

2. Learned Counsel for the Applicant has contended that the Show Cause Notices in these matters were time barred inasmuch as it is not a case of any mis-declaration; hence, does not fall within the contemplation of Section 32(2) of the Act, but falls under Section 32(3) of the Act which provides a limitation of three years, and therefore, time barred. Per learned Counsel, the Tribunal has failed to clearly give its findings on the above objections raised in the memo of appeal; hence, it is a question of law arising out of the order of the Tribunal. He has further contended that the Applicant was fully entitled for claiming exemption under SRO 565(I)/2006 dated 05.06.2005 (“565”) under serial No. 20 inasmuch as the goods imported by the Applicant i.e. Copper Cathodes and Aluminum Ingots are nothing but raw material for the Cable and Conductor Industry and therefore, the department was not justified in initiating action for recovery of the duties and taxes. He has lastly contended that a Provisional Entitlement Certificate was issued to the Applicant, but despite repeated reminders, no final Certificate was ever issued and this inaction on the part of the department cannot justify the recovery of duties and taxes by way of the impugned action.

3. On the other hand, Respondent’s Counsel has supported the impugned order of the Tribunal and submits that the Applicant had failed to get Final Entitlement Certificate issued from the concerned department, including FBR, and therefore, was not entitled for any exemption on the imported goods. According to him, the products in question are not meant for Cable and Conductor Industry; therefore, the exemption available at Serial No. 20 of SRO 565 was not available.

4. We have heard both the learned Counsel, and perused the record. It appears that in both these Reference Applications, the Applicant imported separate consignments of Copper Cathode and Aluminum Ingots which were released on the basis of some Provisional Entitlement Certificate in terms of SRO 565 against Serial No. 20 of the said SRO without charging any duties and taxes on submission of postdated cheques for the differential amount of duties and taxes. It is the case of the department that this

concession was only available to such Industry which manufactures “Cables” and “Conductors”, whereas, from the material imported the Applicant is manufacturing Copper Rod and Aluminum Rod which falls within the category of Wire Rod Industry. It is further stated in the Show Cause Notice that the Applicant had also approached FBR for issuance of retrospective amendment in SRO 565 to include Wire Rod Manufacturing Industry along with Cable and Conductor Industry against Serial No. 20. Based on this detection and failure of the Applicant to get a Final Entitlement Certificate from FBR, a Show Cause Notice was issued on the ground that the Applicant had deliberately misused the exemption so granted as it was never entitled for such exemption. It was further alleged that the Applicant had also failed to obtain any Final Entitlement Certificate as required under SRO 565. On the other hand, all along the case of the Applicant remained that both these raw materials are included under Serial No.20 of SRO 565, and are meant for manufacture of Copper Rods and Aluminum Rods which in turn are used in the Cable & Conductor Industry, and therefore qualify for the claimed exemption. It was further pleaded that if not directly, but at least indirectly through a sister concern, the finished product was being used in the manufacture of Cables and Conductors. Matter was adjudicated against the Applicant and being aggrieved separate Appeals were filed before the Tribunal which stand dismissed in the following terms.

“15. Arguments heard from both the parties extended before the Tribunal and the contents mentioned in the ground of appeal as well as the counter objections filed by the respondents are taken on record. After the perusal of the record and the observations made thereon by the superior courts, it has been observed that the whole controversy revolved around the letter of the Chief Commissioner and clarifications made thereon by the Additional Collector, who issued the quantitative certificate and grant of provisional certificate thereon. It has been clarified that the appellant is the manufacturer of Cable and Conductor of related Industry and not the manufacturer of Copper Rod and Aluminum Rod. It is the mandatory condition No.(i) & (ii) of the SRO-565(I)/2006 dated 05.06.2006, the exemption is only available to the sales tax registered importer-cum-manufacturer, who are / were manufacturing the goods specified in column No. (i) & (ii) of the Table of the said SRO. Amendments in the Notification SRO-565(I)/2006 dated 5.6.2006 through SRO 42(I)/2007 dated 17.01.2007 and inserted the Serial No.31 where Copper Cathode HS CODE 7401.1100 and at S.No 32 Aluminum Ingots in HS Code 7601.1000 are inserted and the claim on that subject amendment made by the appellant also not with regard to their production. It is evident from the survey and record including the inspection made by the competent authority of the appellant's premises where it has been verified that the appellant has no in-house facility for manufacturer of wire rod which is in fact the clear violation of the subject SRO. As

per condition No.(i), it is mandatory that, a sales tax registered importer-com-manufacturer having suitable in-house facilities shall submit a complete list in the prescribed format [appended as Form-I] of his annual requirement of permissible items (inputs) he intends to import for the manufacturer of goods mentioned in column (2) of the Table to the Collector of Sales Tax and Federal Excise having jurisdiction or to any other organization or person as authorized by the Central Board of Revenue condition No.(ii) says that the importer-cum-manufacturer shall file a request containing a declaration of input / output ratios to the Collector of Sales Tax and Federal Excise or the authorized person. The Collector or the authorized person may accept the declaration of input output ratio as declared by the applicant and determine the annual requirements of inputs, without any physical verification, In case the Collector or authorized person is not satisfied with declared input output ratios of the items to be manufactured because of their being prima-facie not in accordance with the prevalent average of the relevant industry or for any other reason, he may, after allowing a reasonable provisional quantity, make a reference to the Engineering Development Board or 10CO or to any other recognized authority for final determination thereof. The Collector or authorized person shall then determine the final annual quantitative entitlement of inputs and the applicant shall proceed to consume imported inputs in accordance with the input output ratios and quantities so determined. It is also a mandatory binding for claim of subject exemption as per condition (v) of the said SRO, the importer-com-manufacturer. who shall file Goods Declaration on prescribed format and manner with complete details of authorization of imported inputs for clearance, The Collector of Customs on satisfaction of correct declaration shall allow clearance of imported inputs after obtaining postdate cheque for the differential amount of statutory tax and concessionary taxes and as per condition (vi) the importer-cum-manufacturer shall maintain record of the inputs and the goods manufactured from imported inputs in such form as may be prescribed by the Central Board of Revenue of required under any other law for the time being in force and as per condition (vii) the importer-cum-manufacturer shall communicate to the concerned Collector of Sales Tax and Collector of Customs in writing about the consumption of imported items within sixty days of consumption of goods. The postdated cheque shall be released or cancelled on receipt of written confirmation regarding consumption of goods by the importer-cum-manufacturer. In case of non-consumption within one year from the date of import; the importer shall pay the customs duty and other taxes involved or obtain extension from the Collector of Sales Tax and Federal Excise under intimation to Collector of Customs giving plausible reasons for a reasonable period. Evidently the subject conditions are not properly been complied by the importer. The mandatory requirement for filing the Goods Declaration on prescribed format and other relevant conditions which are mandatory to perform or comply with are not been fulfilled.

16. For further clarification we made some observations specially the provisional certificate which was issued about the recommended quantity for copper cathode. Although, the copper cathode is the raw material purposely for the use of manufacturing of copper rod and aluminum rod and industry related with that product. The configuration of copper cathode as per the definition of copper and cathode separately, the cathode is the electrode an electrical device where reduction occurs the negative electrode in an electrolytic cell and the positive electrode in a battery while the copper is a chemical element which is a reddish brown metal used for making electric wires, pipes and coins etc., distinctively the electrode and copper is an element. By placing such definition and clarification the concept of conductor defined as substance that allows electricity and heat to pass electric out or through it, the quality of the conductors are based on the elements, and their purity mechanism is the purity better conductor definitions. In this particular case the declaration made by the appellant as a manufacturer of copper and aluminum rod industry while according to the essence of the subject SRO, the exemption is only available to the cable and conductor industry and the raw material are could be imported or brought in the country under the claim of the subject SRO is only for the purpose of use in the cable and conductor industries.

The differentiation for causing a subject rational as exclusively related with the wisdom behind the mind of the legislature as well as the Federal Government. From the available evidence it is established that the appellant did not fill requisite in-house facility to convert the imported copper cathode into the finished product for example copper wire or other allied goods as envisaged in the SRO 565(I)/2006 dated 5.6.2006 read with amended notification SRO-42(I)/2007 dated 17.01.2007 which is the most essential and important condition for availing concession in the said notification. It is also evident from the record that appellant is a manufacturer of copper rod which is categories under Wire R Industry, whereas the concessionary rate of duty on import of copper cathode was only available to manufacturer of cable and conductors in terms of the said notification. It also transpires from the record of the case that the finished copper rod manufactured by the appellant itself constitute raw material for manufacture of cables and conductors. Under these circumstances, the appellants, are under legal obligation to dilute the element of mens rea, during the hierarchy of the customs as well as the evidence brought on record by the appellant in support of their claim has not up to the mark nor have any legal warrant to escape from the element of mens rea. The doubts of fraudulent intention are also not been substantiated or clarified the core issue of the subject case under discussion.

17. Moreover, as per available record no final certificate which could subsequently be issued to authenticate the provisional certificate was ever issued to the appellant.”

5. The controversy insofar as the merits of the case is concerned revolves around SRO 565 and Serial No.20 thereof, which governs the underlying exemption, therefore, before proceeding further, it would be advantageous to refer to the relevant provisions of SRO 565 as well as the details available under Serial No. 20 which reads as under:-

“Notification No. S.R.O. 565(I)/2006, dated 5th June, 2006.--In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), and in suppression of Notification No. S.R.O. 565(I)/2005, dated the 6th June, 2005, the Federal Government is pleased to exempt raw materials, sub- components, components, sub-assemblies and assemblies, as are not manufactured locally, specified in column (3) of the Table below, imported for the manufacture of goods specified in column (2) of the said Table, from so much of customs-duty leviable under the e First Schedule to the Customs Act, 1969: (IV of 1969), as are in excess of the rates specified in column (5) of that Table, subject to certain exclusion specified below, the special conditions as specified in column (6) "of the Table and the following general conditions; namely:--

- (i) A sales tax registered importer-cum-manufacturer having suitable in-house facilities shall submit a complete list in the prescribed format (appended as Form-I] of his annual requirement of permissible items (inputs) he ***intends to import for the manufacture of goods mentioned in column (2) of the Table*** to the Collector of Sales Tax and Federal Excise having jurisdiction or to any other organization or person as authorized by the Central Board of Revenue;
- (v) the importer-cum-manufacturer shall file Goods Declaration on the prescribed format and manner with complete details of authorization of imported inputs for clearance. ***The Collector of Customs on satisfaction of correct declaration shall allow clearance of imported inputs after obtaining postdated cheque for the differential amount of statutory tax and concessionary taxes;***
- (vii) ***the importer-cum-manufacturer shall communicate to the concerned Collector of Sales Tax and Collector of Customs in writing about the***

consumption of imported items within sixty days of consumption of goods.

The postdated cheque shall be released or cancelled on receipt of written confirmation regarding consumption of goods by the importer-cum-manufacturer. In case of non-consumption within one year from the date of import; the importer shall pay the customs duty and other taxes involved or obtain extension from the Collector of Sales Tax and Federal Excise under intimation to Collector of Customs giving plausible reasons for a reasonable period;

- (viii) the Collector of Customs may, on its own or through the Collector of Sales Tax and Federal Excise or through any other department working under Revenue Division, whenever deemed necessary get the records of the importer-cum-manufacturer audited and may also get the stocks verified. In case found that the inputs have not been properly accounted for or consumed for the manufacture and supply of goods as prescribed, the Collector may initiate proceedings for the recovery of leviable customs-duty and other taxes besides penal action under the relevant provisions of the laws in force.”

Relevant Entry of SRO

(1)	(2)	(3)	(4)	(5)	(6)
S.No.	Description of goods To be manufactured	Description of Raw Material	Headings	Extent of Exemption	special conditions
20.	Cables and Conductors.	Raw Materials (excluding artificial Plastic resin)		5% ad val	Nil
		(1)			
		(2)			
		(3)			

6. The aforesaid SRO was then amended by SRO 42(I)/2007 dated 17.01.2007 whereby, the two items in question were added in the said SRO: -

“GOVERNMENT OF PAKISTAN
MINISTRY OF FINANCE, ECONOMIC AFFAIRS, STATISTICS AND REVENUE
(REVENUE DIVISION)

Islamabad, the 17th January, 2007

NOTIFICATION
(CUSTOMS)

S.R.O.42 (I)/2007.- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), the Federal Government is pleased to direct that the following further amendments shall be made in its Notification No.S.R.O.565(I)/2006, dated the 5th June, 2006, namely:-

In the aforesaid Notification, in the Table.

- (1) against S.No.20 in column (1), in columns (3), after item (30) and the entries relating thereto in columns (4) and (5), the following new items and the entries relating thereto shall be added, namely,-

“(31) Copper Cathode 7403.1100 0% ad val”;
(32) Aluminum Ingots 7601.1000”

7. It is a matter of admitted position that though a Provisional Entitlement Certificate was issued to the Applicant in respect of both the items; however, the Applicant was never able to obtain a Final Entitlement Certificate after a due survey of the manufacturing facilities and therefore, had failed to fulfill the requisite conditions of the said SRO. As to the claim of the Applicant that manufacture of Copper Rods and Aluminum Rods falls within the type of industry listed at Serial No.20 i.e. Cable and Conductor is concerned, for that again the Applicant was required to get such certification from FBR as to whether the type of industry being run by them falls within Serial No. 20 or not. The Applicant had claimed certain exemption under SRO 565; was issued a provisional certificate at its request; and in terms of the conditions of the SRO in question was required to obtain a final Entitlement Certificate from FBR. Its admitted failure to obtain a final certificate apparently disentitles it from claiming exemption under the SRO. It is not in dispute that the Applicant neither manufactures “Cables” nor “Conductors” by itself. It manufactures “Copper Rods” and “Aluminum Rods” from the imported raw material and sells it. It may be a case that both the manufactured items are then used by the *Cables and Conductors* Industry; however, the SRO grants exemption to raw materials which are to be used exclusively for the manufacture of Cable and Conductor as an end product as provided in column 2 above. It does not cover any intermediate industry. Lastly, the argument that manufacture of Copper Rods and Aluminum Rods is covered by Serial No.20 of the table to the SRO (Cable and Conductor Industry) or not, we may observe that it is a factual determination and that has been done by the Tribunal against the Applicant which cannot be interfered by us in our Reference Jurisdiction as per settled law the highest authority for factual determination in tax matters is the Tribunal¹. The Applicant in its reply before the Adjudication and Appellate authorities has itself admitted that they are not engaged in the manufacture of any Cables or Conductors; rather, their finished product itself is a raw material for such industry. It has been further

¹ Commissioner Inland Revenue v RYK Mills Lahore; (SC citation- 2023 SCP 226); Also see Commissioner Inland Revenue v. Sargodha Spinning Mills, (2022 SCMR 1082); Commissioner Inland Revenue v. MCB Bank Limited, (2021 PTD 1367); Wateen Telecom Limited v Commissioner Inland Revenue (2015 PTD 936)

reported by the Survey team that the Applicant has no in-house facility for the manufacture of Cables and Conductors. All these factual aspects have gone unrebutted, whereas, even otherwise cannot be looked into at this stage of the proceedings.

8. As to the argument that the Show Cause Notice was time barred under Section 32(3) of the Act, as a limitation period of 3 years would apply, it would suffice to observe that this argument is also misconceived. The Applicant had got the goods cleared on the basis of a Provisional Entitlement Certificate by providing postdated cheques which could only be discharged upon fulfilling the requisite conditions of the SRO in question and for that the Applicant was required to produce a Final Entitlement Certificate from the Concerned Collectorate / FBR. This admittedly, was never done by the Applicant and therefore, now agitating the question that the case falls within Section 32(2) or 32(3) of the Act is nothing but an attempt to avoid the liability already incurred upon the Applicant. In fact, the record demonstrate that the Applicant had also made an attempt to get the post-dated cheques discharged in absence of a Final Entitlement Certificate which was detected by the Intelligence Department and impugned proceedings were initiated; hence, the case would otherwise be covered under Section 32(2) of the Act, providing for a limitation of 5 years. In somewhat similar situation an argument was raised on behalf of one of the Importers in the case of ***Paramount Spinning***² and a learned Division Bench of this Court had repelled this argument, whereas, such view was affirmed by the Supreme Court in ***Paramount Spinning***³. The finding of this Court is as under.

"We are of the opinion that since the exemption which was granted was a contingent exemption, it can be assumed that the appellant was liable to pay the duties unless he fulfilled the conditions on which the exemption was contingent and not fulfilling these conditions or violation thereof will render them liable to pay the government dues on the day of the clearance and there is no time limit for collection of such government dues. We are, therefore of the considered opinion that even the show cause notice or the order in original was not needed to collect these dues and a simple demand notice would have sufficed. We, therefore, hold that the action leading to the recovery of the disputed dues was not barred by the period of limitation."

² Paramount Spinning Mills Limited v Customs, Excise & Sales Tax Appellate Tribunal (judgment dated 30.6.2009 in Special Customs Appeal No.121 of 2000)

³ 2012 SCMR 1860

9. In view of hereinabove facts and circumstances of this case, the proposed Questions No. (I), (II) & (III) are answered against the Applicant and in favour of the Respondent. Insofar as Question No. (IV) is concerned, the same has not been pressed. Lastly, for question No. (V), it may be observed that this cannot be answered by this Court under its Reference Jurisdiction and for that it is for the Applicant to approach the department and seek any correction in the calculation of the amount so demanded by the Department. As a consequence, thereof, both these Reference Applications are ***dismissed***. Let copy of this Order be sent to Customs Appellate Tribunal in terms of sub-section (5) of Section 196 of Customs Act, 1969, with further directions to the Office to place copy of this order in connected Reference application.

Dated: 08.05.2024

J U D G E

J U D G E

Arshad/