

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Present:

**Mr. Justice Muhammad Iqbal Kalhoro J.
Mr. Justice Agha Faisal, J.**

Special Custom Reference Applications No.221, 222 & 223 of 2012.

M/s Faiz Chemical Industries Pvt. Ltd. Applicant

Versus

Collector of Customs & others Respondents

Ms. Pooja Kalpna, advocate for applicant.

Ms. Masooda Siraj, advocate for respondent No.4.

Mr. Irfan Memon, DAG.

Dates of hearing: 01.04.2022 and 08.04.2022.

Date of order: 15.04.2022.

ORDER

MUHAMMAD IQBAL KALHORO J: Applicant, a private limited company, concerned with import of Sabutol and manufacture of Butyl Acetate, on different dates, imported consignments of Sabutol from UAE at declared value of US\$1.00/kg and filed goods declarations (GDs) u/s 79(1) of the Custom Act, 1969 (**the Act**), under a PCT heading 2905.1400 chargeable to customs duty @ 5% for clearance. The department/respondents did not accept the value nor PCT classification of the goods. Nonetheless, the consignments were released to applicant u/s 81 (1) of the Act on the basis of provisional determination of duty, and the differential amount for final assessment was secured through postdated cheques.

2. Resultantly, the matter was referred to Directorate General of Customs Valuation for further inquiry and investigation, which determined value of the goods at US\$ 1.63/kg in terms of a valuation order dated 16.06.2009 passed u/s 25 of the Act in respect of some other consignment imported from South Korea which applicant disputed as not applicable to its case. The issue was finally taken to PCT Committee of Collectorate for a decision which vide a public notice No.1/2010 dated 08.02.2010 ascertained classification of goods under PCT head 3814 chargeable to customs

duty @ 20%. And in the light thereof, vide assessment orders passed on different dates final assessment was made and applicant was directed to deposit certain amounts mentioned therein duly. Applicant impugned the assessment orders in appeals in which they were set aside and the department was directed to finalize the assessment on the basis of declaration made by the applicant. The department feeling aggrieved by the said orders-in-appeal preferred appeals before the Custom Appellate Tribunal which turned the tide and set aside the same.

3. Learned counsel for applicant, citing above facts, has argued that assessment orders were illegal, *mala fide*, extraneous of relevant provisions of the Statute and barred by time; the Customs Appellate Tribunal has ignored that in law final determination was required to be made (maximally) within a period of nine months of provisional assessment of the goods; the Appellate Tribunal has, on one hand, admitted that assessment order was time barred but then by holding that applicant had no remedy u/s 193 of the Act to file appeal against that order has denied the very benefit of its decision to it. That, if the assessment order was time barred shall imply that it had no legal value or a consequence, and therefore, any proceedings challenging the same, may or may not be not permitted by law, shall also automatically wane into an inconsequential oblivion restoring the original position: the provisional assessment attaining finality. Learned counsel lastly stated that that exactly the same situation has been considered in a case law reported as 2017 PTD 1201 and decided in favour of importer.

4. On the other hand, learned counsel for the department has stated that final assessment is not time barred, was made within prescribed time u/s 81 of 1969 Act but applicant has not submitted relevant GD with relevant assessment order in the files in order to create confusion. She however despite our requests to assist by referring to relevant documents aligning with assessment order germane to relevant GD failed to do so.

5. After hearing the parties and perusing the material, the following question is framed for determination:

Whether the provisional determination of the goods for duty, tax, etc. made u/s u/s 81 (1) of the Act attains finality in case final determination within stipulated time of 9 months, maximally u/s 81 (2) of the Act is not made by the department?

6. It is clear that we need to determine import and scope of section 81 of the Act and its impact on controversy in hand. We may remind that this court in an order dated 02.02.2021 in CP No.D-5674/2020 discussed the said provision of law, in a background albeit slightly different from the one in hand, and rejected the case of the department objecting to release of securities furnished by the importer at the time of provisional release of his goods u/s 81 of the Act to meet differential amounts of duties, etc. if any, at the time of final assessment. We, keeping in view peculiar background of these cases, may further add that section 81 stipulates, in the main, that where it is not possible for an officer of the Customs, checking GD u/s 80, to satisfy himself of correctness of assessment of the goods made by the importer in terms of section 79. Then, an officer not below the rank of Assistant Collector of Customs may determine such goods for the duty, taxes and other charges provisionally and release them against the bank guarantee, etc. to be furnished by the importer to meet a likely disparity at the time of final determination of duty, etc. In terms of section 81 (2), then, final determination, within 6 months of such provisional release of the goods, is required to be made. That period, for the reasons exceptional in nature, can be extended for further 3 months by the Collector of Customs or the Director of Valuation. But, irrespective of whether such course has been followed or not, when final determination is not made within specified period, the framework under sub-section (4) of the said provision irrepressibly rolls out requiring provisional determination to be deemed, an inevitable effect, as final determination. It is settled that failure to finalize provisional determination of value of the goods within specified time shall translate into clearing of the goods on the value declared by the assessee, and, therefore the provisional assessment as final. It is not disputed either that the department has the power to take up necessary investigation to find out true value of the goods to finalize assessment after provisional assessment thereof for duty, etc. But this authority, it is to be understood, is subject to the framework provided u/s 81 (2) of the Act, and which unambiguously lays down, for this purpose, a period of 9 months, maximally. For favour of this view, the case law reported in **2007 PTD 1519, 2008 PTD 1950, 2010 PTD 343, and 2010 PTD 900** can be relied upon.

7. The applicant imported consignments on **1.06.2009** (SCRA No.221/2012); **01.8.2008** (SCRA No.222/2012); and **01.01.2009** (SCRA No.223/2012) respectively. Whereas, assessment orders were passed on **28.06.2010** (SCRA No.221/2012); **21.06.2010** (SCRA No.222/2012); and **16.06.2010** (SCRA No.223 / 2012) respectively much beyond limitation provided u/s 81(2) of the Act for this purpose. We have noted that learned Custom Appellate Tribunal, in the impugned orders, has not expressed any opinion different than the one upholding assessment-orders as time-barred and thus against mandate underlined u/s 81 of the Act. Nonetheless, while making an inference that the adjudicating officer had no jurisdiction u/s 193 of the Act to entertain appeal of the applicant-challenging assessment order- it has practically denied applicant the very fruit the law confers on it in such circumstances. The impugned judgment is not sustainable in law is thus clear. Against it, the findings recorded by the Collector of Customs (Appeal) are rested on proper appreciation of law and therefore upheld.

8. For what has been stated above, the question is replied in affirmative in favour of the applicant and against the department. It is held that the provisional determination of duty, tax, etc. made u/s u/s 81 (1) of the Act for release of the goods shall attain finality, and has attained finality in these cases, if final determination is not made by the department within stipulated time of 9 months maximally, in the circumstances as explained above, u/s 81 (2) of the Act. The applications in hand are allowed in the terms as above and disposed of accordingly. A copy of this decision may be sent under the seal of this court and signature of the Registrar to the learned Custom Appellate Tribunal as required u/s 196(5) of the Custom Act, 1969.

JUDGE

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