

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Zulfiqar Ahmad Khan

Mr. Justice Adnan Iqbal Chaudhry.

- S.C.R.A. No.04 of 2011 : The Additional Collector of Customs
MCC of PaCCS versus M/s. K.S.
Sulemanji Esmailji and Sons (Pvt.) Ltd.
- S.C.R.A. No.05 of 2011 : The Additional Collector of Customs
MCC of PaCCS versus M/s. K.S.
Sulemanji Esmailji and Sons (Pvt.) Ltd.
- S.C.R.A. No.06 of 2011 : The Additional Collector of Customs
MCC of PaCCS versus M/s. K.S.
Sulemanji Esmailji and Sons (Pvt.) Ltd.
- S.C.R.A. No.07 of 2011 : The Additional Collector of Customs
MCC of PaCCS versus M/s. K.S.
Sulemanji Esmailji and Sons (Pvt.) Ltd.
- Applicants : Through Mr. Iqbal Khurram, Advocate.
- Respondents : Through Mr. Pervez Iqbal Kasi along
with Mr. Pervez Ahmed Memon,
Advocates.
- Dates of hearing : 17-02-2022 & 23-02-2022

JUDGMENT

Adnan Iqbal Chaudhry J. - These References by the Collector of Customs under section 196 of the Customs Act, 1969 arise from a common order passed by the Customs Appellate Tribunal on appeals preferred by the Applicant/Collector and appeals preferred by the Respondent/Importer, and hence are being addressed together.

2. The Respondent, a manufacturer of snacks, imported consignments of food flavoring powder and declared them under PCT heading 2106.9030 which attracted customs duty @ 10%. On scrutiny of the goods, the Customs department issued show-cause notice alleging mis-declaration and attempted evasion of duty by contending that the goods were in fact "seasoning powder" classifiable under PCT heading 2103.9000 and chargeable to customs

duty @ 35%. By order-in-original dated 06-03-2010, the Adjudicating Officer agreed with the department and held that the goods were classifiable under PCT heading 2103.9000, but he did not go on to impose fine or penalty on the Respondent keeping in view the fact that it had been past practice to classify like goods under PCT heading 2106.9030. Though the Respondent paid the differential duty and cleared the goods, it also appealed under section 193 of the Customs Act. By order dated 03-06-2010, the Collector (Appeals) held that though such goods attracted PCT heading 2103.9000 but in view of established past practice the goods should be classified under PCT heading 2106.9030. Against that order, both sides preferred appeals to the Customs Appellate Tribunal under section 194-A of the Customs Act, which were heard by a Member Judicial of the Tribunal and disposed of by a common order dated 24-09-2010. The appeals of the Respondent were allowed and the appeals of the Collector were dismissed. The Tribunal held for the Respondent concluding that the goods were classifiable under PCT heading 2106.9030.

3. The questions of law proposed by the Collector for our consideration are as follows:

"1. Whether on facts and circumstances of the case the Appellate Tribunal erred in law by not considering the legal plane that the imported goods were / are correctly classifiable under PCT Heading 2103.9000 and chargeable to customs duty @ 35% instead of under PCT Heading 2106.9030 @ 10% customs duty?"

2. Whether in the facts and circumstances of the case the Appellate Tribunal can change the PCT Heading of the imported goods merely on the grounds of "past practice"?"

3. Whether the Member (Judicial) of the Appellate Tribunal has justification to decide a matter related to the technicalities of PCT classification without associating the Member (Technical) and advise from the PCT classification committee?"

4. Whether the Member (Judicial) of the Appellate Tribunal sitting singly can adjudicate a matter involving technical question of

PCT classification of the imported goods without taking assistance from the classification committee and the Member (Technical)?”

4. The PCT heading relied upon by the Collector reads as follows:

“21.03. Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard.

2103.1000- Soya sauce

2103.2000- Tomato ketchup and other tomato sauces

2103.3000- Mustard flour and meal and prepared mustard

2103.9000- other”

The PCT heading relied upon by the Respondent reads as follows:

“21.06 Food preparations not elsewhere specified or included

- Protein concentrates and textured protein substances

2100.1010--- Protein hydrolysates

2106.1090--- Other

- other

2100.9010--- Concentrates for aerated beverage in all forms

2106.9020--- Syrups and squashes

2106.9030--- Flavouring powders for preparation of food

2100.9040--- Emulsifying agents for food and dairy products

2106.9050--- Preparations including tablets consisting of saccharin, lactose

2106.9060--- Sweet meats

2106.9090--- Other”

5. *Ex facie*, PCT heading 2106.9030 is expressly for “flavoring powder”. Nonetheless, the order of the Tribunal manifests that in concluding that the goods in question were classifiable under PCT heading 2106.9030 and not PCT heading 2103.9000, the Tribunal had compared and analyzed the Explanatory Notes to both headings and was fortified *inter alia* by Explanatory Note (B) to heading 21.06 which read as follows:

“(B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.) (see the General Explanatory Note to Chapter 38).

Therefore, it cannot be urged that the Tribunal did not consider the legal plane before classifying the goods. Learned counsel for the Collector was not able to demonstrate that the Explanatory Notes were misconstrued by the Tribunal. Therefore, we answer Question No.1 in the negative against the Collector.

6. Regards Question No. 2, while it is correct that the Tribunal had also held that it had been consistent practice to classify like goods under PCT heading 2106.9030, but the findings of the Tribunal are not based solely on past practice. As discussed above, the Tribunal had taken pain to compare and analyze the Explanatory Notes to both headings before arriving at the conclusion that the goods were correctly classifiable under PCT heading 2106.9030. Question No.2 is answered accordingly.

7. Questions 3 and 4 are essentially the same, *viz.* whether the Judicial Member of the Tribunal acting singly had jurisdiction to decide a question of classification of goods without the input of the Member Technical or the classification committee. The constitution of Benches of the Tribunal are discussed in section 194C of the Customs Act, 1969, the provisions of which at the relevant time were as follows:

“194C. Procedure of Appellate Tribunal.- (1) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the Chairman from amongst the members thereof.

(2) Subject to the provisions contained in sub-sections (3) and (4), a Bench shall consist of one judicial member and one technical member.

(3) Every appeal against a decision or order deciding a case involving duty, tax, penalty or fine exceeding five million rupees shall be heard by a Special Bench constituted by the Chairman for hearing such appeals and such Bench shall consist of not less than two members and shall include at least one judicial member and one technical member :

Provided that the Chairman may, for reasons to be recorded in writing, constitute Benches including special Benches consisting of

-

- (a) two or more technical members; or
- (b) two or more judicial members:

(3A) Notwithstanding anything contained in sub-sections (2) and (3), the Chairman may constitute as many Benches consisting of a single member as he may deem necessary to hear such cases or class of cases as the Federal Government may, by order in writing, specify.

(4) The Chairman or any other member of the Appellate Tribunal authorized in this behalf by the Chairman may, sitting singly, dispose of any case which has been allotted to the bench of which he is a member where-

- (a) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 181; or
- (b) [omitted]
- (c) in any disputed case, the difference in duty or tax involved or the duty or tax involved, or the amount of fine or penalty involved does not exceed five million rupees.

(5)

(6)

(7)

(8)"

8. Sub-sections (3A) and (4) of section 194C of the Customs Act clearly provide that subject to the specification and authorization mentioned therein, a single-Member Bench under the former, and a Member of a Bench sitting singly under the latter, can hear and decide a case.¹ It is not the case of the Collector that the Member Judicial was assigned the appeals contrary to said provisions, rather the Collector seems to rely on sub-section (2) of section 194C which states that a Bench shall consist of one Judicial Member and one Technical Member. However, and as also observed by the Supreme Court in *Collector of Customs, Karachi v. Rehan Ahmed* (2017 SCMR 152), sub-section (3A) overrides sub-section (2); and sub-section (4) is an exception to sub-section (2). Therefore, reliance placed by the Collector on sub-section (2) of section 194C is misconceived.

¹ *Collector of Customs, Karachi v. Rehan Ahmed* (2017 SCMR 152) highlights the distinction between a Member acting as a single Bench under sub-section (3A) from a Member sitting singly under sub-section (4) of section 194C of the Customs Act, 1969. The question in that case had arisen owing to the second proviso to sub-section (3) which had barred a Bench of two or more Technical Members from hearing a matter involving questions of law, which proviso was subsequently omitted by the Finance Act, 2009.

9. Though learned counsel did not specify whether the impugned order was passed by the Member Judicial acting under sub-section (3A) or under sub-section (4) of section 194C, for the question posed before us that does not matter. Neither of the two provisions curtail the jurisdiction of the Member Judicial to decide a question of classification, nor do said provisions fetter the exercise of such jurisdiction by any input from the Member Technical or the classification committee. A similar objection to the jurisdiction of the Member Judicial was rejected by a learned Division Bench of this Court in *Quick Contractor and Traders v. Federation of Pakistan* (2022 PTD 1302). Resultantly, Questions 3 and 4 are answered in the affirmative and against the Collector, *viz.* that the Member Judicial had jurisdiction to decide the subject appeals.

10. The References stand answered as above. 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: ____-09-2022