

IN THE HIGH COURT OF SINDH AT KARACHI

SCRA No. 38 of 2022

[Collector of Customsv.....M/s. Salman Paper Products (Pvt) Ltd]

C.P. No.D-2758 of 2021

[M/s. Salman Paper Products (Pvt) Ltd & othersv..... The Federation of Pakistan & others]

(And connected matters, particularized in the Schedule¹ hereto.)

Present

Mr. Justice Irfan Saadat Khan.

Mr. Justice Zulfiqar Ahmad Khan.

Dates of Hearing : 17.11.2022 & 01.12.2022

Applicant/Department through : M/s. Sarfaraz Ali Metlo, Barkat Ali Metlo, Khalid Rajpar, Pervez Ahmed Memon, Masooda Siraj, Javed Hussain, Khalil Dogar, Tahir Khalil Dogar, Bilal Bhatti, M. Ishaque Pirzada & Sania Zubair, Advocates.

Petitioners/Respondents through : M/s. Naveen Merchant, Aqeel Ahmed Khan, Nadeem Qureshi, Muhammad Salman Khan, Salman Yousuf, Samil Malik Khan, Muhammad Usman Ahmed & Alqamah Bin Mehmood, Advocates.

JUDGMENT

Zulfiqar Ahmad Khan, J:- In all of the listed cases, a common legal question is involved, hence these cases were heard together and being decided through this common judgment. Insofar as Constitution Petitions are concerned, since those were filed impugning various Show Cause Notices issued by the Customs Department involving similar controversy, and as fate of the Special Customs Reference Applications (“SCRAs as per schedule”) filed by the Department will have bearing on such Petitions, these petitions would also culminate

¹ The Schedule hereto shall be read as an integral constituent hereof.

through this Judgment. For the ease and convenience and with the consent of Counsel for contesting parties SCRA Nos.38 of 2022 was taken as the leading case where the Applicant Department has impugned order dated 27.11.2021 (“Impugned Order”) passed by learned Customs Appellate Tribunal, Karachi (“Tribunal”) in Customs Appeal No. 7417/2021 proposing various questions of law. The SCRA’s were admitted to regular hearing to answer the following questions of law with the consent of the parties:-

a. Whether the Appellate Tribunal has erred by not accepting the findings of classification committee dated 26.03.2021 constituted by Board on the specific direction of Senate Standing Committee on Finance & Revenue, which is the highest law making forum of the country?

b. Whether the learned Appellate Tribunal has erred in law by not accepting the decision of Classification Committee dated 26.03.2021, circulated vide Boards’ letter No.3(14)Tar-I/2014 Pt-I dated 30.03.2021 and Public Notice 01/2021 dated 27.11.2021 wherein the item i.e. two-side coated paper is correctly classifiable under PCT heading 4810.1990?

2. Per Departments’ learned counsel², the impugned order is based on wrong assumption and mis-interpretation of the facts provided by the Department. Learned counsel for the assailed the impugned Order alleging that the same is in dissonance with the law and policy. Mr. Sarfaraz Ali Metlo next contended that learned Tribunal had illegally invalidated the Classification Ruling which was

² Spearheaded by Mr. Sarfaraz Ali Metlo, Advocate. The arguments were complimented by Mr. Khalid Rajpar, Mr. Pervez Ahmed Memon and Ms. Masooda Siraj, Advocates and adopted by the remaining learned counsel for the Applicants/Department.

neither subject matter of the appeal, whereas a Classification Ruling is appealable under Section 194-A of the Customs Act, 1969. He next contended that use of the subject consignment of papers is not restricted to writing rather the imported paper has multiple uses, resultantly it could fall in more than one class heading, thus classifiable under PCT heading No.4810.1990 as claimed by the Department, instead of heading No.4810.1910 as decided by the Order impugned. According to him, Board through its Classification Committee is the final fact-finding authority for such purposes and no statutory remedy is available against Committee's such decisions. It was also contended that the classification of goods is particularity not always a matter of judicial interpretation as it requires specialized expertise of technical experts to take into account physical characteristics, chemical properties and eventual use of the imported goods. Ordinarily, per learned counsel classification disputes which cannot be resolved through legal interpretations are referred to the Classification Committee which consists of technical experts and where necessary, the Committee co-opts other experts for its assistance too, therefore, such decision is to be taken as final adjudication of such facts. While concluding submissions, learned counsel vehemently contended that the subject consignments fell under PTC heading No.4810.1990 as those pertain to two sided coated writing paper which falls under "other" category instead of "writing paper" alone, therefore, the SCRA's filed by the Applicant/Department be allowed by answering the questions so framed in favour of the Department and against the Respondents.

3. The Respondents'/Petitioners' learned counsel³ submitted that the Impugned Order is maintainable in the interest of law, facts and justice. Their pivotal contention was that Importers/Respondents have been importing subject consignments from China from 2007 under PCT Heading 4810.1910 without any objection from the Department. Ms. Navin Merchant, Advocate contended that subject goods are chargeable to 20% Customs Duty from all the countries, except China pursuant to Pakistan China Free Trade Agreement effective from 2007, Government issued SRO dated 31.12.2019 in terms of which rate of Customs Duty was reduced from 20% to 16%, and the Respondents/Importers have been enjoying the benefit of the said SRO pursuant to the said FTA but owing to a complaint filed by a rival importer, this controversy arose which is malafide in nature to start with. While concluding submissions, learned counsel for the importers/Respondents argued that Lab Reports and Certificate of Chinese Government available on record unequivocally show that the subject consignment is a writing paper hence falling in HS Code 4810.1910 instead of 4810.1990 and that the learned Tribunal having examined all aspects, passed a well-reasoned order which ought to be maintained. So as to strengthen the above submissions, learned counsel for the importers relied upon the judgments of Superior Courts reported as Commissioner Inland Revenue Lahore v. Sargodah Spinning Mills Pvt. Ltd. Faisalabad (2022 PTD 1079), Collector of Custom, Islamabad v. Askari Cement Pvt. Ltd (2020 SCMR 649), Central Insurance Co. v. Central Board of Revenue Islamabad (1993 SCMR 1232), Ghulam Hussain v. Nabi Bux (1989 SCMR 353), Al-Tech

³ Arguments were primarily articulated by Ms. Navin Merchant, Advocate, Mr. Aqeel Ahmed Khan, Advocate and Mr. Nadeem Qureshi, Advocate and seconded by the remaining learned counsel.

Engineers & Manufacturers v. Federation of Pakistan (2017 SCMR 673) and Noor Muhammad v. Ghulam Rasool (1999 SCMR 709).

4. Mr. Metlo, in rebuttal, reiterated the submissions articulated supra and relied upon the precedents reported as Messrs. Squibb Pakistan Ltd. v. Commissioner of Income Tax (2017 SCMR 1006), Iqbal Hussain v. Federation of Pakistan (2010 PTD 2338), Big Mak Foods Ltd v. Deputy Collector of Customs (1994 SCMR 537), Messrs. Qasim International Container Terminal Ltd. Karachi v. Collector of Customs Karachi (2005 PTD 9), Hashwani Hotels Ltd v. Government of Pakistan (2007 SCMR 1131), Pakistan Machine Tool Factory Pvt. Ltd Karachi v. Commissioner of Sales Central Zone-B, Karachi (2006 PTD 2331) and Bisvil Spinner Ltd. v. Superintendent Central Excise & Land Custom Circle Sheikhpura (PLD 1988 S.C. 370).

5. We have heard the arguments of respective learned counsel and considered the pertinent law rules and procedures. It is considered expedient to initiate these deliberations by referring the well settled principle penned down by Supreme Court of Pakistan in Commissioner of Inland Revenue Lahore v. M/s. Sargodha Spinning Mill Pvt. Ltd. Faisalabad & others (2022 SCMR 1082 also reported as 2022 PTD 1079) holding that the Tribunal is the final forum for determination of facts in tax matters. The Appellate Tribunal is therefore the final fact-finding body and final arbitral, its findings of facts are conclusive; and High Courts not to disturb the same unless it is shown that there was no evidence on which the Appellate Tribunal could arrive at its conclusion and record such findings, or the same are perverse or based on surmises and conjectures. Further, per supra a High Court cannot go behind any

finding of fact recorded by the Appellate Tribunal even on such grounds, unless it has been expressly challenged by raising a 'question of law' relating thereto in the application. Without raising a 'question of law' in the terms, like, 'whether there was evidence to support the finding of the Appellate Tribunal on such and such fact', the High Court is bound by the finding of fact recorded by the Tribunal. Thus in a case, where no question of law is raised to challenge the finding of fact recorded by the Appellate Tribunal as being not supported by any evidence or being perverse, the finding recorded by the Tribunal attains finality. For the ease of reference the pertinent excerpt of the edict reported as in Commissioner of Inland Revenue Lahore v. M/s. Sargodha Spinning Mill Pvt. Ltd. Faisalabad & others (2022 SCMR 1082 also reported as 2022 PTD 1079) is reproduced hereunder:-

“3. We have heard the learned counsel for the department and have examined the record of the case. It is now well established that the Tribunal is the final forum for determination of facts in tax matters. The Appellate Tribunal is therefore the final fact-finding body and its findings of facts are conclusive; the High Court cannot disturb them unless it is shown that there was no evidence on which the Appellate Tribunal could arrive at its conclusion and record such findings, or the same are perverse or based on surmises and conjectures. Further, the High Court cannot go behind any finding of fact recorded by the Appellate Tribunal even on such grounds, unless it has been expressly challenged by raising a 'question of law' relating thereto in the application. Without raising a 'question of law' in the terms, like, 'whether there was evidence to support the finding of the Appellate Tribunal on such and such fact', the High Court is bound by the finding of fact recorded by the Tribunal. Thus in a case, where no question of law is raised to challenge the finding of fact recorded by the Appellate Tribunal as being not supported by any evidence or being perverse, the finding recorded by the Tribunal attains finality. It has also been established and clearly borne out

from section 47(1) of the Act that the “question of law” must arise from the decision of the Appellate Tribunal and in the absence thereof, any such reference is not maintainable.”⁴

6. In sequel to above, the Hon’ble Supreme Court in the case of Messrs. Middle East Construction Company, Karachi v. Collector of Customs, Karachi (2023 SCMR 838) went on to hold that the High Court’s jurisdiction under section 196 of the Customs Act is limited to a question of law⁵, it is considered expedient to reproduce the pertinent excerpt of the above edict which is delineated hereunder:-

8. It is also well settled that the Tribunal is the last forum for the determination of facts. In these cases the Tribunal had concluded that the imported vehicles were prime movers. The learned Judges of the High Court undoubtedly realized the shortcomings in the respondent’s references, therefore, they took it upon themselves to ascertain the nature of the vehicles. The High Court’s jurisdiction under section 196 of the Act is limited to a question of law. It did not lay within the jurisdictional domain of the High Court to itself determine the nature of the imported vehicles. If the learned Judges of the High Court preferred any particular reports which were before them, and if they were setting aside the judgments of the Tribunal then they should have given valid reasons for their preference. However, the High Court should not have embarked upon determining the nature of the vehicles itself, and to do so by relying upon material which had not been produced either before the adjudicating officer or the Tribunal. We cannot endorse the manner in which the learned Judges of the High Court took it upon themselves to ascertain the nature of the imported vehicles”

7. Considering the above edict of the Supreme Court of Pakistan, we now discuss the questions of law so framed. It is an admitted position that the consignments of goods were thoroughly examined by

⁴ Per Syed Mansoor Ali Shah.J

⁵ Per Qazi Faez Isa. J

the Laboratory and after unanimous examination, the Laboratory reported (page 385-423 Annexure P-27 of court file of C.P. No.D-2758/2021) that:-

“The given sample is both sided coated paper which can be used for multipurpose i.e. writing as well as printing”

8. It is gleaned from appraisal of the foregoing that the Laboratory having examined the sample sent to it for examination formulated its opinion to the effect that the subject consignment comprised paper which can be used for both purposes i.e. writing as well as printing. As it is well known that any paper which is used for writing can also be used for printing and any paper which is being used for printing can also be used for writing thenceforth (with the exception of Blotting paper, which is not the case at hand) but propriety demands that such paper can't be classified in two separate head for fiscal purposes. During the course of arguments, Ms. Merchant drew Court's attention to Certificates issued from Chinese Government (available at page 125, 135, 147 & 157, annexures P-5 to P-8 respectively of file of C.P. No.D-2758/2021) which unequivocally show that the subject consignment comprised of two sided writing paper, falling under PCT Heading 4810.1910 against which no other evidence was placed therefore, in our humble view, the learned Tribunal rightly applied its fact finding skills and passed the impugned order.

9. The Importers/Respondents (petitioners in their respective petitions as they have challenged the Show Cause Notice issued by the department to challenge the controversy involved in these References) resonated that the petitioners have been importing the

subject consignment from China since 2007 by declaring the goods under PCT Heading 4810.1910 and by paying custom duty 16% under Free Trade Agreement between China & Pakistan (SRO1640(I)/2019 dated 31.12.2019) and that the Department/Applicant never raised any objection for over a decade, hence there has been a long-standing practice of the Department/Applicant to determine the subject goods (as printing paper) under PCT Heading 4810.1910 instead of PCT Heading 4810.1990 (“other” category). The Hon’ble Supreme Court at various instants has held that where the Departmental practice had followed a particular course it would be extremely unfair to make an unsubstantiated departure therefrom disturbing rights that may have accrued⁶. Another learned Division Bench of this Court in *Dow University of Health Sciences v. Federation of Pakistan & others* (2020 MLD 357) while holding the similar principle also relied upon the above settled principle of long-standing practice.

10. Learned counsel for the Importers thus also complained discriminatory treatment on the part of the Custom Authorities accordingly. She stated that the rival of the Petitioners have been importing the subject consignment under PCT Heading 4810.1910 as well as the Importers/Petitioners have been importing the subject consignment since 2007 under PCT Heading 4810.1910 thus sudden change of long-standing practice on the part of the Custom Department and assessment of the subject consignment under PCT Heading 4810.1990 instead of PCT Heading 4810.1910 is infested with malafide as well as against the fundamental right guaranteed to the

⁶ Per Nasim Hussain Shah (as his lordship then was) in *Radaka Corporation & others v. collector of Customs & another* 1989 SCMR 353.

Importers/Petitioners vide Article 4, 18 and 25 of the Constitution as her clients are being treated discriminately. To meet with the said submission, we may say that when a right is safeguarded by a Constitutional guarantee, it becomes a “Fundamental Right” beyond the power of any organ of State, whether, Executive or Legislative to act in violation thereof. Such a right cannot be taken away, suspended or abridged. The Fundamental Rights are natural rights which are personal to the individual as a citizen of a free and civilized community. The essential characteristic of fundamental rights is that they impose limitations, express or implied, on public authorities, interfering with their exercise. It is the duty of the Court to protect Fundamental Rights granted in the Constitution. Article 199 of the Constitution empowers this court to issue any appropriate directions for the enforcement of Fundamental Rights conferred by the Constitution. The superior courts time and again pronounced that any law which is inconsistent and in contravention of fundamental rights or which took away or abridged such rights, is void, to the extent of such contravention.

11. With regards to the binding effects of the instructions of the Classification Committee (per question “b”), it is considered pertinent to illustrate here that the Customs Department is working under the statutory hierarchy and performing their functions being a quasi-judicial body. Any circular or instructions/report issued by the Classification Committee or, relating to interpretation of any statutory provision, rule or regulation, cannot be treated as judicial interpretation, hence not binding on authorities performing judicial/or quasi-judicial functions. Reliance in this regard can be

placed in the case of Central Insurance Company v. Central Board of Revenue (1993 SCMR 1232), wherein, the Hon'ble Supreme Court, while examining the legality of a Circular issued by the Central Board of Revenue, interpreting the provisions of Income Tax Ordinance, 1979, has been pleased to hold as under:-

“22. It is evident from the above provisions that though the Central Board of Revenue has administrative control over the functionaries discharging their functions under the Ordinance, but it does not figure in the hierarchy of the forums provided for adjudication of assessee's liability as to the tax. In this view of the matter, any interpretation placed by the Central Board of Revenue, on a statutory provision cannot be treated as a pronouncement by a forum competent to adjudicate upon such a question judicially or quasi-judicially. We may point out that the Central Board of Revenue cannot issue any administrative direction of the nature which may interfere with the judicial or quasi-judicial functions entrusted to the various functionaries under a statute. The instructions and directions of the Central Board of Revenue are binding on the functionaries discharging their functions under the Ordinance in view of Section 8 so long as they are confined to the administrative matters. The interpretation of any provision of the Ordinance can be rendered judicially by the hierarchy of the forums provided for under the above provisions of the Ordinance, namely, the Income Tax Officer, Appellate Assistant Commissioner, Appellate Tribunal, the High Court and this Court and not by the Central Board of Revenue. In this view of the matter, the interpretation placed by the Central Board of Revenue on the relevant provisions of the Ordinance in the Circular, can be treated as administrative interpretation and not judicial interpretation.”

12. The above discussion leads us to the conclusion that the learned Tribunal was not bound to the Standing Committee or the Classification Committee's dictates as it if after having examined all necessary aspects rightly allowed the Appeal preferred by the Importers/ Respondents, therefore, it can safely be held that the subject consignments fell under PCT Heading 4810.1910 instead of PCT Heading 4810.1990, hence the questions are answered in

Negative, i.e. against the Applicant /Department and in favour of the Importers/Respondents.

13. As to maintainability of connected petitions wherein Show Cause Notices have been directly impugned before this Court, we are satisfied that the petitions are maintainable in the circumstances where the impugned Notices pertained to subsequent imports of the same material. Since the Tribunal's order is itself before this Court through various SCRA's, having been decided against the Department, dismissal of petitions in our view would be an abuse of the process of law. Accordingly, in these circumstances, the Petitions are allowed to the extent that notices impugned or pertinent constituents thereof are hereby quashed and *set aside*. Let copy of this order be sent to Customs Appellate Tribunal, Karachi, in terms of sub-section (5) of Section 196 of Customs Act, 1969. The case laws relied upon by the learned counsel for the Department are distinguishable from the facts and circumstances of the case at hand as in none of those cases the Superior Court allowed the High Court to touch the factual controversy while deciding Reference Applications.

14. Office to place copy of this order in the connected Reference Applications and petitions.

Karachi
Dated:10.08.2023

J U D G E

J U D G E

SCHEDULE

Sr. No.	Case No.	Parties
1.	SCRA No.38/2022	Collector of Customs v. M/s. Salman Paper Products Pvt. Ltd.
2.	SCRA No.137/2021	Collector of Customs v. M/s. Younus & Sons Pvt. Ltd.
3.	SCRA No.567/2022	Collector of Customs v. M/s. Yousuf & Co. Karachi & another
4.	SCRA No.568/2022	Collector of Customs v. M/s. Bilal Traders, Karachi & another
5.	SCRA No.569/2022	Collector of Customs v. M/s. Unico Printers, Karachi & another.
6.	SCRA No.570/2022	Collector of Customs v. M/s. Al-Noor Traders, Lahore.
7.	SCRA No.571/2022	Collector of Customs v. M/s. Niaz Paper Mark, Lahore & another.
8.	SCRA No.572/2022	Collector of Customs v. M/s. AMN Trading Co. Karachi & another.
9.	SCRA No.573/2022	Collector of Customs v. M/s. Saima Packaging Pvt Ltd, Lahore & another.
10.	SCRA No.574/2022	Collector of Customs v. M/s. Five Star Paper Merchant SMC Pvt. Ltd. & another.
11.	SCRA No.575/2022	Collector of Customs v. M/s. Quick Process, Karachi & another.
12.	SCRA No.576/2022	Collector of Customs v. M/s. Parri Traders, Karachi & another.
13.	SCRA No.577/2022	Collector of Customs v. M/s. The Time Press Pvt. Ltd. Karachi & others.
14.	SCRA No.578/2022	Collector of Customs v. M/s. M. Kamil Sons Pvt. Ltd. Karachi & another.
15.	SCRA No.579/2022	Collector of Customs v. M/s. A.B. Saeed Pvt. Ltd. Karachi & another.
16.	SCRA No.580/2022	Collector of Customs v. M/s. Ahmed Corporation Karachi & another.
17.	SCRA No.581/2022	Collector of Customs v. M/s. Zahabia Traders Karachi & another.
18.	SCRA No.582/2022	Collector of Customs v. M/s. Apple Paper Products Pvt. Ltd. Karachi & another
19.	SCRA No.583/2022	Collector of Customs v. M/s. Ammar Brothers, Lahore & another
20.	SCRA No.584/2022	Collector of Customs v. M/s. Spotilt Printers (Pvt.) Ltd. Karachi & another
21.	C.P. No.D-6104/2020	M/s. Salman Paper Products Pvt. Ltd. & others. V. Federation of Pakistan & others
22.	C.P. No.D-2758/2021	M/s. Salman Paper Products Pvt. Ltd. & others. V. Federation of Pakistan & others

23.	C.P. No.D-2977/2021	M/s. Younus & Sons Pvt. V. Federation of Pakistan & others
24.	C.P.No.D-3039/2021	M/s. Well Traders & others v. Federation of Pakistan & others.
25.	C.P. No.D-348/2021	M/s. Barry Ind. Pvt. Ltd. & others V. Federation of Pakistan & others.
26.	C.P. No.D-4774/2021	M/s. Cloud Traders & others v. Federation of Pakistan & others.
27.	C.P. No.D-6471/2021	M/s. Salman Paper Products Pvt. Ltd. & others. V. Federation of Pakistan & others
28.	C.P. No.D-6558/2021	M/s. Younus & Sons Pvt. Ltd. V. Federation of Pakistan & others.
29.	C.P. No.D-6765/2021	M/s. Nusrat Corp. & another v. Federation of Pakistan & others.
30.	C.P. No.D-6795/2021	M/s. Ali Impex & others v. Federation of Pakistan & others.
31.	C.P. No.D-6873/2021	M/s. A. Wahab Trader & others v. Federation of Pakistan & others.
32.	C.P. No.D-7230/2021	M/s. Habib Paper Corporation & others v. Federation of Pakistan & others.
33.	C.P. No.D-7458/2021	M/s. Supreme Art Pvt. Ltd. V. Federation of Pakistan & others.
34.	C.P. No.D-7573/2021	M/s. Five Star Paper Merchant v. Federation of Pakistan & others.
35.	C.P. No.D-2155/2022	M/s. Abbas Traders & others v. Federation of Pakistan & others.