ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

SPL. CUST. REF. APPLAN NO. 30 to 33 / 2013

Date	Order with signature of Judge

HEARING / PRIORITY

1) For orders on office objection a/w reply of Advocate at flag "A".
2) For hearing of main case.
3) For hearing of CMA No. 304/2013

10.11.2020

Mr. Iqbal M. Khurram Advocate for Applicant
in SCRA No. 30 & 31 of 2013.
Mr. Sardar Faisal Zafar Advocate for Respondent.

Through these Reference Application(s) along with other connected matters the Applicants (**Collector of Customs & Director Intelligence**) have impugned two separate orders (**in Custom Appeal No.14 & 15 of 2010**) dated 17.09.2012 passed by the Customs Appellate Tribunal, Karachi, by way of separate Reference Applications; being aggrieved; proposing the following Questions of Law purportedly arising out of the order of the Tribunal:-

"1) Whether on the facts & circumstances of the case the learned Appellate Tribunal erred in law to hold that the penalty imposed on the clearing agent and the show cause notice, issued to him, is void of law?

2) Whether on the facts & circumstances of the case and considering the admitted fact that the declaration in terms of Section 79(1)(a) of the Act was transmitted through the respondent clearing agent in terms of Section 155-E of the Act, the learned Appellate Tribunal erred in law to hold that the respondent clearing agent has no association / collusion with the importer of the goods within the meaning of Section 32(1) & 32(2) of the Act?

3) Whether on the facts and circumstances of the case and considering the fact that the importer / owner of the goods had made an attempt to deprive the Government from its legitimate revenue to the tune of Rs. 2,925,729/- with the connivance of the respondent clearing agent, through gross mis-declaration, the learned Appellate Tribunal erred law to hold that due to the issuance of an Order-in-Original, passed by an authorized officer on the basis of the hearing concluded by his predecessor, shall render the issuance of the show cause notice as without jurisdiction?

4) Whether on the facts & circumstances of the case and considering the provisions of Section 208 & 209 of the Act, read with Rule 101 & 102 of the Customs Rules, 2001, the learned Appellate Tribunal erred in law by holding

that the respondent clearing agent has made nothing wrong or against the law despite the fact that right from obtaining delivery order (D/O) from the shipping company to getting the goods out from the port area, all steps were undertaken by the respondent clearing agent?

5) Whether on the facts & circumstances of the case and considering the provisions of 155-E, 155-1 & 155-K of the Act, read with clauses 101, 102 & 103 of Section 156(1) of the Act, the Appellate Tribunal erred in law to hold that the respondent clearing agent has not made any unauthorized access to the Pakistan Customs Computerized System (PaCCS)?

6) Whether in the light of the facts & circumstances of the case the learned Appellate Tribunal erred in law by not reading / misreading the record and not giving any findings on established facts of the case?"

Learned Counsel for the Applicant in SCRA No. 30 & 31 of 2013 has read out the impugned order and submits that the Tribunal has erred in law and facts by allowing the Appeal of the Respondents, whereas, sufficient material was available on record implicating the Respondent in the commission of the offence so alleged. According to him, the Goods Declaration was filed by the Respondents which was appraised and assessed, whereafter, on detection by the Directorate of Intelligence, it transpired that it was a case of mis-declaration and evasion of huge amount of duty and taxes and therefore, proceedings were justified against the Respondent and so also the imposition of the penalty.

On the other hand, learned Counsel for the Respondent has supported the impugned order and has also drawn our attention to order dated 11.03.2010 passed in C. P. No. D-1274/2018 and submits that the order of the Adjudicating Authority was itself illegal and without jurisdiction and therefore, a Constitutional Petition was filed which was disposed of by certain directions to the Tribunal.

We have heard both the learned Counsel and perused the record. Insofar as the Questions of Law as above are concerned, and before any discussion thereon could be made; after going through the record in our considered view, first it would be appropriate that if we discuss Question No.3 (part of it only) as raised on behalf of the Applicant. This question appears to be somewhat argumentative; otherwise referring to two different aspects of the case; and therefore, needs to be redrafted in the following manner;

whether the Appellate Tribunal was justified in holding that the order-in-original passed by the officer who never conducted hearing nor heard arguments, and decided the same on the basis of record of hearing conducted by his predecessor in interest, was illegal and without jurisdiction.

And to that extent, the relevant findings of the Tribunal is contained in Para 9,10 & 11 of the impugned order and reads as under:-

"9) The learned advocate for the appellant referred the order passed by the Hon'ble High Court in this subject issue dated 11.03.2010 in C.P. No. D-1274/2009, which was filed by the appellant during the pendency of the subject appeal. The Hon'ble High Court referred the subject controversy as prayed by the appellant to "Tribunal with the direction that "The Tribunal before whom the appeals are stated to be pending can always considered this fact and pass an appropriate order in this regard." The Appellant, therefore, raised this question before this Tribunal by referring the said order and stated that, the subject matter was heard by the Additional Collector (Mr. Wasif Memon), after giving the hearing notice the said hearing was attended in accordance with the procedure along with representative of the respondent, Mr. Qasim Alvi, S.I.O. On the contrary Order-in-Original was passed and issued by the Additional Collector (Mr. Muhammad Iqbal Bawana) which is without jurisdiction, illegal and as such the order passed thereon is without lawful authority, without jurisdiction and beyond the legal obligations.

10) By taking the notice of these arguments and directions given by the Hon'ble High Court and consider the contents of application filed by the appellant for calling the seizing officer, Mr. Qasim Alvi, S.I.O. as witness which was subsequently allowed. Seizing Officer was called before the Tribunal, who states that, he is a complainant in the case pending before the Special Court of Customs as well as before the adjudicating proceedings. He reiterated and states that on the relevant date of hearing he attended the proceedings before the Additional Collector, Mr. Wasif Ali Memon on behalf of the Department. The advocate of the appellant was also present there on 30.3.2009. The arguments from both the sides were concluded and the case was reserved for order. He further states that, he never attended any hearing nor received any hearing memo to attend the hearing of subject case before Additional Collector, Mr. Iqbal Bawana. The said statement was not rebutted and as such established that the order-in-original was passed without giving a fresh hearing opportunity. It is the settled and cardinal principle of judicial system that the case should be decided by the authority after hearing the arguments and that the successor cannot decide the case without hearing the arguments afresh on the ground that arguments have already been advanced before his predecessor, who left the case without deciding. The object of hearing arguments is in fact given the opportunity to a party to satisfy the Court about the case setup by that party and to explain any adverse effect which may emerge on the record. Therefore, it is essential that the successor must hear the arguments afresh. If one person hears and other decides then personal hearing is an empty formality and a mere farce.

11) It has been observed from the face of the order-in-original that the hearing was conducted on 30.03.2009 and judgment was passed on 25.05.2009 without jurisdiction by the Additional Collector (Mr. Muhammad Iqbal Bawana), which is the clear violation of maxim of law "Audi Alteram Parterm". The Hon'ble Supreme Court of Pakistan following the aforesaid principle of natural j justice in the case of Anees Rehman V/s PIAC reported din 1994 SCMR Page No. 332, set aside the impugned order. It is also legal requirement that if the hearing is given by one officer and the order is passed later on by another officer who has not heard the explanation, clarification and the arguments of the parties concerned reflects the intention of the legislature with effect of the statue, the law provide an opportunity to the person

> concerned to present his case by spoken words before the authority. It is clear requirement that the person concerned should be given a reasonable opportunity of being heard and if the officer have not heard the person concerned he would not have the knowledge of explanation given in the arguments advanced and consequently would not be qualified to pass an order because the hearing of a predecessor does not mean or amount to a hearing by the officer passing the order. Such an officer meant to be ignorant of the explanation, clarification and argument advanced by the party concerned, and such order based on his own perception and understanding of the issue in question is violate from the law."

Perusal of the aforesaid findings reflects that admittedly, after issuance of Show Cause Notice the last hearing was conducted on 30.03.2009 by the then Adjudicating Officer (**Mr. Wasif Ali Memon**), whereas, the Order-in-Original ("**ONO**") was passed on 25.05.2009 by another officer (**Mr. Muhammad Iqbal Bawana**). Such fact is not disputed from the record pursuant to summoning of the officer concerned by the Tribunal and while confronted today in Court, the learned Counsel for the Applicant also concedes. Such conduct on the part of the adjudicating authority is totally against the law and the norms of acting as a Qusai Judicial Officer inasmuch as by now it is settled that the right of hearing to an aggrieved person who has been show caused is an inherent right and cannot be denied. Not only this, the adjudicating officer in his ONO has even gone to the extent by stating that ***he has given due consideration to the arguments advanced by the Counsel, has perused the record and also heard the version of the prosecution***. When admittedly, he never conducted any hearing of the matter; nor issued any notice for such purposes, how he could observe such fact in his ONO is beyond comprehension. In fact, he has even gone to the extent of observing that he has heard the prosecution side. How in absence of the aggrieved party he could do so. In our opinion the ONO has been passed in a slip shod manner, without application of mind and apparently the Tribunal was justified in holding that the said order is without jurisdiction and a nullity in the eyes of law. For a moment, we have given a thought so as to remand the matter on this ground that since no hearing was provided, the matter be decided afresh; but considering the fact that this matter pertains to the year 2009, whereas, time and again the Applicant Department was confronted with such illegality and they never came forward to concede and request remand of the matter; hence, the conduct of the Applicant does not warrant such directions by us. In fact, they have all along justified such conduct and have even gone to the extent of

proposing a question of law to this effect. Therefore, in our considered view, no such discretion can be exercised in favour of the Applicant Department which has remained delinquent and has slept over its right.

It is also a matter of record that the Respondent being aggrieved by such conduct of the adjudicating officer in passing the ONO in question, had filed C.P. No. D-1274/2009 which was disposed of by this Court on 11.03.2010 through the following order:-

> "It seems that the petitioner has availed a remedy against the impugned order in original No. 2/2009 dated 25.5.2009 by filing Appeals No. 3053 and 3054 of 2009 with the Collector of Customs (Appeals) which have been decided by order in appeal dated 11.11.2009 and it is stated by the Counsel for the Respondent that the appellant has challenged the said order in appeal by filing appeal before the Customs Appellate Tribunal.
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> The Counsel for the petitioner says that the matter was heard by the Additional Collector namely Wasif Memon but its judgment was given by Muhammad Iqbal Bawana and that this is the precise illegality which he has challenged in this petition.
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> The Tribunal before whom the petitioner's appeals are stated to be pending can always consider this question of fact and pass an appropriate order in this regard. The petitioner may therefore, raise this question before the Tribunal.
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> The Petition in the above terms along with the listed application stands disposed of."

Perusal of the aforesaid order reflects that while disposing of the Petition this Court directed the Tribunal to consider this question of fact and pass an appropriate order in this regard. Even at that point of time the Applicant Department never conceded or offered for a remand order, and therefore, we do not deem it appropriate now to remand the matter to the Department so as to overcome the illegality committed by them in such a manner.

Accordingly, in view of hereinabove facts and circumstances of this case, the reframed question is answered in the affirmative; against the Applicant Department and in favour of the Respondent; as a consequence, thereof, all these Reference Applications are dismissed. Let copy of this order be sent to Customs Appellate Tribunal, Karachi, in terms of sub-section (5) of Section 196 of Customs Act, 1969. Office is directed to place copy of this order in all above connected SCRAs.

J U D G E

J U D G E

Arshad/