracted only when a mis-declaration or misstatement was made with a view to obtain illegal gain by evasion of payment of customs duty and other taxes or by causing loss to Government revenue¹. We are of the view that no substantial question of law arises out of the impugned order,

¹ Collector of Customs (Exports) v R A Hosiery 2007 SCMR 1881

which appears to be passed after taking into consideration the relevant facts as well as law; hence both these Reference Applications, being misconceived, are hereby 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 connected Reference Application as above.

J U D G E

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