

THE HIGH COURT OF SINDH, KARACHI

Special Custom Reference Application No. 233 of 2024

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

**Applicant: Collector of Customs, Collectorate
of Customs Enforcement, Customs
House, Karachi through Mr. Faheem
Raza Khuhro, Advocate.**

Respondents. M/s. Indus Divers & another.

Date of hearing: 06.11.2024

Date of Judgment: 06.11.2024

JUDGMENT

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant has impugned judgment dated 06.12.2023 passed in Customs Appeal No. K-7155/2021 by the Customs Appellate Tribunal, Bench-I at Karachi proposing the following questions of law:-

- I. Whether the learned Customs Appellate Tribunal Karachi has failed to determine actual fact that a body of Toyota Hilux Pickup can be mounted on a chassis frame of a Nissan Truck as per registration documents and to hold that the claimant has discharged the burden on proof properly as provided under section 187 of the Customs Act, 1969?
- II. Whether the Customs Appellate Tribunal has failed to appreciate that facts show chassis of impugned vehicle pertaining to Nissan Truck whereas the vehicle is registered as Nissan Station Wagon with body of Toyota Hilux mounted on it resulting in failure of the claimant to discharge the burden of proof?
- III. Whether on the facts and the circumstances of the case, the learned Customs Appellate Tribunal has justified by holding that the body of Toyota Hilux Pickup Double Cabin has been legally mounted on the chassis frame of Nissan Station Wagon manufactured or locally produced by M/s. Gandhara Nissan Ltd?
- IV. Whether the respondents have adduced the material evidence which may prove that the chassis frame of Nissan Station Wagon was locally produced and body of Toyota Hilux Pickup Double Cabin was legally imported into the country under valid license and all leviable duty and taxes were paid in accordance with law?

- V. Whether the Customs Appellate has seriously erred in law by disposed of controversy involved in the impugned order dated 06.12.2023 by considering that the impugned vehicle was legally imported into the country and all leviable duty and taxes had been paid in accordance with law?
- VI. Whether the conclusion arrived at by the Customs Appellate Tribunal with regard to the fate of the case is in derogation of judgment of Hon'ble Supreme Court of Pakistan in Civil Appeal No. 1625 of 2015 titled Muhammad Ramzan v. Collector of Customs?

2. Heard learned Counsel for the Applicant and perused the record. We have confronted the Applicant's Counsel that the proposed questions appear to be questions of facts; whereas, this matter pertains to the period prior to Finance Act, 2024 and this Court cannot look into the finding of fact determined by the Tribunal and learned Counsel has not been able to controvert such position except that the Tribunal has failed to appreciate the correct facts. It would be advantageous to refer to the finding of the Tribunal, which reads as under:-

“06. Arguments heard from both the sides and examined the case record. The facts of the case as presented before us are that;

- (i) The chassis Number is not tempered as per forensic report.
- (ii) No PRAL data of the subject chassis number is available.
- (iii) The chassis number belongs to a Nissan Truck.
- (iv) Body of Toyota Hilux Pick-up double Cabin has been fixed on the chassis of Nissan Truck.
- (v) Show Cause Notice mentions detained/seized vehicle as Nissan Station Wagon as per registration documents.
- (vi) The original file of the vehicle is not available with Motor Registration Authority, Karachi.

07. In view of the above facts, we are constrained to hold that it appears to be a case of body change. Body of a Toyota Hilux Pick-up Double Cabin has been mounted on a Nissan chassis manufactured by M/s. Ghandar Nissan Ltd. The respondent could not substantiate with any cogent evidence that the subject vehicle has been smuggled into Pakistan. We are of the view that on the basis of a body change on a locally produced vehicle, the charges levelled in Show Cause Notice do not stands established.

08. The appeal is allowed with no order as to costs.”

3. From perusal of the aforesaid finding of the Tribunal, it appears that the Tribunal has finally determined the facts and the since a finding of fact has been recorded which is primarily based upon documentary evidence submitted by the Respondent, to which apparently there is no denial, whereas such finding 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.

4. It further appears that though no question has been proposed by the Applicant nor the Tribunal has dilated upon that aspect; however, the Order-in-Original dated 18.03.2021 appears have been passed beyond the time period as prescribed in Section 179(3) of the Act, 1969, inasmuch as the Show Cause Notice is dated 12.08.2020 and the Order-in-Original has been passed on 18.03.2021. The relevant portion of the order of the adjudicating authority reads as under:-

“5. Record of the case has been examined and allegations levelled against the Respondent considered. The case is pending since August last year. Despite extensions in time period, no one preferred to defend the case. Since the case cannot be kept pending for indefinite period. The record shows no hearing was fixed since September 2019, therefore, to meet the ends of justice a final opportunity of hearing was accorded by undersigned, which was duly attended by the representatives of the respondent. Therefore, to meet the ends of justice, an opportunity was accorded by the undersigned. For the allegedly smuggled vehicle import record is not available, the respondents argued that they had purchased the vehicle from local manufacturers, but when asked about any proof of purchase from local manufacturers, the respondent could not produce them. Thus the charges stand established. I therefore order outright confiscation of the seized vehicle.

6. The Show Cause Notice is disposed off in above terms.

7. This order consists of (07) pages and each page bears my initials as well as an official seal with full signature on the last page.”

4. From perusal of the above finding, it appears that the Adjudicating Authority has not bothered to even seek extension as apparently this is a case involving Section 2(s) of the

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)

Customs Act, 1969 and the period provided for passing of Order-in-Original is 30 days. The law to this effect has now been settled against the department as this issue now stands decided by the Supreme Court² 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 provision insofar as passing of an Order in Original (“ONO”) within a certain period is concerned. 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)

6. In view of the above, the proposed questions are answered against the Applicant and in favour of the Respondent, whereas the issue regarding the ONO being time barred also stands decided against the Applicant. Consequently thereof, this Reference Applications is hereby dismissed in *limine* along with pending application(s). 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.

JUDGE

JUDGE

Ayaz P.S.

² 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),