ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application ("SCRA") Nos. 578 to 580/2014
a/w SCRA No. 599 to 629, 681 to 723/2014

Date	Order with signature of Judge

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Agha Faisal

Applicant:	**Qasim International Container Terminal Through Mr. Ali Alman, Advocate.**
Respondent:	**Collector, Model Customs Collectorate of PACCS through Mr. Shakil Ahme, Advocate.**
Date of hearing:	**12.11.2020 and 16.11.2020**
Date of Order:	**16.11.2020.**

Muhammad Junaid Ghaffar, J: In all these connected Reference Applications the Applicant has impugned a common order dated 20.10.2014 passed by the Customs Appellate Tribunal in Customs Appeal No. K-392 to 398 & 579 to 609 of 2011; K-1085, 1086 & 1088 to 1097 of 2011; K-1232/2011; K-1314 to 1327 of 2011; K-1383 to 1392 of 2011; K-709 & 710 of 2013 (**M/s. Qasim International Container Terminal Karachi V. The Additional Collector of Customs Model Customs Collectorate PaCCS, Karachi**), proposing the following Questions of Law which according to the Applicant arise out of the order of the Tribunal:-

> "a) Whether, in the circumstances of the case, the Applicant's appeals could have been dismissed under Section 195-B of the Customs Act, 1969 for failure to deposit the penalty imposed?
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> b) Whether the show cause notice was barred by limitation?
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> c) Whether the CAT would have dismissed the Applicant's appeal while addressing only one of the Applicant's objection and ignoring the remaining objections and the particular facts of the case?
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> d) Whether the CAT could have dismissed 78 appeals filed by the Applicant through a combined order without addressing the individual merits of any appeal or the particular facts of any case?"

Learned Counsel for the Applicant submits that there are three different transactions and set of allegations against the Applicant in these matters; namely the allegation to the effect that consignments of the Afghan Transit Trade have been removed illegally; that some

consignments have been released against fake and fictitious Goods Declaration and some of them were released on fake NOC issued by the bonded carrier (National Logistic Cell) and instead of dispatch to Customs Dry Port at Islamabad were consumed in Karachi. Per learned Counsel, the Tribunal has miserably failed to appreciate these facts and instead of considering the stance of the Applicant independently and separately, has decided the same collectively through the impugned order and without deciding the facts and law in respect of each set of allegation; hence, the order is liable to be set aside. Per learned Counsel, there is issue of limitation involved in all these cases but the learned Tribunal has failed to appreciate the same and in a cursory manner, has arrived at a conclusion that no limitation runs against a fiscal fraud, whereas, according to him Section 32-A of the Customs Act, 1969 ("Act") provides a limitation of 180 days in respect of fiscal fraud. He has further argued that since Tribunal is the last fact finding forum, whereas, the Collector Appeals had dismissed the Appeals under Section 195-B of the Act and not on merits; therefore, serious prejudice has been caused by the conduct of these two forums below, rendering the impugned order liable to be set aside. Per learned Counsel, the forums below including the adjudicating authority have not considered the fact that the Customs Rules 2001 were amended on 14.07.2007 whereby, Rule 556 was inserted, whereas, the transactions in question are prior to that date and therefore, a clear finding ought to have been given by the Departmental Authorities as well as the Appellate Tribunal that whether such rules could be applied retrospectively or not. According to him, during the period when these transactions took place, two clearance systems were in force simultaneously; i.e. *WEBOC* as well as *One Customs*, therefore, the matter was required to be dealt with separately in each case by considering the facts involved which has not been done; hence, the impugned order is liable to be set aside. He has also argued that penalty has been imposed under Clause (1) and Clause (63) of Section 156(1) of the Customs Act; which provides for a maximum penalty of Rs.0.5 Million, whereas, penalty of Rs.2.0 million has been imposed which is illegal and cannot be sustained; hence, the entire order in original and subsequent proceedings are illegal. He has further argued that the Collector Appeals had dismissed the Applicant's Appeals pursuant to Section 195-B of the Act which provides that if the adjudged amount is not deposited; the Appeal is not maintainable and per learned Counsel, the said finding

is erroneous and against settled law, as the appeal cannot be dismissed for failure to deposit penalty as the Appeal is a statutory right and such deposit is not mandatory. In support he has relied upon ***Messrs Wateen Telecom Ltd. V. Commissioner Inland Revenue and others*** **(2015 P T D 936)** and an unreported judgment of the Islamabad High Court in **Sales Tax Reference Application No. 10 of 2015 (PTCL V. Commissioner Inland Revenue)**.

On the other hand, learned Counsel for the Department has argued that deposit of the adjudged amount before an Appeal could be heard and decided is mandatory under Section 195-B of the Act and despite an opportunity to do so, the Applicant failed to comply with such directions; hence, Appeals were competently dismissed by the Collector Appeals. As to the limitation, he has argued that it is a case of fiscal fraud and therefore, no limitation would run, whereas, Show Cause Notice was also issued under Section 32(1) and (2) of the Act which provides a limitation of five years; hence, the objection is misconceived. He has prayed for dismissal of these Reference Applications.

We have heard both the learned Counsel and perused the record. Insofar as Question No. (a) is concerned, though the Tribunal has dealt with this issue and also given its finding; however, since the Tribunal itself entertained the Appeals and has decided the same on merits and on some of the issues raised by the Applicant; therefore, in our considered view, for the present purposes we need not answer this question and would leave it open to be decided in future in an appropriate case.

As to Questions No. (b), (c) and (d) are concerned, the relevant findings of the Appellate Tribunal is as under:-

> "12. The main thrust of learned counsels appearing on behalf of the appellants was that the Collector Customs (Appeals) dismissed the appeals on the grounds that the amount of evaded duty and taxes was not deposited as required under Section 195-B of the Customs Act, 1969 and the Collector Appeals did not discuss the merit of the case. They also contended that the show cause notice was time barred which fact was not considered. Learned counsels appearing on behalf of appellants also argued on the technical aspects of impugned order. They further contended that terminal operator was not responsible for the above offence which were in fact committed by the Customs staff who were then on duty.
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> 13. Before discussing further, we go through the duties, responsibilities and functions of the terminal operators as provided under the law:

"The Terminal Operator shall have the following Rights and obligations under PACCS:

(a) Safe Custody of Cargo/Goods and Containers:

(i) The Terminal Operator is obligated to ensure the safe custody of all goods, cargo and containers received from a vessel or from the shipper's truck and to ensure that the goods, cargo and containers are not tampered with the goods, cargo and containers are not tampered with in any manner whatsoever and that the container seals care not removed or replaced in any manner whatsoever.

(c) Entry and Exit Control:

(i) The Terminal Operator shall control all entry and exit points at the terminal and shall not permit or exit of any goods, vehicle or person from the terminal except through the designated entry and exit points, however, the Terminal Operator may change or modify or add additional entry and exit points by informing the Collector in writing at least fifteen days in advance or such change, modifications or addition, whereupon, the Collector may allow movement of cargo and personnel from such modified or additional exit or entry points after verification by technical team

(ii) The Terminal Operator shall not permit entry or exit of any goods, from or to the technical unless so authorized electronically by PACCS.

(iii) The Terminal Operator shall have complete liabilities for any breakage, theft or pilferage of any goods from the terminal where against the customs authorities shall not accept any liability for such events."

14. In these cases, the Terminal Operator not only violated the customs laws and rules but they are also guilty of gross violation of PACCS Rules which provide that the terminal operator shall not permit entry or exit of any goods unless they are authorized to do so by the PACCS Electronically. The containers were allowed. To exit to fake GDs, notwithstanding that the terminal operators were having the knowledge that the GDs do not bear the machine numbers/index numbers/IGM numbers, etc, and thus deprive the state from a huge exchequer just for their personal and associates illegal gains. It all happened in league with the importers, clearing agents and the staff on duty. The staff of QICT is equally involved with others, who issued get [sic] passes and allowed the illegal exit of consignments.

15. So far as the cases of importers are concerned, the shipping companies record highlight that containers were illegally removed during the period 2006-2008 but till today, the importers have not lodged any complaint about the missing of their goods or non-arrival of their consignment. If otherwise, the consignment of any importer had been lost, the consignee would have initiated civil as well as criminal proceedings against all the concerned.

16. Record further highlights that the QICT own record confirms that the containers were 'gate out' without obtaining prescribed permission (on-line message) in terms of Section 155-D and 155-E of the Act which fully establish that the terminal operators in league with the importers/consignee, clearing agents and other staff then on duty played active role in the removal of the containers from the port area.

18. The facts of the case in hand are that on fake documents hundreds of containers loaded with imported goods involving duty and taxes of millions of rupees were allowed to be clandestinely removed from the port premises by the terminal operators in active connivance of importers, clearing agents and other staff then present on duty. Further interesting aspect of this case is that no one denies the series of occurrences, i.e. illegal removal of containers from port area on the basis of forged GDs but simply everyone to shift the burden of guilt on the other. In the peculiar circumstances, the Collector Customs (Appeals) had rightly brought in operation the provisions of Section 195-B of the Customs Act, 1969.

> 19. The objection raised by the learned counsel for the appellants in relation to the show cause notice is also not sustainable in the eyes of law because limitation does not run in cases of fiscal fraud. In the instant case which is of a peculiar nature and after disclosure of offence, the matter was interrogated by the authorities. A number of departments including foreign shipment companies were contacted for verification purposes. The conduct of accused persons also remained non-cooperative, causing the delay in issuance of show cause notice which is not fatal.
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> 20. The upshot of the above discussion is tht the appeals are without merit. The guilt of appellants is fully proved without any shadow of doubt. No interference is called for. All the appeals are dismissed."

Perusal of the aforesaid findings reflects that insofar as the question of limitation is concerned, the same has been answered in Para 19 as above; however, such findings appears to be arrived at in a cursory manner without touching upon the prevalent law. The learned Tribunal has observed that limitation does not run in case of fiscal fraud; however, this does not seem to be appropriate and is a case of complete mis-reading and ignorance of law. The law as to limitation is settled and the cardinal principle of law is that all are equal before law, whether a citizen or State, and if a law prescribes period of time for recovery of money, after its lapse recovery is not enforceable through Courts[1]. Reliance may also be placed on[2]. The learned Tribunals finding that no limitation runs in cases of fiscal fraud is not supported by any discussion and we are unable to comprehend as to from where and which provision of the Act, it is so. While confronted, department's Counsel was also unable to assist except that in criminal cases no limitation run. Again this is not true for all intent and purposes; nonetheless, present case before us is not on the criminal side and is a case of imposition of penalty upon the Applicant under s.156 ibid. Moreover, the finding of the learned Tribunal that conduct of the accused persons remained non-cooperative causing delay in issuance of Show Cause Notice; hence, is not fatal is also without any basis and support of any law; nor the Tribunal has bothered to cite and refer any such law in this regard.

Insofar as Questions No. (c) & (d) are concerned, it clearly reflects from the impugned order that it was not only passed in respect of the present Applicant; but so also against one another person namely Mr. Aslam Niazi and after discussion of facts as available before the Tribunal, the finding has been given in a generic way without adverting to the arguments raised on behalf of the

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[1] Federation of Pakistan v Ibrahim Textile Mills Limited (1992 SCMR 1898)

[2] Collector of Customs V. K & A Industries (2006 P T D 537) and Assistant Collector Customs V. Khyber Electric Lamps (2001 S C M R 838)

Applicant. Even the findings are more or less, combined in respect of all connected persons, whereas, admittedly, different role has been assigned to the persons so show caused and were required to be dealt with according to their assigned role and the law applicable upon them. This admittedly has not been done and in a casual way the entire set of Appeals have been decided through this common order. The Tribunal being the last and final fact finding forum ought to have been vigilant and careful in deciding these Appeals as it involves distinct set of allegations and role of each person in the show cause notices and the Order in Original. If the relevant facts are not taken into consideration or deliberated, and the reasons for or against have not been weighed, the Tribunal would then not have decided the appeal. Any purported order or judgment without deciding the appeal would be a nullity in law. It is for this reason that if the Tribunal fails to advert to a question of law or fact raised before it or before any other forum under the relevant statute, it is treated as a question of law for the purposes of a reference application before the High Court[3].

In view of hereinabove facts and circumstances of the case, we do not see any reason to maintain the impugned order of the Tribunal; as the Tribunal has failed to discuss facts of each case; or at least the facts in each set of cases adjudicated upon; and this itself amounts to a pure question of law, vesting jurisdiction on this Court to set-aside the impugned order. Since we, in our Reference jurisdiction cannot finally decide all the aforesaid questions without this finding and discussion of facts of each set of case(s), are left with no option but to set aside the impugned order to the extent of the present Applicant and remand the matter to the Tribunal for deciding the Appeals afresh. It is so ordered; proposed questions (a) and (b) need not be answered in view of the above, whereas, question (c) and (d) are answered in negative in favour of the Applicant and against the department. Consequently, the Appeals of the Applicant shall be deemed to be pending which the Tribunal is directed to decide separately and independently in respect of each set of allegations, and after discussing and responding to all the issues raised by the Applicant, including but not limited to, the question of limitation as well as the relevancy and applicability of Rule 556 of the Customs

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3 **(2015 PTD 936)** WATEEN TELECOM LTD. V COMMISSIONER INLAND REVENUE

Rules, 2001 and in the light of the procedure prevalent at the relevant time when these transactions took place.

Since the Tribunal is non-functional, we direct the concerned Department not to resort to any recovery proceedings pursuant to the Order in Original in question till the Appeals are finally decided by the Tribunal. 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/