

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Special Customs Reference Application No. 411 to 429/2011
Allied Industries Hub (Private) Ltd and others v Collector of Customs and others

Date _____ Order with signature of Judge _____

HEARING/PRIORITY

- 1) For hearing of main case.
- 2) For hearing of CMA No. 1529/2011.

11.11.2020

Mr. Abdul Ghaffar Khan Advocate for Applicant.
Mrs. Masooda Siraj Advocate for Respondent.

These Reference Applications have impugned Judgment dated 30.12.2010 passed by the Customs Appellate Tribunal through which Appeal Nos. K-551, 552, 553 to 554 / 2009 filed by M/s Allied Industries Hub (Private) Limited and Appeals No. K-555 to 569/2009 filed by M/s. A. G. E. Industries (Private) Limited have been decided against the Applicants. The Applicants had proposed several Questions of Law; however, vide order dated 31.10.2012 the following Questions were pressed and pre-admission notice was issued:-

- “1) Whether the officers of Customs have powers to allow the clearance of goods on any terms and conditions other than the provisions of section 79, 80 & 81?
- 2) Whether the final assessment in the present case was made by the respondent within the period of limitation provided under Customs Act, 1969 and what is its effect?
- 3) Whether the provisional assessment made in the present case attains finality on the expiry of the period limited provided under section 81 of the Customs Act, 1969?”

Learned Counsel for the Applicants submits that the consignments of Copper Rods due to a classification dispute were cleared by the Customs Authorities under section 81 of the Customs Act, 1969, after obtaining postdated cheques and indemnity bonds

from time to time and the matter was referred to FBR for a final decision whereafter, vide letter dated 20.10.2000 the question of classification was decided against the Applicant and pursuant to directions of FBR vide letter dated 17.7.2001, without any prior notice encashment of the cheques was sought against which Suit No. 1056/2001 was filed by one of the Applicants and the Respondent Department was restrained. According to him, the said Suit was decided and disposed of on 13.02.2006 with certain directions and thereafter, assessment order was passed on 30.6.2009 against which both Appeals before the Collector and Tribunal have failed; hence, instant Reference Applications. According to him, the release / assessment at the relevant time was a provisional assessment under section 81 of the Customs Act, 1969 and was never finalized within the stipulated time; hence, the same was time barred and no recovery could be made. Per learned Counsel, in identical situation another importer / manufacturer had also come before this Court by way of Suit No. 995/2001 which was disposed of through order dated 07.03.2003 and thereafter, in an identical fashion assessment order was passed and First Appeal was also dismissed. He submits that thereafter, the Tribunal decided the matter in favour of the importer vide order dated 20.10.2005 in Customs Appeals No. K-367 to K-394 of 2003 against which the Department preferred Customs Reference No.05/2007 and a learned Division Bench of this Court vide order dated 13.02.2007 answered the question in favour of the importer and against the Department. According to him, identical facts are involved and therefore, the question so proposed be answered accordingly.

On the other hand, learned Counsel for the Department has read out the order of the Tribunal and submits that the same is in accordance with law and no exception can be drawn.

We have heard all the learned Counsel and perused the record. It appears that the case of the Applicants is that the original assessment on the basis of securing the disputed amount of duty and taxes for a classification dispute of Aluminum and Copper Rods was done under s.81 of the Customs Act notwithstanding and without prejudice that the matter was referred to FBR; hence, it ought to have been decided within the time period as contemplated under s.81 *ibid.* Before us this is the moot legal question as the forums below (i.e. Collector Appeals and Tribunal) have held otherwise. Insofar as the relevant findings of the learned Tribunal is concerned, the same reads as under:-

“6. Arguments have been heard. Record has been paused. In order to decide the question whether the goods were released provisionally under section 81 of the Customs Act, 1969 or otherwise the indemnity bond submitted by the appellant for release of the impugned goods is most significant. The relevant part of the said indemnity bond is re-produced:-

"Now therefore, the aforesaid M/s Allied Industries Hub (Pvt) Ltd., hereby authorize the Collector of Customs, Port Bin Qasim to encash the said cheque, if payment become due in the light of Central Board of Revenue decision against them and undertake to indemnify the Collector of Customs to the extent of custom duty and taxes as stated above as well as 20% markup per annum from day next to the date of final decision of Central Board of Revenue in case the aforesaid cheques is not honoured by the Bank on account of reason beyond its control. This Indemnity Bond is valid till the date of final decision from Central Board of Revenue, to the satisfaction of the Collector of Customs of all the liabilities which might accrue to them under the said clarification and/or on account of penal and recovery action which may be taken under the Customs Act, (IV of 1969) and/or allied laws by the Collector of Customs for breach/violation of any of the conditions prescribed thereunder."

7. The language of the Indemnity Bond shows that the impugned goods were released conditionally against the Indemnity Bond and postdated cheques through which the appellant bound himself that on confirmation of the correct PCT Heading of the impugned goods by the CBR, the department would be at liberty to encash the postdated cheques. Therefore, it can be held safely that the terms of release of the impugned goods agreed by the appellant are totally different from those of provisional release of goods under section 81 of the Customs Act, 1969. Therefore, the orders passed by the Collector (Appeals) as well as the adjudicating officer are

maintained and the appeal is dismissed. No order to costs. Parties be informed through registered post AD or by UMS.”

Perusal of the aforesaid findings reflects that the Tribunal after going through the record came to the conclusion that the assessment in this matter was not made under section 81 of the Customs Act, 1969 and therefore, question of limitation would not arise. However, it appears that such finding is, on the face of it, erroneous and against the very conclusion drawn by this Court as referred to hereinabove in Special Customs Reference No. 05 to 32 of 2007. In that Reference Application numerous questions were proposed by the Department before the learned Division Bench of this Court; however, for the purpose of deciding the Reference Application(s) this Court only considered the question(s) that;

“(i) whether the order in original passed on 1.4.2003 was passed after the lapse of statutory period, as held by the Tribunal in its impugned order and

(ii) whether the provisional assessment made by the Customs Authorities in terms of section 81(1) of the Customs Act, 1969, if otherwise not finalized within the period stipulated in subsection (2) of section 81 (ibid) will, by operation law, attain finality on the basis of valuation earlier determined by the Customs Authorities or at the value of the consignment declared by the assessee”

The relevant findings of the learned Division Bench reads as under:-

4. Mr. Aqeel Ahmed Abbasi, learned counsel for the applicant, when confronted with the impugned order, vis-à-vis, the proposed questions, did not dispute that the moot points for consideration in these reference applications, are; (i) whether the order in original passed on 1.4.2003 was passed after the lapse of statutory period, as held by the Tribunal in its impugned order and (ii) whether the provisional assessment made by the Customs Authorities in terms of section 81(1) of the Customs Act, 1969, if otherwise not finalized within the period stipulated in subsection (2) of section 81 (ibid) will, by operation law, attain finality on the basis of valuation earlier determined by the Customs Authorities or at the value of the consignment declared by the assessee. In view of this position, learned counsel also did not dispute that other proposed questions are not the questions of law in terms of section 196 of the Customs Act 1969, arising out of the impugned order of the Tribunal. As regards the two questions framed above, submission of Mr. Abbasi is that the Central Board of Revenue vide its letter No. C.No.2(11)Tar/11/91 dated 18.2.1999 has confirmed Custom’s viewpoint regarding appropriate heading and the Board vide its letter of

even number dated 17.7.2001 had therefore directed the respondent to enforce all bank guarantees, indemnity bonds and pay orders secured as differential amount, which shows that provisional assessment was substantially finalized on that basis within the stipulated period prescribed by subsection (2) of section 81, but this important legal aspect was overlooked by the Tribunal at the time of passing of impugned order. He further contended that the order in original dated 1.4.2003 was nothing, but re-affirmation of the clarification given by the Central Board of Revenue, vide its letter dated 18.2.1999, therefore, it shall be deemed that earlier the assessments were finalized by the department in PCT heading 7605.1100, under section 80 of the Customs Act 1969, and it was only at the instance of the assesses that such assessments were shown under section 81(1) as provisional assessments, so that, to the satisfaction of the assesses, further clarification may be obtained from the CBR about the correct PCT heading applicable in these cases, which clarification was also received by the department on 18th February 1999. He also contended that in the facts and circumstances of the case the provisional assessment in terms of subsection (1) to section 81 will attain finality on the basis of valuation determined by the department at the time of such assessment and not as per the declared value of the assessee, as such intention of the law makers is evident from its language. In this context, he also made reference to the explanation added to section 81(4) (ibid). However, when asked by the Court that how this explanation could be of any help to the present case of the department when provisional assessments of all the respondents were made in the year 1999/2000 and the said explanation was added vide Finance Act 2005 and it has not been given retrospective applicability, learned counsel was unable to give any satisfactory reply.

5. After careful perusal of case record, we find no substance in the submission of Mr. Abbasi that the earlier assessments made by the respondents were under section 80 and not under section 81(1) of the Customs Act, 1969, as enough material is available on record to falsify such claim of the respondents. Learned counsel, was also unable to controvert the crucial point involved in these references that the provisional assessments made in these cases were not finalized by the customs department within the stipulated period, as prescribed by section 81(2) ibid, applicable at the relevant time. There are number of judgments of this Court, wherein the scope and applicability of section 81(4) of the Customs Act, 1969, has been examined and it has been held that in case of failure of the Customs Authorities to finalize the provisional assessment within the stipulated period, provided under section 81(2) (ibid) the assessment of the provisionally assessed goods shall be deemed to have been finalized under section 81(4) on the basis of declared value of the goods by the assessee and not on the basis of valuation determined by the Customs Authorities at the time of provisional assessment. If any case law is needed to fortify this view, reference can be made to the following cases:-

- (a) M/s Hassan Trading Company V. Central Board of Revenue, Government of Pakistan, Islamabad (2004 PTD 1979).
- (b) Collector of Customs (Appraisement) Karachi V M/s Auto Mobile Corporation of Pakistan, Karachi (2005 PTD 2116).
- (c) M/s Wall Master V Collector of Customs and Others (2005 PTD 2573).

6. In view of the above discussion, we are of the view that the questions proposed by the applicant in these references do not arise out of the impugned order dated 20.10.2005 passed by the Tribunal. Regarding the two reframed questions on which the learned counsel for applicant has advanced his arguments, the question No. 1 is to be answered in the affirmative while the other question is to be answered in line with the ratio of three judgments of this Court, referred above. These reference applications are accordingly disposed of.”

Perusal of the aforesaid findings clearly reflects that insofar as the facts of this case are concerned, they appear to be identical in nature. The issue was also in respect of same goods i.e. Aluminum and Copper Rods, whereas, similarly the consignments were released after obtaining postdated cheques and indemnity bonds and matter was referred to FBR, and it was contended that the letter of FBR requiring encashment of securities is the final order of assessment; hence, within time. However, this contention was repelled and it has been observed that all these assessments were provisionally made under section 81 of the Customs Act, 1969 and were required to be finalized within the time stipulated under section 81(4) *ibid* and admittedly, in the instant matter as well the assessments were never finalized within such time period. In fact, as to that, calculating from the date of assessment order(s), there is no dispute that these were done much after the time had already expired. The law in this regard (pre-2005 period at least) that if provisional assessment under s.81 *ibid* is not finalized within the period as provided therein, then the provisional assessment (i.e. the declared value or classification, as the case may be) is the final assessment and the securities obtained from an importer are to be discharged is by now settled. The provisional assessment was to be treated as final assessment and the petitioners were entitled to release of the bank guarantee furnished by them in favour of the Collector of Customs¹. In other words, when no final assessment is made in terms of subsection (2) to section 81, the provisional assessment will become final on declared value of 'goods by the assessce, and disbursement of additional amount or guarantee furnished by the importer/exporter, in terms of subsection (3) to section 81, will be regulated on such premises². In the above

¹ Hassan Trading Company V. Central Board of Revenue, (2004 PTD 1979)

² Collector of Customs (Appraisement) v Auto Mobile Corporation of Pakistan, Karachi (2005 PTD 2116)

circumstances we are of the considered opinion that no final assessment order has been made under section 80 of the Customs Act, therefore, by virtue of the provisions contained in section 81(4) of the Customs Act, the provisional assessment made under section 81(1) has attained finality³. Consequently, the provisional assessment made by the Custom Authorities on the basis of declared value has attained finality. The ad hoc amount to meet the differential in case of final assessment thus became refundable to the appellant⁴.

In view of hereinabove facts and circumstances of the case Question No. 2 is answered in the negative in favour of the Applicant and against the Respondent, whereas, Question No. 3 is answered in the affirmative in favour of the Applicant and against the Respondent. Insofar as Question No. 1 is concerned, the same need not be answered in view of the above findings. Accordingly, all these Reference Applications are allowed. The impugned order of the Tribunal is set aside. Let copy of this order be sent to Appellate Tribunal Customs 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 SCRA's.

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³ M/s Wall Master V Collector of Customs and Others (2005 PTD 2573).

⁴ Dewan Farooq Motors Ltd v Customs Tribunal (2006 PTD 1276)