

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
C. P. NO. D-2271 / 2011

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Date	Order with signature of Judge
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- 1) For katcha peshi.
- 2) For hearing of Misc. No. 10298/2013.

8.9.2015.

Mr. Khalid Javed Khan Advocate for the Petitioner.  
Mr. Asim Mansoor Khan DAG.  
Mr. Kashif Nazeer Advocate for the Respondent.

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Through instant petition, the petitioner seeks declaration from this Court as being entitled to import Air Handling Units (A.H.U) at the concessionary rate of duty of 5% in terms of SRO 575(I)/2006 dated 5.6.2006.

Briefly the facts are that the petitioner in order to manufacture Vaccines required AHU's of some special specifications and opened Letter of Credit dated 9.9.2010 for its import from China for US\$ 255,329/-. Before opening of Letter of Credit, the petitioner through its consultant checked the local market, that as to whether, the goods of required specification are manufactured in the country and the consultant vide letter dated 28.2.2010 confirmed to the petitioner that the goods in question are not being manufactured locally. The first shipment comprising 18 AHU's arrived on 14.2.2011 and due to some confusion the Goods Declaration was filed for Air Desiccant De Humidifiers under HS Code 8479.8990 in response to which a Show Cause notice was issued, whereafter, an Order in Original bearing No. 66156/2011 was passed through which the charge of mis-declaration was dropped; however, the petitioner was directed to pay duty and taxes at the statutory rate of 35% and since heavy demurrage charges were incurring, the petitioner had no option but to pay the same and lift the Cargo. It is further stated that thereafter the petitioner approached respondent No. 2 (Engineering Development Board) vide letter dated 14.3.2011 for seeking clarification with regard to local manufacturing status of the goods in question who vide letter dated 16.5.2011 has held that such AHUs are being manufactured locally. In the meantime the 2<sup>nd</sup> shipment arrived and on 7.7.2011 an interim order was passed in the instant petition, whereby, the second shipment of AHUs was ordered to be released on deposit of differential amount of duty and taxes through a Bank Guarantee before the Nazir of this Court.

Mr. Khalid Javed Khan learned Counsel for the petitioner submits that out of two local manufacturers M/S Habibullah Industries (Pvt.) Limited vide letter dated 24.3.2011 had confirmed that they are not manufacturing the goods in question and therefore, the order passed by EDB dated 16.5.2011 is not sustainable. Learned Counsel further submits

that the goods in question are of such specification that have never been manufactured in the country, which fact has been confirmed by M/S Habibullah Industries' (Pvt.) Limited as well as vide letter dated 25.4.2009 issued by EDB, whereas, it was confirmed that similar goods imported by Nestle Pakistan were not being manufactured locally. Learned Counsel has referred to the case of *Sohail Jute Mills Ltd. And others Vs. Federation of Pakistan through Secretary, Ministry of Finance and others (PLD 1991 SC 329)* and submits that the Hon'ble Supreme Court has already decided the matter by observing that exemption in respect of any goods is to be granted by examining the fact that whether at the relevant time, when the goods are imported, the same were being manufactured or not and not by the fact that prior to and subsequent to the import of such goods, they were or are being manufactured. Learned Counsel has also relied upon the case of *M/S United Refrigeration Industries (Pvt.) Ltd. Vs. Federation of Pakistan through Secretary, ministry of Finance, Government of Pakistan, Islamabad and another (2000 CLC 1660)*.

Conversely, Mr. Kashif Nazeer Counsel for respondent department contends that in an identical matter this Court vide judgment dated 19.8.2015 in the case of *M/S Novartis Pharma (Pakistan) Limited Vs. Federation of Pakistan and others (C.P. No. D-1214/2012)* has already held that the determination and/or status of local manufacturing is a finding of fact, which cannot be interfered by this Court while exercising Constitutional jurisdiction and has been pleased to dismiss the said petition. Counsel has further referred to Order-in-Original No. 66156/2011 and contends that when the first shipment of 18 Units of AHUs was imported, the petitioner had tried to clear the same by declaring as Air Desiccant De Humidifiers under HS Code 8479.8990 and after passing of the Order-in-Original the petitioner had paid the entire duty and taxes on statutory rate, therefore, claim of exemption in the second shipment is unwarranted. Counsel has further referred to letter dated 24.5.2011 addressed by the petitioner to EDB, wherein, it has been stated that they intend to export their products to developed countries of the world like UK, USA, Japan, Australia etc. and it is an essential requirement of these countries that all such equipment / material should be procured from approved vendors and such vendors are approved not on their potential to produce a supply but on the basis of actual supplies made by them. Per Counsel this is a matter of choice, whether to import from abroad or procure it locally, and in such matter, no vested right could be claimed.

Learned DAG has referred to the comments filed by EDB and submits that a very well-reasoned order has been passed by EDB after convening meeting of all the local manufacturers, including the petitioner, which confirms that the goods in question are being manufactured locally. Learned DAG also referred to letter dated 24.3.2011 issued by one of the manufacturer namely Cool Point (Pvt.) Limited who have stated that a similar type of unit manufactured by them has already been supplied to Johnson and Johnson Karachi and contends that this fact confirms that the goods in question are being manufactured locally.

We have heard all the learned Counsel as well as learned DAG, and perused the record. It appears that AHU's are entitled for exemption under SRO 575(I)/2006 dated 5.6.2006 vide serial No. 24 to the Table of SRO, however, with a specific condition that such benefit is only available to AHUs which are not manufactured locally. It is an admitted position that the status of these goods, that as to whether they are manufactured locally or not is determined by FBR through CGO 11/2007 and the entitlement to exemption in terms of SRO 575(I)/2006 dated 5.6.2006 is subject to the list notified through CGO 11/2007. It is also an admitted position that the question with regard to the status of certain goods being manufactured locally or not, requires determination through a finding of fact, which in the instant matter has already been arrived at by EDB vide letter dated 16.5.2011, and such finding of fact cannot be interfered by this Court while exercising Constitutional Jurisdiction. We have already dismissed an identical petition vide order dated 19.8.2015 passed in C.P. No. D-1214/2012 as referred to hereinabove.

Insofar as the case of *Sohail Jute Mills (supra)* is concerned, we may observe that in that case the matter was remanded by the Hon'ble Supreme Court to the concerned authorities, for the reason that no finding of fact was recorded in the case of petitioner(s) before the Hon'ble Supreme Court, with regard to the status of the goods being manufactured locally or otherwise, and, while passing such remand order, the Hon'ble Supreme Court had further observed that if a machinery is locally manufactured, prior to and subsequent to, but not during the year, when the order is placed, the exemption cannot be refused on the ground that local manufacture has been taking place, notwithstanding the gap forcing the entrepreneur to seek it from abroad. However the facts in the instant matter are materially different for the reason that insofar as the status of the goods being manufactured or otherwise is concerned, the same already stands determined as the goods are notified in CGO 11/2007 as being manufactured locally. In fact in the instant matter, despite such status, the petitioner has been granted further audience, whereafter, a detailed and reasoned order has been passed by confirming the status of the goods in question as being manufactured locally, which have even been supplied to a company similar to that as of the petitioner. Therefore, in our humble view the ratio of the judgment in the *Sohail Jute Mills (Supra)* is not applicable to the case of the petitioner, as there is a definite finding of fact against the petitioner to that effect, whereas, the petitioner has also been provided ample opportunity to contest the matter.

In view of hereinabove facts and circumstances we are of the view that instant petition is devoid of any merits and is misconceived. Accordingly, the same is hereby dismissed with directions to the Nazir of this Court to encash the Bank Guarantee forthwith in favour of respondent No. 3.

JUDGE

JUDGE