

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Zulfiqar Ahmad Khan

Mr. Justice Adnan Iqbal Chaudhry.

S.C.R.A. No. 371 of 2016

[The Collector of Customs v. Quick Contractors & Traders]

Applicant : The Collector of Customs through
Mr. Muhammad Bilal Bhatti, Advocate.

Respondent : M/s. Quick Contractors & Traders through
Mr. Imran Iqbal Khan, Advocate.

Const. Petition No. D-3461 of 2018

[Quick Contractors & Traders v. The Federation of Pakistan]

Petitioner : M/s. Quick Contractors & Traders through
Mr. Imran Iqbal Khan, Advocate.

Respondent 1 : The Federation of Pakistan through Mr.
Kafeel Ahmed Abbasi, Deputy Attorney
General for Pakistan.

Respondent 2 : The Collector of Customs through
Mr. Muhammad Bilal Bhatti, Advocate.

Date of hearing : 22-02-2022

Date of decision : 22-02-2022

JUDGMENT

Adnan Iqbal Chaudhry J. - By short order dated 22-02-2022 we had answered the Reference against the Applicant (Collector Customs), and the constitution petition in favor of the Petitioner (Importer). The reasons for doing so are as under:-

2. The Collector Customs had proposed the following questions for our consideration under section 196 of the Customs Act, 1969

“(i) Whether the learned Appellate Tribunal erred in law to hold that the impugned vehicle is ‘Prime Mover’ of PCT Heading 8701.2040 instead of ‘Truck’ of PCT Heading 8704.2390 in the absence of principal function of

hauling & pushing another vehicle the impugned vehicle can be termed as 'Prime Mover' within the meaning of 8701.2040 as defined in Pakistan Customs Tariff read with WCO's Explanatory Notes ?

(ii) Whether in the presence of internet definition of 'Prime Mover' as 'a device that imparts, power or motion to another device to turn a generator, or an engine or motor that powers a drive train' the subject imported truck can be treated as 'Prime Mover' ?

(iii) Whether the learned Appellate Tribunal has not erred in law by not considering that even on second examination, the goods were confirmed as Hino Truck instead of old & used Hino Prime Mover, which is not importable in terms of Sr. No.10 of Appendix-C of Import Policy Order. Therefore, the provisions of Sections 16, 32(1), 32(2), 32-A & 79(1) of the Act, read with Section 3(1) of the Imports & Exports (Control) Act, 1950 were rightly invoked against the respondent ?

(iv) Whether in view of the established facts & relevant provisions of law, the findings of the learned Appellate Tribunal are not perverse for non-reading of the available record to the detriment of revenue and the consequent benefit to the respondent importer, who made an attempt to import the banned item and the order of learned Appellate Tribunal would encourage the unscrupulous importers to get the benefit under its banner ?"

3. The background is that the Import Policy Order, 2013, as amended upto 26-08-2014, permitted construction companies to import used, second-hand 'prime-movers' on certain conditions as under:

"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."

APPENDIX-B, PART-II

S. No.	PCT Codes	Commodity Description	Conditions
(1)	(2)	(3)	(4)
28.	8701.2040	Prime movers with engine capacity of 380 HP and above in second hand / used	Import shall be allowed only in favour of freight forwarders and movers subject to certification by the competent authority of exporting country or a recognized pre-shipment inspection company listed in the Appendix-H to the effect that the said prime movers (a) is compliant with Euro-II emission standards, and (b) is in good working condition/has a remaining productive life of five years.

4. On 15-12-2014, the Importer filed Goods Declaration to import two 'old and used Hino Prime Mover Trucks' under PCT Code 8701.2040 chargeable to customs duty @ 15%. However, per the examination report, followed by a show-cause notice, and then by an Order-in-Original No. 387091-29062015, Customs held that the vehicles in question were not prime-movers; rather these were trucks classifiable as 'other' under PCT Code 8704.2390 which are chargeable to customs duty @ 30%; but since Appendix 'C' of the Import Policy Order, 2013 had prohibited the import of a truck in used, second-hand condition, the vehicles in question were liable to outright confiscation. However, on the appeal of the Importer, the learned Customs Appellate Tribunal concluded that the vehicles in question were prime-movers and ordered release. By way of the present Reference, the Collector Customs has impugned such order of the Tribunal; whereas, by way of the connected constitution petition, the importer seeks implementation of the Tribunal's order.

5. Learned counsel were heard in the presence of the learned Deputy Attorney General and the record was perused with their assistance.

6. As narrated above, second-hand/used prime-movers with engine capacity of 380 HP were importable by construction companies under the Import Policy Order, 2013 subject to certification by the competent authority of the exporting country, or a recognized pre-shipment inspection company, to the effect that such vehicle was compliant with Euro-II emission standards, that it was in good working condition, and that it had a remaining productive life of five years. Before the *fora* below, it was not disputed that the Importer was eligible to import such prime-movers, nor was it disputed that the vehicles imported were above 380 HP and fulfilled the required fitness standards. Rather the question was *whether the vehicles in question were in fact prime-movers or trucks.*

7. To conclude that the vehicles imported were not prime-movers, the Order-in-Original relied on the examination report of the vehicles, which opined that:

"..... Trader has tried to make some alteration in the truck chassis to present before Customs as prime mover, as a turn plate mounted with bolts on chassis to show appearance of truck as prime mover. On internet definition of prime mover: 'device that imparts power or motion to another device such as a turbine that turns a generator, or an engine or motor that powers a drive train'; whereas in these trucks cabins are to be mounted on same chassis, as such cannot be considered as prime mover but confirmed these are truck 100%. Gross weight vide slip # 2628917 is 33000 kg. No tare is admissible. Group may call authentic catalogue of the manufacturer or get detail from manufacturer for further confirmation beside confirmation of genuineness of import documents including PSI certificate and all aspects. Images attached."

8. As evident from the above, the finding of the department that the vehicles in question were not prime-movers was based on an 'internet' definition of prime-mover as a *"device that imparts power or motion to another device."* From that definition the department deduced that where the cabin of the vehicle was mounted on the same chassis, it could not be classified as a prime-mover while at the same time noting that turn-plates had been mounted to give the appearance of prime-movers.

9. On the other hand, as noted by the learned Appellate Tribunal, the fact that the vehicles imported were prime-movers was substantiated by the pre-shipment inspection certificate of the vehicles issued by a recognized inspection company, which was also the criteria prescribed in the Import Policy Order, hence reliable evidence especially when such certificate was never disputed by the department. Nothing has been pointed out to us to show that such finding of the Appellate Tribunal is in any way preserve or suffers from any misreading of evidence. In these circumstances, we had answered the Reference against the Customs and in favor of the Importer, and the constitution petition was accordingly allowed in favor of the Importer by our short order.

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.

JUDGE

JUDGE

Karachi
Dated: 26-03-2022