

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-7271 of 2021
(Atlas Honda Limited Vs. Federation of Pakistan and two others)

Present:

Mr. Justice Irfan Saadat Khan
Mr. Justice Mahmood A. Khan

Date of hearing : 19.04.2022.
For the petitioner : Barrister Asad Khan, Advocate.
For the respondent No.1 : Mr. Kafeel Ahmed Abbasi, Deputy Attorney General for Pakistan (DAG).
For the respondent No.2 : Mr. Muhammad Khalil Dogar, Advocate.
For the respondent No.3 : Ms. Masooda Siraj, Advocate.

JUDGMENT

IRFAN SAADAT KHAN, J. The instant petition has been filed on the ground that since the department after provisionally assessing the goods imported by the petitioner has failed to make the final assessments, hence the department may be required to accept the provisional assessments as final assessments under the provisions of Section 81(4) of the Customs Act, 1969 (**the Act**).

2. Briefly stated the facts of the case are that the petitioner imported certain consignments from Japan during the period November-2020 to April-2021 and were provisionally assessed during the period December 2020 to April-2021, under the provisions of Section 25 read with Section 79 of the Act but no final assessments, as provided under Section 81(4) of the Act, was made by the department.

3. Barrister Asad Khan has appeared on behalf of the petitioner and has reiterated the above submissions and stated that since the department has failed to make the final assessments within the stipulated period as provided under Section 81 of the Act hence, for all practical purposes, the provisional assessments have to be considered as the final assessment as specifically provided under the provisions of Section 81(4) of the Act.

4. Mr. Kafeel Ahmed Abbasi, DAG is present for the respondent No.1, whereas Mr. Muhammad Khalil Dogar and Ms. Masooda Siraj, Advocates are present for the respondents No.2 & 3, respectively. The learned counsel stated that the final assessments in the present matter were not made as matter required valuation of the goods imported by the petitioner and the same was referred to the concerned Director Valuation for his report. They stated that since no report from the Director Valuation has been received so far that is why no final assessments were made in the instant matter. It is, however, an admitted position that the final assessments in the instant matter have not been made.

5. We have heard all the learned counsel at some length and have also perused the record.

6. Before proceeding any further, we deem it appropriate to reproduce hereinbelow provisions of Section 81 of the Act:

81. Provisional determination of liability.-
(1).....
.....
.....

(2) Where any goods are allowed to be cleared or delivered on the basis of such provisional determination, the amount of duty, taxes and charges correctly payable on those goods shall be determined within six months of the date of provisional determination:

Provided that the Collector of Customs or, as the case may be, Director of Valuation, may in circumstances of exceptional nature and after recording such circumstances, extend the period for final determination which shall in no case exceed ninety days:

Provided further that any period, during which the proceedings are adjourned on account of a stay order or for want of clarification from the Board or the time taken through adjournment by the importer, shall be excluded for the computation of aforesaid periods.

(3).....
.....
.....
.....

(4) If the final determination is not made within the period specified in subsection (2), the provisional determination shall, in the absence of any new evidence, be deemed to be the final determination.

(5) On completion of final determination under sub-section (3) or (4), the appropriate officer shall issue an order for adjustment, refund or recovery of amount determined, as the case may be.

Explanation.- Provisional assessment means the amount of duties and taxes paid or secured against bank guarantee or pay order.

7. A perusal of the above provision of law clearly reveals that it is only when there is a stay order or for want of clarification from the Board the matter with regard to final assessment could be deferred. It is an admitted position that none of those exclusions are available in the instant matter as neither there is a stay order in the present case

nor the matter has been referred to the Board for final determination, whereas the matter has been referred to the Director Valuation for his report which does not fall within the exclusion category, as provided under Section 81 of the Act. The learned counsel appearing for the department have candidly conceded that there was no bar on the departmental authorities to make the final assessment and the delay occurred in this regard for finalizing the assessments could not be attributed to the petitioner. It is a settled proposition of law that nobody should suffer on account of lapses on the part of the office. In our view if the matter was referred to the Director Valuation for his report the department should be conscious and vigilant enough to finalize the assessments before the expiry of the date, which admittedly has not been done in the instant matter. Hence we are of the view that since no final determination /assessment admittedly has been made by the department for all practical purposes the provisional assessments have to be considered as the final assessments in accordance with law. Needless to state that on this aspect there are plethora of decisions given by the High Courts and the Hon'ble Supreme Court and quite recently a Bench comprising of myself (Irfan Saadat Khan J.) and Zulfiqar Ahmed Khan J. in C.P. Nos.D-5491 of 2021 and others has observed as under:

8. The above provisions of law clearly stipulates that when goods arrive at the port in order to facilitate the importers the said goods are released on a provisional basis. However, a duty is reposed upon the Customs Authorities to make a final determination in respect of the provisional assessment made by them within a period of six months from the date of the provisional assessment/determination. The law further stipulates that in case final determination is not made within a period of six months' time the said provisional assessment

would be considered as final determination. Though there are certain conditions stipulated under the law that when six months period would not be counted but admittedly the present petitions do not fall under those exceptions. Moreover, it is also an admitted position that the bank guarantee and pay-orders furnished by the petitioners were not by way of any order passed by this Court or any other authority, which could place any embargo or a bar upon the Customs Authorities for not making a final determination.

9. The rationale behind the final determination of a provisional assessment seems quite obvious which stipulates that in order to close the chapter of the provisional assessment and not to linger on unnecessarily the process of final determination the legislature has put a bar upon the Customs Authorities to make a final assessment in respect of a provisional assessment made by them, if the matter is clear from other exceptions, in accordance of the provision of Section 81(4) of the Act. The other reason could be that the legislature wants to put a time frame on the customs Authorities with regard to final determination so that the matter could come to its final conclusion within the stipulated period of time and that an importer should not suffer, if the Customs Authorities have failed to make a final determination, in respect of the provisional assessment made by them.

10. Now, if the present case is examined, it could be seen that when goods were imported by the petitioners these were provisionally assessed and it is an admitted position that final determination as required under Section 81(4) of the Act was not made within a period of six months' time. Though Mr. Arfi tried to explain that the provisional assessment was made on the basis of bank guarantee or pay-order but could not controvert the fact that those bank guarantees or pay-orders were not required to be deposited by the importers by way any order passed by this Court or any other authority so as to justify the department not to make any final determination within the stipulated period. It was also observed that the other counsel appearing for the department in CP No.D-5491/2021 or the Federation have neither supported the stance of Mr. Arfi, with regard to non-finalization determination of the provisional assessment nor have brought any material to controvert the fact that the final determination in the present matters were not made within the stipulated time which clearly demonstrate that in the present cases provision of Section 81(4) of the squarely applicable.

11. No doubt it is for the concerned Customs Authorities to assess/determine the value of the goods imported by a person with regard to his payable duty and taxes as the legislature has clearly provided that where assessment/determination was not made due to any reason could not either for further tests,

inquiry or other reason and provisional assessment/determination was made but that provisional assessment has to finally made as clearly explained under Section 81(4) of the Act within six months' time. We need not to cite here case laws on this issue as this aspect is so clearly determined / established in a plethora of decisions given by this Court as well as by the Hon'ble Supreme Court of Pakistan in this regard.

12. In view of what has been stated above, we hold that the provisional determination made by the Customs Authorities in the instant petitions, for all practical purposes, have to be accepted as final determination. We, therefore, allow the instant petitions in the manner indicated above. All the pending and listed applications also stand disposed of. These are the reasons for our short order dated 10.03.2022.

8. In view of what has been discussed above, we are of the view that since the department has failed to finalize the assessments under the provisions of Section 81 of the Act within the stipulated time, the provisional assessments made by the department during the period December-2020 to April-2021 for various consignments imported by the petitioner have to be considered as final determination /assessments. Order accordingly. The petition stands allowed in the above terms along with the listed /pending application, if any. However there would not order as to cost.

JUDGE

JUDGE

Karachi:

Dated: .04.2022.