

IN THE HIGH COURT OF SINDH AT KARACHI

Const. Petition No. D – 1161 of 2018

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Zulfiqar Ahmed Khan

Petitioner: M/s. Sun Tube (Pvt.) Ltd.,
through Mr. Muhammad Adeel Awan,
advocate.

Respondents: Federation of Pakistan & others,
through: Ms. Afsheen Amaan, advocate
&
Mr. Mir Hussain,
Assistant Attorney General.

Date of Hearing: 14.11.2018.

Date of Order: 14.11.2018.

ORDER

Aqeel Ahmed Abbasi, J: Through instant petition, petitioner has claimed the refund of the disputed amount of duty and taxes, which was secured by the petitioner, at the time of seeking provisional release of the subject consignment, however, subject to deposit of 50% of the differential amount of duty and taxes before the concerned Collectorate and remaining 50% before the Nazir of this Court in the shape of Pay Order/Bank Guarantee, as according to learned counsel for the petitioner, petition filed by the petitioner alongwith other importers of the alloy steel, was allowed through a consent order dated 04.05.2015, in the case of the petitioner in C.P.No.D-3816/2013 [*Karachi Tubes Mills (Pvt) Ltd. & others v. The Federation of Pakistan & others*] and thereafter, the matters were referred for the purposes of testing to A. Q. Khan Laboratory and in view of favourable result, the Assessment Order dated 05.11.2015 has been passed in the case of the petitioner by the Deputy Collector, Group-V (Legacy Issues) through Assessment Order dated 05.11.2015 in respect of the 14 GDs of the

petitioner, which was subject matter in the aforesaid petition and the version of the petitioner has been accepted. However, according to learned counsel, while passing the Assessment Order, the Deputy Collector has been pleased to observe that differential amount partly paid to the department and partly secured with the Nazir of this Court through Pay Order/Cheque, will be refunded to the importer, however, subject to discharge of burden of proof in terms of Section 19A read with Section 30A of the Customs Act, 1969. Per learned counsel, the similar Assessment Orders passed by the department were challenged by some of the petitioners through C.P.No.D-6367/2017 [Re: *M/s. Akbat Tube Industries & another v. The Federation of Pakistan & others*], whereas, a Divisional Bench of this Court has been pleased to allow such petition vide order dated 06.02.2018 in terms of Para: 21 of the said order, wherein, it has been held that in these cases, the provision of Section 33 and 19A are not attracted as the duty paid by the petitioner is the amount, which was liable to be paid in accordance with law and does not include the differential amount, which was secured by the petitioner by way of Pay Order/Bank Guarantee before the concerned Collectorate and Nazir of this Court on account of litigation as referred to hereinabove. In support of his contention, learned counsel for the petitioner has referred to the consent order passed by a Divisional Bench of this Court in C.P.No.D-3816/2017 and others as well as the order dated 06.02.2018 passed in C.P.No.D-6547/2016. Learned counsel for the petitioner has also referred to the Certificates issued by the Nazir of this Court in respect of the 14 GDs of the petitioner, which was subject matter in the aforesaid petitions.

2. While confronted with hereinabove factual position, learned counsel for the respondents could not controvert the same, however, submits that

petitioner may be directed to appear before the Concerned Collectorate and discharge its burden in terms of Section 19A of the Customs Act, 1969, thereafter, the case of refund will be processed in favour of the petitioner. It has been further stated by the learned counsel for the respondents that against such order, CPLA has been filed before the Hon'ble Supreme Court.

3. We have heard the learned counsel for the petitioner, perused the record as well as the judgment passed by a Divisional Bench of this Court as referred to hereinabove on the subject controversy. Since the facts as stated by the petitioner, have not been disputed by the respondents, where only controversy to application of Section 19A and the 33A of the Customs Act, 1969, in the case of the petitioner, therefore, the decision of the Divisional Bench of this Court in C.P.No.D-6367/2017, caters to the controversy involved in the instant petition. we would refer to the relevant para of the judgment passed by the Divisional Bench of this Court with particular reference to Para 13 and 21, wherein, the subject controversy has been dealt with, which reads as follows:-

“13. As mentioned above, learned counsel for the department has argued that the request for refund should have been made within one year as provided for in section 33 whereas learned counsel for the petitioners argued that section 33 is not applicable in the present case. In this regard, we observe from the current proceedings as well as the earlier round of litigation between the parties in C.P.No.D-3816 of 2013 etc that the guarantees/pay orders furnished by the petitioners were furnished in from forum of security (to be encashed in the event they lost the case) and not on account of inadvertence, error or misconstruction. The importers stance was clear all along – they were not liable to pay the customs duty being demanded on their imports. The guarantees/pay orders were furnished as an interim arrangement to prevent further demurrage of their consignments and at that preliminary stage, to partially protect their interest of the department in the even it was found that the importers were

indeed liable to pay 5% customs duty. The Supreme Court in the Gul Rehman case considered the position in a similar set of facts and circumstances. In that case, the respondent was an importer of fabrics and it made a declaration in the bill of entry that the imported goods were covered by heading 5407.5200 attracting 14% customs duty. The department controverted this declaration and claimed instead that the correct PTC heading was 5903.1000, on which 25% customs duty was payable. In appeal, it was determined that the appropriate heading was indeed 5407.5200 and that there was no misdeclaration by the respondent. The respondent sought refund of the amount paid by it on the basis of the order-in-original. The department declined to refund the said amount. Instead, the department held that as the incidence of the duty had been passed onto the consumer by the respondent therefore it was not entitled to any refund in terms of sections 33 and 19-A of the Act. The Court observed:

“.....it is clear from the language of section 33(1) that refund in terms thereof is to be allowed only where/if customs duty has been paid as a result of some inadvertence, error or misconception, which is not the position in the present matter. Right from the beginning the respondent has agitated that the declaration made by it under PTC heading 5407.5200 was correct. There was no advertence, error or misconception involved in such declaration whereas it has been the stance of the department that this heading was incorrectly attributed to the goods.”

The Supreme Court held as follows (emphasis supplied):

“Therefore the proviso to section 33 has to be confined to the particular sub-section to which it is attached, i.e. subsection in that the customs duty was not paid as a result of inadvertence, error or misconception then obviously the proviso would not be relevant. Before a proviso can have any application, the section itself must apply. A holistic reading of section 33 of the Act, particularly the provisions of subsection (3), clarifies that where a refund becomes due as a result of any decision or judgment passed by a customs officer, Appellate Tribunal etc., the proviso to subsection (1) would not be applicable because no such proviso is attached to subsection (3), meaning thereby that the refund has to be made notwithstanding the fact that the incidence of customs duty

had been passed onto the customer and therefore section 19A of the Act would not be attracted.”

23. *In view of the above discussion, our findings on the issues raised before us are as follows:-*

(i) Section 33 is not applicable in the circumstances of the present case. Therefore the limitation of one year to seek a refund would not come into play.

(ii) The furnishing of guarantees/pay orders in compliance of the Court order dated 25.09.2013 in C.P.No.D-3816 of 2013 etc by the petitioners did not tantamount to the customs duty being “paid” within the meaning of the statute.

(iii) If section 33 is not applicable in a case, then the refund has to be made notwithstanding the fact that the incidence of customs duty has been passed on to the customer and therefore section 19A of the Customs Act would not attracted. The power of the department under section 19A does not give the department a licence and unfettered discretion to go on a fishing and roving exercise. The power must be exercised fairly and reasonably. Once an importer has provided reasonable evidence to show that the incidence of duty has not been passed on to the end user, it will have discharged its burden and it would be up to the department to them prove otherwise.

(iv) The act of the department to return some of the importers the guarantees/pay orders while declining to do the same for others who were sailing in the same boat is discriminatory, unfair and violates the fundamental rights of the petitioners.”

4. From perusal of hereinabove finding, as recorded by the Divisional Bench of this Court, it is clear that provision of Section 19A and 33 of the Customs Act, 1969, are not attracted, wherein, a dispute with regard to amount of duty paid on the imports made by the importers, whereas, in the instant case, admittedly, the amount of duty paid is not under dispute, however, the claim of the petitioner, which was secured before the

concerned Collectorate and the Nazir of this Court, in view of dispute created by the respondent department, which has now been decided in favour of the petitioner, therefore, the limitation of one year as provided under Section 33 of the Customs Act, 1969, or to discharge the burden to the fact that incidence duty passed on to the consumer in terms of Section 19A of the Customs Act, 1969, is not attracted under the facts and circumstances of the case.

5. In view of hereinabove facts and circumstances, we are of the opinion that the case of the petitioner is fully covered by the judgment passed by the Divisional Bench of this Court in C.P.No.D-6547/2016, therefore, we are not inclined to take any inception to the judgment passed by this Court, which otherwise is not attracted in the instant matter.

6. Accordingly, instant petition is allowed in terms of Para: 21 of the aforesaid judgment alongwith listed applications.

JUDGE

JUDGE

A.S.