

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-2184 of 2022

M/s. Sikandar & Co.

Vs.

Federation of Pakistan & two others.

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Mahmood A. Khan

Date of hearing : 25.05.2022.

For the petitioner : Mr. Aqeel Ahmed Khan, Advocate.

For the respondent No.1 : Mr. Kafeel Ahmed Abbasi, Deputy Attorney General for Pakistan (DAG).

For the respondent No.2 : Mr. Irfan Mir Halepota, Advocate.

For the respondent No.3 : Mr. Muhammad Khalil Dogar, Advocate.

JUDGMENT

IRFAN SAADAT KHAN, J. The instant Constitutional Petition has been filed on the ground that the department after provisionally assessing the goods under Section 79 of the Customs Act, 1969 (**the Act**) in the month of January-2020 has not finalized the assessment by July-2020 or within such extended 90 days, which expired in October-2020, as required under the provisions of Section 81(4) of the Act, hence the department has to accept /assess the goods, as provisionally assessed by them, as finally assessed goods.

2. Mr. Aqeel Ahmed Khan Advocate has appeared on behalf of the petitioner and has reiterated the above submissions and stated that

since the final assessment, which was supposed to be finalized by 15.07.2020 or within such extended period which expired on 14.10.2020, has not been made by the department, therefore, the provisional assessment made by the department, for all practical purposes, has to be considered as final assessment. In support of his contention the learned counsel has placed reliance on the decisions given in C.P. Nos.D-5491/2021, D-7258/2021, D-7259/2021 and D-7260/2021, dated 10.03.2022 (authored by one of us, namely, Irfan Saadat Khan J.) and the decision given in C.P. No.D-5674/2020, dated 02.09.2021.

3. M/s. Kafeel Ahmed Abbasi (DAG), Irfan Mir Halephota and Muhammad Khalil Dogar, Advocates have appeared on behalf of the respondents/department and though they have conceded that no final assessment was made within the stipulated period however stated that with regard to the consignment imported by the petitioner the department has assessed the same on a value which was more than provisionally assessed hence, according to them, though the assessment was not finalized within the stipulated period but since in respect of the same goods /consignment the department has applied different rates than to the provisionally assessed goods impugned in the instant petition, therefore, according to them, the same rates as applied to the very goods imported by the petitioner in respect of other consignments may be applied /accepted in respect of the consignment under question.

4. We have heard all the learned counsel at considerable length and have also perused the record and the decisions relied upon by the learned counsel for the petitioner.

5. We are of the view that the primary issue raised in the instant petition is with regard to very legality or otherwise of the applicability of Section 81(4) of the Act and not with regard to applicability of the customs duty rates. It is an admitted fact that the department was supposed to finalize the assessment by 15.07.2020 or in such extended period which in no case exceeds 90 days by 14.10.2020, which has not been done. Even the counsel appearing before us on behalf of the respondents /department have not controverted the fact that no final assessment was made by the department after provisional assessment within the stipulated period; hence, in our view, on the face of it the provisions of Section 81(4) of the Act have not been followed and complied with by the department and no lease in this regard could be granted to them.

6. So far as the issue of applicability of rates on the consignment are concerned, this issue cannot now be agitated by the department, as had the goods been finally assessed in a timely manner then a question with regard to applicability of the valuation /rate could be raised but in the case in hand the matter is not with regard to the applicability of the valuation /rate rather the petitioner has raised a basic legal issue with regard to finalization of the assessment, after the provisional assessment as specifically enshrined under Section 81(4) of the Act. Moreover it is also an admitted position that the present matter does

not fall within the exclusion clause of Section 81(4) of the Act. Same issue came up for hearing before this Court in a number of petitions and in those matters it was observed that if the provisional assessment is not finalized within the period provided under Section 81 of the Act, provisional assessment is to be considered as final assessment. For ready reference relevant extracts from some of the decisions are reproduced hereunder:

Decision in C.P. Nos.D-5491/2021, D-7258/2021, D-7259/2021 and D-7260/2021

“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.”

Decision in C.P. No.D-5674/2020

“In our view to claim the amount which was secured by the importer as differential amount either for warehousing or for release for home consumption, the final determination is inevitable after provisional determination and since it has not been done within the prescribed time under sub-section 2 of Section 81 of the Customs Act 1969 nor within any extended period of time [though it has not been extended as it was not the case of the respondents], we deem it appropriate to allow this petition to the extent that the amount of security lying in the shape of pay order or in case they have encashed it, be released forthwith.”

Decision in Special Customs Reference Applications No.63/2015 and 64/2015

“.. .. in our considered view, law already stands settled, that if the provisional assessment is not finalized within the period provided in Section 81 ibid such provisional assessment attains finality. The above question is answered in negative; against the applicant and in favour of the respondent. All these Reference Applications stand dismissed.”

Decision in C.P. No.D-7271 of 2021

“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.”

7. In the light of what has been stated above, we are of the view that since the department has failed to finalize the provisional assessment within the stipulated time, as provided under Section 81 of the Act, the provisionally assessed goods of the petitioner are to be considered as finally assessed. Petition stands allowed in the above terms.

Above are the reasons of our short dated 25.05.2022.

JUDGE

JUDGE

Karachi:

Dated: 26.05.2022.