

Order Sheet

IN THE HIGH COURT OF SINDH, KARACHI**Special Custom Reference Application No. 234 of 2024**

Date

Order with signature of Judge

Hearing/Priority

- 1.For order on office objection Nos.16, 25 and 28
- 2.For hearing of main case
- 3.For hearing of CMA No.999/24

30.04.2024

Mr. Makhdoom Ali Khan, assisted by M/s. Ali Almani, Furqan Mushtaq and Samiur Rehman, Advocates for Applicant

Mr. Kashif Nazeer, Assistant Attorney General

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Mr. Sardar Zafar Hussain has affected appearance on behalf of the department and files Vakalatnama, which is taken on record.

Through this Reference Application, the Applicant has impugned order dated 19.03.2024 passed by the Customs Appellate Tribunal, Bench-III, Karachi, in Custom Appeal No.K-162/2020, by raising the following questions of law:-

- (i) Whether the Impugned Order which does not provide any independent reasoning is sustainable in law?
- (ii) Whether the Tribunal could have, in law, recorded any findings of fact different from those of the Engineering Development Board ("EDB") dated 21.06.2006 ("2006 Report") which findings were in favour of Applicant?
- (iii) Whether such findings conform to the requirements of the law as laid down by the superior courts as well as S.R.O 484(I)/92 dated 14.05.1992 ("SRO 484") and S.R.O 978(I)/1995 dated 04.10.1995 ("SRO 978")?
- (iv) Whether Customs authorities can, in law, initiate proceedings and recover Sales Tax on consignments earlier cleared and released?
- (v) Whether the Show Cause Notice ("Show Cause Notice") dated 25.09.2019 is vague and fails to provide the required details of consignments on which the Customs authorities are seeking to recover Customs duties and taxes?
- (vi) Whether to the extent of machinery against which Customs authorities had never issued any show cause notice prior to 25.09.2019, the Show Cause Notice was barred by limitation?
- (vii) Whether Customs General Order 17 of 1994 dated 30.10.1994 conforms to statutory limits and whether it can be applied retrospectively to imports for which letters of credit were established prior to that date?

- (viii) Whether a penalty can be imposed in the absence of a finding of *mens rea*?

Learned counsel for the Applicant has contended that neither the Collector of Customs (Adjudication-I), Karachi, nor the Customs Appellant Tribunal have appreciated or adjudicated the legal, as well as the factual issues raised by the Applicant and therefore, the orders passed by both the forums below are liable to be set aside on this ground alone. According to him the Tribunal being the last fact finding forum ought to have examined the same and record its findings on all such aspect of the case as according to him, besides legal issues in respect of limitation, the Applicants case is also premised on the fact that majority of the outstanding demand has already been paid and the department has erred in its reconciliation. On his pointation, we have gone through the orders of the Customs Appellate Tribunal and the Collector of Customs (Adjudication-I) and the relevant findings of these two forums are as under:-

Order of Customs Appellate Tribunal:-

25. Heard both the sides and examined the case record. What we have gathered is that appellant imported certain plant and machinery which included components that were manufactured locally and exemptions was not available thereon. The CBR/FBR allowed the release of the same against an undertaking which was subsequently not honoured by the appellant importer, resultantly lengthy rounds of litigation started, but the final outcome remained the same that the impugned goods were manufactured locally and the exemption was not available on them. The first question that come to our mind is why the CBR/FBR allowed release of the Impugned goods on undertaking and jeopardized the legitimate revenue of the State as the CBR/FBR is not empowered under any provision of the Customs Act, 1969, to allow release of goods without payment of leviable duty/taxes on undertaking. Therefore, the Chairman CBR/FBR is directed to look into legality of this action on the part of the CBR/FBR and take whatever remedial measures required to safeguard the legitimate revenue of the State that has been put at stake by release of goods on undertakings.

26. It is also observed that in para 37 of the impugned Order-in-Original, the Adjudication Authority has already excluded recovery of duty/taxes from components that are sub-judice, therefore, any consignments that are sub-judice before the Hon'ble High Court or the Hon'ble Supreme Court of Pakistan are to be excluded from the implementation of the impugned Order-in-Original.

27. The contention of the appellant that the Show Cause Notice does not specify GD numbers, names of goods and PCT headings etc., after such lengthy litigation spreading over three decades seems to be too naive. However, the respondent is directed to provide details to the appellant, only, if they were not provide before during rounds of litigation and make recoveries as per the impugned Order-in-Original which is hereby upheld”

Order-in-Original No.559/2019-20, passed by the Collector of Customs (Adjudication-I), Karachi.

“36. Having perused the case record and considered written as well as verbal arguments of both the sides I observe and order as under:

- a) Case of the collectorate against respondent importer in respect of 16 consignments imported by M/s. Fauji Cement Company Limited, Rawalpindi is established and submission of contravention report in respect of these consignments (subject matter of this Show Cause Notice) is tenable. The decision of FBR vide letter No.31/March/1996 dated 09.05.1996 as above also substantiates the contention of the case making collections as far as adjudication of 16 consignments under issuance of this Show Cause Notice is concerned.
- b) It is observed that leviable custom duty and taxes at standard rate are required to be paid by the respondent importer as the same are being locally manufactured in view of clarification by FBR letter No. 31/March/1996 dated 09.05.1996.
- c) Submission of the advocate of the respondent to provide him complete detail of duty and taxes as per impugned GDs on which these 16 consignments were cleared, however, seems reasonable.
- d) During the course of hearing and also in his written arguments the respondent has not been able to produce any restrain order from any competent legal fora for not recovering the duty and taxes or not to adjudicate the case.
- e) Respondent importer has also failed to prove his contention that these 16 consignments (subject matter of present Show Cause Notice) were exempted from duty and taxes due to any reason.
- f) In case any of consignments (under issuance of this Show Cause Notice) is sub-judice before Honourable High Court, recovery action for the same cannot be initiated. If any payment has already been made by the respondent in respect of the 16 consignments, the same will be adjusted while recovering the amount of duties & taxes.

37. Based on above mentioned observations I am of candid view that case of the collectorate against the respondent importer is established and allegations levelled in the Show Cause Notice are proved. Respondent importer M/s. Fauji Cement Company Limited, Rawalpindi is, therefore, ordered to deposit the correctly calculated leviable amount of duty and taxes in above terms into government revenue henceforth. Surcharge applicable at bank

rate will also be paid by the respondent importer in respect of withheld government dues and revenue as per bank rate. However, the collectorate is directed to provide GD wise details of recoverable amount of duty and taxes to be deposited by the respondent importer keeping in view the above mentioned observations and also ensure that duties and taxes in respect of consignment will not be demanded if such case is sub-judice before any legal fora. A personal penalty of Rs.1,000,000/- (Rupees One Million only) is also imposed on the respondent importer for violation of provisions of law as mentioned in the Show Cause Notice.

38. Show Cause Notice No.Coll.Adj.-I/77/2019-20 (SI/MISC/264/2018-VI) dated 20.09.2019 is disposed of accordingly”.

From perusal of aforesaid findings of the two forums below, it does not reflect that any of them has adjudicated and decided the questions raised by the Applicant, including the issue of limitation as well providing the required details of consignments so as to reconcile the claim in respect of recovery of Customs duties and taxes. In fact, in Para 37(c), the Collector has observed that the request “seems to be reasonable”; but at the same time has passed the Order, asking the Applicant to approach the Respondents for reconciliation, if any. Such conduct does not seem to be appropriate and correct in law. We have confronted the learned counsel for the Respondent/department, but he has not been able to satisfactorily respond. In our considered view orders of both the forums below are non-speaking orders, whereas, despite recording the objections (both legal as well as factual), they have deliberately avoided to adjudicate the same. Such an approach is to be deprecated as in this Reference jurisdiction we are not required to decide all such issues, which in the first instance are required to adjudicated by the forums provided under the hierarchy under the tax laws.

In view of the above, we are left with no option, but to set aside the orders passed by both forums below. It is so ordered. Matter stands remanded to the Collector of Customs (Adjudication-I), Karachi for deciding it afresh in accordance with law, after hearing the parties and considering the objections raised by the Applicant in its reply to Show Cause

Notice, including any additional objections, if any. Since the issue is pending since long, let such exercise be carried out within a period of (60) sixty days from the date of this order.

The Reference Application stands allowed in the above terms. Office to send the copy of this order to the Collector of Customs (Adjudication-I) Karachi, for compliance.

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Ashraf