

IN THE HIGH COURT OF SINDH AT KARACHI

Present

Mr. Justice Irfan Saadat Khan

Mr. Justice Zulfiqar Ahmad Khan

C.P. No.D-1390 of 2020

[M/s Middle East Construction Companyvs..... The Federation of
Pakistan & others]

SCRA No. 303 of 2020

[The Collector of Customsvs.....M/s Middle East
Construction Company]

&

SCRA No. 304 of 2020

[The Collector of Customsvs.....M/s Middle East
Construction Company]

Dates of Hearing : 03.03.2022, 10.03.2022 & 17.03.2022

Date of Decision : 07.05.2022

Petitioner through Ms. Dil Khurram Shaheen, Advocate for
the petitioner in C.P. No.D-1390/2020
and for Respondent in SCRA No. 303 &
304 of 2020.

Respondents through : Mr. Khalid Rajpar, Advocate for the
applicant in SCRA No. 303 & 304 of
2020 and for the Respondent in C.P.
No.D-1390/2020

Mr. Kafeel Ahmed Abbasi, DAG.

JUDGMENT

Zulfiqar Ahmad Khan, J:- Through this common judgment we intend to dispose of above identified two Special Customs Reference Applications moved under section 196 of Customs Act, 1969 and the connected constitutional petition as these involve common questions of law, and for the sake of convenience the Reference Applications are being treated as leading matter as the answer to the questions proposed in the References will decide the fate of the constitutional

petition as well, which was filed for the compliance of Tribunal's judgment.

2. The subject Special Customs Reference Applications were originally filed by the department posing a number of questions of law, which were later on reframed in terms of order dated 14.10.2020 leaving the following two questions of law being:

1. Whether old and used prime mover is importable without fulfillment of conditions laid down under (b) of Para-9(II)(5) of Import Policy Order, 2016?
2. Whether the ambiguous description of vehicle mentioned in the Pre-Shipment Inspection Certificate is not an attempt to hoodwink the Customs authorities?

3. Compendiously the facts of the case are that the petitioner/ importer imported a consignment declared to consist of four units old and used Hino Prime Mover Trucks and filed Goods Declaration under PCT heading 8701.2040 having Chassis Numbers JHDGH1JRPXXX11574, JHDGH1JRPXXX10245, JHDGH1JRPXXX10028 and JHDGH1JRPXXX11444. When the declaration of the petitioner/importer was checked and examined and it was found that the consignment actually consisted of old and used Hino Trucks of PCT heading 8704.2219 which were allegedly imported under the garb of Prime Mover carrying PCT heading 8701.2040. At the request of the petitioner/importer, the subject vehicles were re-examined as the petitioner/importer pleaded to have only imported Prime Mover Trucks instead of Trucks whereupon the concerned examiner reported that the subject consignments were in fact Trucks instead of Prime Mover Trucks. Considering these anomalies, the petitioner/importer was confronted with a show cause notice on the

ground that the petitioner/importer imported old and used Trucks having PCT sub-heading 8704.2219 which were not importable vide S.No. 10 of Appendix C read with Para-9(II)5(A) of Import Policy Order, 2016. The Adjudicating Authority having heard the petitioner/importer, passed an Order-in-Original directing confiscation of the subject vehicles, alongside imposing a penalty of 0.5 million per truck on the importer and the clearing agent alike. Petitioner/importer impugned the said Order-in-Original before Custom Appellate Tribunal by filing Custom Appeals Nos.K-1148/2019 and K-1149/2019 and that the Appellate Tribunal vide order dated 17.01.2020 set aside the Order-in-Original which is impugned by the department in the SCRAs at hand.

4. The case set forth for the department/applicant by Mr. Khalid Rajpur, Advocate was that since the claimed PCT heading in respect of the imported goods was adjudged to be at variance to the ascertained PCT heading, hence, the petitioner's/importer's claim automatically constituted a mis-declaration begging adjudication as the subject vehicles were only used Trucks as per assessment report, and not Prime Movers as claimed by the importer, and since such imports were banned under the Import Policy Order 2016, confiscation order along with penalty was passed, which has been turned down by the Tribunal based on surmises and conjectures.

5. To the contrary, the petitioner's/importer's counsel articulated that the claimed PCT heading was cited honestly, based inter alia on past departmental treatment in such regard, and that there was no element of culpable *mens rea* in the facts under consideration and placed reliance on the PSI Certificates Reports

which stated that the vehicles were “Prime Mover Trucks”. She further stated that a Divisional Bench of this Court in another similar matter has passed short orders for release of identical goods and requested for similar treatment.

6. Mr. Kafeel Ahmed Abbasi, DAG supported the case of the Department and drew our attention to the applicable provisions of the law and the IPOs.

7. We have appreciated the arguments placed before us and have examined the record of the case. The legal position is that in exercise of the powers conferred under sub-section (1) of section 3 of the Imports and Exports (Control) Act, 1950, (XXXIX of 1950), the Federal Government on April 18, 2016, issued S.R.O. 345(I)/2016 dated titled “The Import Policy Order, 2016” The said Order in Paragraph 9 created possibility of Import of used plant, machinery and equipment. The said paragraph in part-II, in terms of clause (5) prescribes following conditions for the import of *inter alia* Prime Movers:-

9. Import of used plant, machinery and equipment. - The import shall be as under. -

(i) Project relocation scheme...

(ii) Import of second hand plant, machinery and equipment and specialized machinery by construction, mining and petroleum sector...

.....

(5) Construction companies, mining, oil, gas and petroleum sector companies are also allowed to import specialized vehicle-mounted machinery and transport equipment such as mobile transit mixer, concrete pumps, crane lorries, concrete placing trucks, dumpers designed for off highway use, cement bulkers and prime movers 280 HP and above, etc. including those specified in Appendix-I. Import of said specialized machinery or transport equipment as mentioned above shall however be subject to prior pre-shipment inspection in the exporting country from any of the internationally recognized pre-shipments inspection companies listed at Appendix-H to the effect that the said machinery or transport vehicles are (a) Euro-II compliant (b) **manufactured as such by Original Equipment Manufacturer (OEM)**; and (c) not older than five years.

8. As evident from the foregoing, a used prime mover can be imported into Pakistan under the above scheme as long as it is (a) Euro-II compliant, (b) not more than 5 years old and (c) manufactured as such by the Original Equipment Manufacturer (OEM). In the case at hand, it is stated that conditions (a) and (b) have been fulfilled, however as per the examination of the consignment it appears that the equipments were Trucks where external Turn Plate has been added, and the original Chassis having been “cut” to depict it a Prime Mover. Whilst having been established that the Tribunal is the final forum for determination of facts and such findings are conclusive, as well as the High Court cannot disturb those unless it is shown that there was no evidence available on which the Appellate Tribunal could have arrived at its conclusion, or such findings are perverse or based on surmises and conjectures¹. Further, the High Court cannot go behind any finding of fact recorded by the Appellate Tribunal, unless it has been expressly challenged by raising a ‘question of law’ relating thereto in the application. In the case at hand it appears that such factual controversy has not been properly addressed by the learned Tribunal and a Question of Law to that effect has been posed for our consideration compelling us to consider factual aspects of the controversy.

9. The factual aspect that whether the vehicle was manufactured by its original manufacturer M/s Hino Motor Ltd of Japan as a Truck or a Prime Mover [as required under Paragraph 9(II)(5) of IPO 2016] could easily be answered by logging into <http://www.hinodecoder.com/> by

¹ M/s Shah Nawaz v. Commissioner of I.T. 1969 SCMR 123; Commissioner of I.T. v. M/s Smith, Kline & French 1991 SCMR 2374; Commissioner of I.T. v. M/s Farrokh Chemical 1992 SCMR 523; Ibrahim Ishaq v. Commissioner of I.T. 1993 SCMR 287; M/s Irum Ghee Mills v. I.T. A.T. 2000 SCMR 1871

providing its VIN which is composed of 17 characters (digits and capital letters) that act as a unique identifier for the vehicle. When VINs of all the vehicles were fed on this website, the following results were shown:

VIN Number JHDGH1JRPXXX11574



Vehicle Type	Truck
Vehicle Class	Truck Delivery
Make	Hino
Model Year	2012
Chassis No	JHDGH1JRPXXX11574
Engine No	E13C
Engine Type	12.8L 4X2
Capacity	13000CC
Color	White
Fuel Type	Diesel
State Asia	Japan
Manufacturer	Hino Motor Ltd

VIN Number JHDGH1JRPXXX10245



Vehicle Type	Truck
Vehicle Class	Truck Delivery
Make	Hino
Model Year	2012
Chassis No	JHDGH1JRPXXX10245
Engine No	E13C
Engine Type	12.8L 4X2
Capacity	13000CC
Color	White
Fuel Type	Diesel
State Asia	Japan
Manufacturer	Hino Motor Ltd

VIN Number JHDGH1JRPXXX10028



Vehicle Type	Truck
Vehicle Class	Truck Delivery
Make	Hino
Model Year	2012
Chassis No	JHDGH1JRPXXX10028
Engine No	E13C
Engine Type	12.8L 4X2
Capacity	13000CC
Color	White
Fuel Type	Diesel
State Asia	Japan
Manufacturer	Hino Motor Ltd

VIN Number JHDGH1JRPXXX11444



Vehicle Type	Truck
Vehicle Class	Truck Delivery
Make	Hino
Model Year	2012
Chassis No	JHDGH1JRPXXX11444
Engine No	E13C
Engine Type	12.8L 4X2
Capacity	13000CC
Color	White
Fuel Type	Diesel
State Asia	Japan
Manufacturer	Hino Motor Ltd

10. As it could be seen from the above details, all vehicles are Delivery Trucks and none of those is a are Prime Mover. Also, it could be seen that the Year of Manufacture is 2012 against 2013 as indicated by the importer in the PSI Certificate, hence these Trucks (even if imagined to be Prime Movers) were more than 5 years old at

the time of their import, thus failing Clause (c) of Para-9(II)(5) of Import Policy Order, 2016.

11. With regards the learned counsel's contentions that in SCRA No. 371 of 2016 [The Collector of Customs v. Quick Contractors & Traders] and Constitution Petition No. D-3461 of 2018, in which one of us (Mr. J. Zulfiqar Ahmad Khan) was a member of the Bench, this court allowed import of such vehicles, in distinguishable circumstances as those vehicles were imported when Import Policy Order 2013 was in the field, in terms of which construction companies were permitted to import used, second-hand Prime Movers whilst observing the following conditions:

“9. Import of used plant, machinery and equipment.--

(i)

(ii) Import of Secondhand Plant, Machinery and Equipment and Specialized Machinery by Construction, Mining and Petroleum Sector.—

.....

(5) Construction companies, mining, oil, gas and petroleum sector companies are also allowed to import specialized vehicle-mounted machinery and transport equipment such as mobile transit mixture, concrete pumps, crane lorries, concrete placing trucks, dumpers designed for off highway use, cement bulkers and **prime movers** 380 HP and above, etc. specified in Appendix-I. However, import of such items will be subject to certification by the competent authority of exporting country or a recognized pre-shipment inspection company listed in Appendix-H to the effect that the said machinery or transport equipment (a) is compliant with Euro-II emission standards (b) is in good working condition and has a remaining productive life of five years.”

12. Comparison of IPO 2013 and 2016 conditionalities of import of used Prime Movers shows that 2016 requirements are different to the extent that in the year 2013 there was no requirement that the vehicle should have been manufactured as such by the Original Equipment Manufacturer (OEM), which condition has been added in the 2016 IPO only. An original equipment manufacturer (OEM) is generally perceived as a company that produces parts and equipment

that may be marketed by another manufacturer or third parties. In Automotive Industry, OEM automotive products are considered to be the official and genuine products produced directly by the vehicle's maker in the finished or given exportable or sellable state as such. In the case at hand, the OEM maker M/s Hino Motor Limited of Japan manufactured these vehicles as Delivery Trucks and converting them into Prime Movers is an adulteration of such OEM regime therefore, as indicated in the Examination Report, the vehicles' Chassis was 'cut' to turn them into Prime Mover by artificially welding or bolting Fish Plates thereon depriving them of the original OEM product as such. Such findings on the facts have not been considered by the Tribunal, except it took the PSI certificate as gospel truth without any application of mind.

13. Resultantly Question No. 1 as to *Whether old and used prime mover is importable without fulfillment of conditions laid down under (b) of Para-9(II)(5) of Import Policy Order, 2016* is answered in **Negative** (i.e. against the importer and in favor of the department) and Question No. 2 as to *Whether the ambiguous description of vehicle mentioned in the Pre-Shipment Inspection Certificate is not an attempt to hoodwink the Customs authorities?* is answered in **Affirmative** (i.e. against the importer and in favor of the department). The Constitutional Petition seeking implementation of the Tribunal Judgment as a result thereof becomes meritless, hence dismissed.

14. A copy of this judgment under seal of the Court be sent to the Customs Appellate Tribunal as per section 196(5) of the Customs Act, 1969.

Karachi

JUDGE

JUDGE