

IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application ("SCRA") Nos.168 to 173 of 2011

Date

Order with signature of Judge

**Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Mohammad Abdur Rahman**

APPLICANT : **Collector of Customs, MCC Appraisement**
(in all SCRA's) : **Through Mr. Pervaiz A. Shams Memon,**
Advocate.

RESPONDENT : **M/s. Orient Colour Lab Pvt. Ltd.**
(in all SCRA's) : **Through Mr. Ozair Khan Shoro, Advocate.**

Date of Hearing : **18.09.2024**

Date of Judgment : **18.09.2024**

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through these Reference Applications the Applicant department has impugned a common Order dated 30.11.2020 passed in Customs Appeals No.K-73 to 78 of 2010 [Old Customs Appeals Nos.385 to 390 of 2009] by the then Customs, Excise & Sales Tax Appellate Tribunal, Bench-II at Karachi; proposing various questions of law, however, through statement dated March 2012, the Applicant department has proposed the following questions: -

- 1) *Whether on the facts and circumstances of the case, the Appellate Tribunal erred in law to hold that the issuance of an order was mandatory even before the promulgation of Section 81 (5) of the Act which is effective from 01.07.2010?*
- 2) *Whether on the facts and circumstances of the case that the Appellate Tribunal erred in law is not treating the Customs value data of similar kind of goods which proved clearance of the same commodity for home consumption at higher assessed values as evidence at all?*
- 3) *Whether on the facts and circumstances of the case, the Appellate Tribunal erred in law that the presence of in- built mechanism of Section 81(3) of the Act, for adjustment/ recovery of the differential amount of duty / taxes issuance of an order is mandatory?*
- 4) *Whether on the facts and circumstances of the case, the Appellate Tribunal erred in law by treating the demand enforcement assessment order as an order for finalization of provisional assessment which was actually within the stipulated period and conveyed vide letter / notice dated 23.05.2006, mis-reading / non-reading the record of the case?*

- 5) *Whether on the facts and circumstances of the case, the Appellate Tribunal erred in law by not considering the proposition of law that as per amended provisions of Section 194-A (I) of the Act non filing of any appeal / petition against the Order-in-Review dated 15.12.2008 passed by the Director General of Customs Valuation, under Section 25D of the Act has attained / rendered the Valuation Ruling as final decision?*

2. Heard learned counsel for the parties and perused the record. Insofar as the proposed questions of law are concerned, it appears that if question No.4 as above, (duly rephrased), as to **“whether hearing notice dated 23.5.2006 by itself was an order finalising the provisional assessment of the goods within the limitation period as provided under Section 81(2) of the Act”**, is dealt with first, then the remaining questions are not required to be answered. This is so because a learned Division Bench of this Court in ***Sus Motors***¹ upheld by the Hon’ble Supreme Court in ***Federation of Pakistan v Sus Motors***² has already decided this question in favour of the importers by holding that if provisional determination is not finalized within the stipulated period, then such provisional assessment becomes final. It further appears that the Tribunal has also framed various questions, including the question regarding the above issue, which reads as under: -

- iv) *Whether the final assessment order No. 16/2008 dated 21.7.2008 passed by Assistant Collector of Customs (Appraisalment) is patently barred by limitation in terms of subsection (2) of Section 81 of the Customs Act, 1969 since the provisional assessment in terms of Section 81 was made on 27.4.2006?*

3. The findings of the Tribunal on the above question read as follows: -

“16. As regards issue No. (iv), the case record shows that provisional assessment was made on 27.4.2006 and final assessment order No.16/2008 was passed on 21.7.2008 i.e. after a lapse of a period of more than two years. As such it is barred by limitation in terms of Section 81 (2) of the Customs Act, 1969. The time bar has created a vested right in favour of the assessee which

¹ *Sus Motor (Pvt) Limited v Federation of Pakistan* (2011 PTD 235)
Similar view has been expressed in *Hassan Trading Company V. CBR* (2004 PTD 1979), *Collector of Customs (Appraisalment) v Auto Mobile Corporation of Pakistan* (2005 PTD 2116) and *Wall Master V Collector of Customs* (2005 PTD 2573)

² 2023 SCMR 1421

cannot be denied to him in view of a number of judgments of superior courts in this behalf. Even otherwise the provisional assessment becomes final after the expiry of the prescribed period as held by the Honourable High Court of Sindh in the judgments reported as 2004 PTD 1971, 2006 PTD 1276 and Special MASTICustoms Reference Application No.33 of 2010 recently decided on 1.10.2010. The view is supported by the recent amendment in EXCISE & SAL Section 81(b) of the Customs Act, 1969 which reads as under:-

(b) after sub-section (4), the following new sub- section shall be added namely:-

"(5) On completion of final determination under sub-section (3) or (4), the appropriate officer shall issue an order for adjustment, refund or recovery of amount determined, as the case may be."

17. The above amendment clearly stipulates that the appropriate officer shall issue an order for adjustment, refund or recovery of amount determined completion of final on determination under sub-section (3) or (4) of the Customs Act, 1969. The stance of the taxpayer as against the revenue in such cases was disputed and has been resolved through the aforesaid amendment. As such issue No. (iv) is answered in the affirmative."

4. Today, the Applicant's Counsel has been confronted as to the above findings as well as facts available on record and though he has conceded that the assessment order in these matters was passed on 21.07.2008, however, after referral of the matter to the Valuation Department a Valuation Ruling was issued on 16.05.2006, whereas, the hearing notice was also issued within the limitation period on 23.05.2006 and, therefore, the Tribunal was not justified in answering the above question in favour of the Respondent. According to him the Applicants case is that issuance of hearing notice dated 23.5.2006 was in fact a finalisation of the provisional assessment; hence, the order of the Tribunal in this regard is flawed. However, we are unable to agree with this contention, as admittedly in the instant matter, provisional determination was made on 27.04.2006, whereas final assessment order was passed on 21.07.2008 i.e. after more than two years, which is beyond the period of limitation so provided in Section 81(2) of the Customs Act, 1969.

5. As to the contention of Applicant's Counsel that a hearing notice, or for that matter a valuation ruling was issued within time, it would suffice to observe that mere issuance of a notice or a ruling does not amount to finalizing the assessment proceedings as in terms of Section 81 of the Customs Act, 1969 a final assessment order is required to be passed, notwithstanding that whether any advice was received in time or otherwise. This is an internal matter between the concerned Collectorate and the Valuation Department; and in any case cannot be made basis to enlarge the statutory period of limitation of as provided under Section 81 of the Customs Act, 1969. Notwithstanding this, in the instant case even if the notice or ruling were issued in time; however, the assessment order was admittedly passed after the limitation stipulated under Section 81 *ibid*, and therefore, the Tribunal has arrived at a correct decision which is in conformity with law. Lastly, even if this argument is accepted, then why subsequently a final assessment order was passed by the Applicant department on 21.07.2008. There is no convincing reply or argument on behalf of the Applicant in this regard.

6. In view of hereinabove facts and circumstances of the case, the question as framed by the Tribunal in its order is answered *in affirmative* in favour of the Respondent and against the Applicant department and consequently thereof, all these Reference Applications are hereby dismissed. The remaining questions need not to be answered. Let copy of this order be sent to the Customs Appellate Tribunal in terms of sub-section (5) of Section 196 of the Customs Act, 1969.

J U D G E

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Farhan/PS