

# **THE HIGH COURT OF SINDH, KARACHI**

Present: Mr. Justice Muhammad Junaid Ghaffar  
Mr. Justice Jawad Akbar Sarwana

## **Special Customs Reference Application No. 811 of 2023**

**Applicant:** The Director, Directorate of Intelligence and Investigation-Customs, Hyderabad.  
Through Mr. Pervaiz Ahmed Memon, Advocate.

**Respondents:** Ajab Khan,  
Through M/s. Sardar Muhammad Ishaque and Amjad Hayat, Advocates.

**Date of hearing:** 30.05.2024

**Date of Judgment:** 30.05.2024

## **JUDGMENT**

**Muhammad Junaid Ghaffar, J:** Through this Reference Application, the Applicant Department has impugned Order dated 23.11.2022 passed in Custom Appeal No. H-1905/2022 by the Customs Appellate Tribunal, Karachi proposing various questions of law. However, for the present purpose Question No. "iv" can decide the entire controversy as the said question now stands decided by the Honourable Supreme Court against the Applicant Department and in favour of the importers. The said question reads as under:-

"(iv). Whether the Appellate Tribunal has not erred in law by ignoring that the show cause notice issued on 07.04.2022 and Order-in-Original was passed on 01.08.2022 after getting extension from Collector (Adjudication) under Section 179(3) of the Customs Act, 1969?"

2. Heard learned Counsel for the parties and perused the record. Insofar as the above question is concerned, it appears that Show Cause Notice in this matter was issued on 07.04.2022 alleging violation of Sections 2(s) & 16 of the Customs Act, 1969 in respect of the goods i.e. solvent import / white spirit including the vehicle of the Respondent in question. The said Show Cause Notice was adjudicated vide Order-in-Original dated 01.08.2022 in terms of Section 179(3) of the

Customs Act, 1969 and the first proviso thereof, the cases wherein, Section 2(s) of the Act has been invoked are to be decided within a period of 30 days from the issuance of Show Cause Notice. Such period can be extended by the Collector for a maximum period of 60 days for reasons to be recorded. The Order-in-Original in the instant matter has been passed after 112 days; whereas, in the concluding paragraph of the said order, it has been stated that the Collector (Adjudication) has granted extension. Neither any reasons of the said extension have been mentioned; nor it has been stated that as to when the original period had expired, when the extension request was made and how much period was extended by the Collector. Notwithstanding this, as already noted, the maximum period for which the Collector can extend the adjudication proceedings is 60 days; therefore, the Order-in-Original was required to be passed within a period of 90 days from the date of Show Cause Notice, whereas, admittedly this time line was not complied with. It further reflects that in the entire Order-in-Original nothing has been stated as to any adjournment sought by the present Respondent, therefore, no such period is to be excluded from this time line. In somewhat similar circumstances, this Court in SCRA No. 119 of 2024 (*Director, Director General I & I (Customs), Karachi Vs. M/s. Chase Up*) vide Order dated 15.03.2024 while dealing the above proposition has held as under:-

“From perusal of the aforesaid finding of fact, which otherwise cannot be disturbed in our Reference jurisdiction, it clearly reflects that insofar as the delay in passing of the Order-in-Original is concerned, the same is not in dispute. The Show Cause Notice was issued on 24.05.2023 and in terms of the first proviso<sup>1</sup> to Section 179(3) of the Customs Act, 1969, wherein the provisions of clause (s) of Section 2 ibid have been invoked, such cases shall be decided within a period of thirty days of the issuance of show cause notice. It is not in dispute that the ONO was passed after 92 days from the date of show cause notice. While confronted, learned Counsel for the Applicant has though made an attempt to justify that the Applicant was not at fault and adjournments were sought by the Respondent, hence, the Order was passed within the time period as provided in the 2<sup>nd</sup> proviso to section 179(3) of the Act. However, we are not impressed with his submission inasmuch as the record placed before the Tribunal and as noted in the aforesaid

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<sup>1</sup> Provided that in cases, wherein the provisions of clause (s) of section 2 have been invoked, such cases shall be decided within a period of thirty days of the issuance of show cause notice

finding does not support this contention. Moreover, the Adjudicating authority has not even bothered to discuss this aspect of the case and has not endorsed the view point of the Applicant in any manner. These are admitted facts and cannot be controverted in such a manner on behalf of the Applicant.

Even if we look into the documents so placed before us today, the ONO is still time barred. As noted, the date of Show Cause Notice is 24.05.2023, whereas, the first date of hearing is 01.06.2023, when as per diary sheet the Respondent had already filed its reply to show cause notice, and next hearing was fixed on 13.6.2023. It is contended that an adjournment was sought by Respondent on 13.6.2023 till 13.07.2023, which was granted; however, surprisingly, the next date was fixed for 20.07.2023, when the representative of Applicant department was called absent. Record further reflects that thereafter on 25.7.2023 instead of conducting hearing the Collector extended the time for completion of proceedings for 60 days in terms of Section 179(3) of the Act, for certain reasons which are not relevant for the present purposes. It needs to be appreciated that the maximum adjournment which could be granted to the Respondent is for 30 days as per the 2<sup>nd</sup> proviso to Section 179(3) *ibid*. When the initial time of 30 days from the show cause notice dated 24.5.2023 is added to this 30 days of adjournment, the last date for passing the ONO was 23.7.2023, whereas the extension was admittedly granted by the Collector to himself on 25.7.2023, by which date the time had already expired. Therefore, even if the Collector had any jurisdiction to extend the time period (which he had not) it was done after the cut-off date; hence, was meaningless and was without lawful authority.

Lastly, in cases falling under Section 2(s) of the Act, no extension can be granted by the Collector for passing the ONO inasmuch as the authority vested in him is for cases other than of Section 2(s) as the said cases fall within the 1<sup>st</sup> proviso to Section 179(3) and are excluded from the ambit of Section 179(3) wherein the authority to extend the time period has been provided. This is more clarified if one examines the 3<sup>rd</sup> proviso<sup>2</sup> to Section 179(3) of the Act, which provides that in cases wherein goods are lying at sea-port, airport or dry-port, they shall be decided within thirty days of the issuance of show cause notice which can be “*extended by another fifteen days by Collector of Customs*”, whereas, in the first proviso the said authority is lacking and if the intention had been otherwise as observed above, then in the same manner the Collector would have been authorised to extend the time period in cases falling within the 1<sup>st</sup> proviso pertaining to cases of Section 2(s) of the Act, which is not the case, and therefore, in such case it is only FBR which can be approached to exercise its powers in terms of Section 179(4) of the Act and not otherwise. In view of such position, the finding of the Tribunal with respect to question in hand is unexceptionable and does not warrant any interference.”

3. As to the argument of the Applicants Counsel that such period of limitation is directory and not mandatory, it would suffice to observe that this issue now stands settled by the Supreme Court<sup>3</sup> by deciding it against the department in various cases under the Sales Tax Act, 1990 as well as The Customs Act, 1969, as both the statutes have analogous provisions insofar as passing of ONO within a certain period of

<sup>2</sup> [Provided further that in cases where in goods are lying at sea-port, airport or dryport, these shall be decided within thirty days of the issuance of show cause notice which can be extended by another fifteen days by Collector of Customs, if required so.]

<sup>3</sup> *Mujahid Soap & Chemical Industries (Pvt.) Ltd., v Customs Appellate Tribunal* (2019 SCMR 1735); *The Collector of Sales Tax v Super Asia Mohammad Din* (2017 SCMR 1427) and respectfully followed in the case of *A.J. Traders v Collector of Customs* (PLD 2022 SC 817), followed by this Court in SCRA No. 119 of 2024 (*Director, Directorate General, Intelligence & Investigation (Customs), Karachi Vs. M/s. Chase Up.*)

time is concerned. It has been held that wherever the legislature has provided certain period for passing of an Order; then the said direction is mandatory and not directory and in that case non-compliance of such a mandatory provision would invalidate such act. It has been further held that since adjudication was beyond time as prescribed in Section 179(3) of the Act; therefore, the said decision is invalid. In Super Asia (Supra) it has been held that wherever, the legislature has provided certain period for passing of an Order; then the said direction is mandatory and not directory and in that case non-compliance of such a mandatory provision would invalidate such act. In Mujahid Soap (Supra) it was held that since adjudication was beyond time as prescribed in Section 179(3) of the Act; therefore, the said decision is invalid. Both these views have been followed and affirmed in the case of A.J. Traders (Supra).

4. Accordingly, the proposed question as above, is answered in the **affirmative** against the Applicant and in favour of the Respondent and as a consequence thereof, answer to the remaining Question(s) would be an academic exercise; hence, we deem it appropriate not to answer the same. The Reference Application is hereby **dismissed**. Office is directed to sent copy of this order to Customs Appellate Tribunal, Karachi, in terms of sub-section (5) of Section 196 of Customs Act, 1969.

**JUDGE**

**JUDGE**

Ayaz P.S.