

IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Reference Application
Nos. **334/2015** alongwith
SCRA Nos. 95, 96, 99, 100, 101, 102, 198 **to** 202, 335 **to**
574, 576 **to** 728, 1081, 1493, 1711 **to** 2150, 2792 of 2015
SCRA Nos.07 **to** 12, 14, 15 of 2016,

DATE

ORDER WITH SIGNATURE OF JUDGE

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

Applicants: M/s. Collector of Customs & others
Through Mr. Khalid Rajpar, Advocate.

Respondents: In all Reference Applications
Through M/s. Zain A. Jatoi alongwith
Waseem-ur-Rehamn, Pervaiz Iqbal, Zia-ul-
Hassan, Adnan Ahmed Zafar, Mohabbat
Hussain Awan, Zafar Hussain, Abdul Qadir
Sayed, Atta Muhammad Qureshi, Abdul
Rahim Lakhani alongwith Mr. Abdul Jabbar
Mallah, Sardar Aamir, Faheem Shah.

Mr. Kafeel Ahmed Abbasi, DAG.

Date of hearing: **24.11.2020**

Date of Order: **24.11.2020**

ORDER

Muhammad Junaid Ghaffar J.- In All these connected Reference Applications, the Applicant department has impugned Order dated 26.09.2014 passed by the Customs Appellate Tribunal in Customs Appeal Nos.K-705/2013 & other connected identical matters proposing the following questions of law purportedly arising out of the Order of the Tribunal: -

- i. Whether Clearing Agent can be absolved of any illegality, mis-declaration if subsequently detected after the release of the consignment?
- ii. Whether carrying of cargo by NLC will anyway absolve the clearing agent from assuring the availability of a cross border certificate of the consignment which the clearing agent got released as a transit cargo?
- iii. Whether the provisions of Section 32(1) & (2) of the Customs Act, 1969 as well as Section 32 A of the Customs Act will be attracted when the

clearing agent acts on behalf of its principal in seeking the release of the consignment?

- iv. Whether the Show Cause Notice in the instant case was barred by time?
- v. Whether the Clearing Agent being a Custom House licensed agent is bound to produce the principal on behalf of whom he presented the documents and whether on production of such principal can the clearing agent be absolved from the criminal liability?
- vi. Whether the carrier companies can be held liable in place of clearing agent or both can be held responsible for their criminal liability individually?
- vii. Whether the checking by the custom officers of the container in the transit trade will absolve the clearing agent of all the responsibilities and criminal liabilities?
- viii. Whether the clearing agent connived and abetted in the matter in which he has been absolved by the Appellate Tribunal?
- ix. Whether the provisions of Section 207 of the Customs Act, 1969 in any way prevent or protect the clearing agent from being penalized for the alleged act in the instant case?"

2. Learned Counsel for the Applicant submits that the Respondents being authorized Customs Agents were required in law to produce Cross Border Certificates ("CBC"), which admittedly they failed to do so; hence were liable for the pilferage and misappropriation of the consignment en-route to Afghanistan and played a role in the consumption of these consignments within Pakistan. Per learned Counsel the penalty was correctly imposed and the Tribunal has failed to appreciate the law in this regard. He has also referred to Public Notices No.16/2000 dated 30.09.2000 and 05/2003 (PQ) dated 6.11.2003 in support of his contention.

3. On the other hand, Mr. Zain A. Jatoi, appearing on behalf of some of the respondents has argued that nowhere in any of the Public Notices or guidelines issued from time to time, respondents were required to bring CBC from the Exit Collectorate; rather in view of Public Notices in question it was an internal arrangement between Collectorate at Karachi and respective counterpart at destination port to reconcile and forward CBC within a period of 45 days. According to him responsibility of the respondent ended when the containers in sealed condition were handed over to the nominated and authorized Bonded Carrier i.e. NLC. He has

prayed for dismissal of these Reference Applications. All other Learned Counsel for the other respondents have adopted the arguments of Mr. Zain A. Jatoi.

4. We have heard all the learned Counsel and perused the record. In all these cases precise allegation levelled against the respondents is to the effect that the consignments were cleared by them from the Port area and were destined as transit cargo to Afghanistan, whereas, it has been reported that CBC's of the said consignments are not available in the record of exit Border Collectorate, thereby rendering strong credence to the effect that goods being transited to Afghanistan were pilfered en-route and consumed within Pakistan territory. It was further alleged that this has resulted in loss of revenue; hence, show cause notices for appropriate proceedings under the Customs Act. Such show cause notices were adjudicated by the Adjudication Authority, whereby, after discussing facts of only one case, the order was applied on hundreds of respondents including the present respondents mutatis mutandis. Similar exercise was also carried out in respect of other show cause notices and in similar fashion the orders were passed. At the very outset, learned Counsel for the Applicant was confronted to take us to any Rules, Public Notices or directions issued by the FBR, which requires that CBC has to be obtained and furnished by the respondents and on this he was unable to assist the Court. The learned Tribunal has also dealt with this question and the operative part of the impugned order reads as under:-

"15. There is no denial from either side that all the appellants are licensed Customs house agents who were engaged in the clearance of goods relating to their Afghan clients. Admittedly the consignments arrived at Karachi Port/Port Qasim were cleared by Customs for onward transit to Afghanistan and were put on the containers in presence of concerned Customs authorities which were checked by them. After fulfillment of necessary formalities, the containers were sealed. Thereafter, the imported cargoes was lifted by the authorized national bonded carriers i.e. National Logistics Corporation (NLC) to safely transit the goods across Pakistan through designated destination i.e. either through Spin-Boldak (Chaman) or the Trokham borders.

16. The responsibility of the appellant companies was restricted to the Karachi Port/Port Qasim till the cargo was loaded into the containers, checked by the customs authorities and containers are sealed and handed over to the bonded carriers. Thereafter, it is sole responsibility of carrier companies and other involved in the safe transportation/transit of the goods across the country, which also included to get receipt from the competent authorities as to the safe

and sound arrival of the goods at the destination alongwith cross border certificate.

17. In the instant cases, this Tribunal has observed that the stereo type notices were cyclostyled by the Additional Collector, Port Muhammad Bin Qasim, Karachi and were served upon the appellants. Perusal of Show Cause Notice reveals that no specific allegation was leveled against the appellants except that the appellants are clearing agent who allegedly joined hands with the NLC management and misappropriated the goods from the containers within the territory of Pakistan.

18. There are certain admitted facts in this case that the appropriate goods arrived at Karachi port which were loaded in the containers; they were checked by the competent Customs authorities; GDs were filed by the appellants, containers were sealed and were handed over to the NLC for further transportation to Afghanistan.

19. As per the relevant law, the clearing agent's job ends with the filing of GDs, their processing and loading on the containers, etc, and it is the sole responsibility of carrier to safely transit the goods across the country through designated destination via Chaman or Torukam borders.

20. The above appeals were heard at length. There is no evidence in the record that the appellants actively participated or convinced in the misappropriation/pilfering or smuggling of impugned goods. Similarly, the D/Rs representing various Directorates could also not point out that the goods from the containers were pilfered, smuggled or misappropriated by the appellants or with their connivance.

21. The upshot of the above discussion is that this Larger Bench is unanimously of the view that no sufficient evidence is available on the files/record to connect the appellants i.e. clearing agents with the smuggling, pilfering or misappropriation of impugned goods. As a consequence, all these appeals to the extent of appellants/clearing agents are accepted and the impugned orders to the extent of clearing agents are set-aside." **(Emphasis supplied)**

5. Perusal of the aforesaid findings clearly reflects that after fulfillment of necessary formalities and sealing of containers, the respondents handed over the same to the designated Bonded Carrier i.e. NLC for safe transit of the goods to the respective destinations either through Spin-Boldak (Chaman) or the Trokham borders. Such finding of fact to this effect has not been denied that the respondents being Customs Agent fulfilled this responsibility and handed over these containers in sealed condition to NLC duly authorized for such purposes. In fact, in the Show Cause Notices issued to the respondents the applicant department has by itself alleged against NLC that they were legally under obligation to ensure safe and secure transportation of the transit cargo to the notified point of exit at Peshawar via the transit route duly notified for such purpose. We have

confronted the learned Counsel for the Applicant as to how in one Show Cause Notice the allegations have been levelled against respondents as well as NLC holding both of them responsible for the same act, whereas, admittedly the present respondents had no control over transportation of these containers, once they were handed over to NLC and on this learned Counsel could not satisfactorily respond. It further appears that in view of Public Notices as above under the head of record keeping and reconciliation at Para-7 it is clearly provided that respective Customs station at the border will send the CBC confirming that the goods have crossed over to Afghanistan within 45 days of the dispatch of the copy of the ATTI from Karachi. It further provides that the Afghan transit section officer shall reconcile its record on receipt of CBC. Besides this nothing has been placed on record or referred to so as to justify that any responsibility was fixed upon the respondents to manage the transportation of the containers in question up to the exit points and obtain CBC notwithstanding the facts that such responsibility has already been fixed upon NLC according to the applicants in these very Show Cause Notices.

6. Even otherwise, it does not appeal to a prudent mind that Respondents being based in Karachi, and after having been directed to hand over the containers to NLC (the authorized carrier), could in law, be asked to get the container transported till Afghanistan and then bring CBC to ensure that it has crossed the border. At most, it could be the responsibility of NLC to ensure that it hands over the container to the next exit point in transit, and in fact, such responsibility has already been alleged / fixed in these very show cause notices. Therefore, we do not see as to why the present respondents have been show caused for the same without their being entrustment of any such responsibility.

7. In view of hereinabove facts and circumstances of this case, in our opinion no case for indulgence is made out so as to interfere with the impugned order of the learned Tribunal. The questions which have been proposed are neither properly phrased nor all are relevant; hence following questions of law are re-phrased by us:

1) *“Whether in the facts and circumstances of the case the Tribunal was justified in holding that pursuant to Public Notice No.16/2000 (A) dated 30.09.2000 and Public Notice No.05/2003 (PQ) dated 6.11.2003 the respondents were not liable to bring Cross Border Certificates of the containers/consignments handled by them as Customs Agents from the respective Exit Customs Stations”?*

2) *Whether in the facts and circumstances of the case provisions of Section 32(1) & (2) and 32-A of the Customs Act, 1969 read with s.207 ibid will be attracted when the respondents handed over containers in sealed condition to NLC as per procedure in vogue?*

8. The answer to question No.1 is in the affirmative against the Applicant and in favour of the Respondents; and to question No.2 is in negative, against the Applicant and in favor of the Respondents. Let copy of this Order be sent to Appellate Tribunal Customs in terms of sub-section (5) of Section 196 of Customs Act, 1969.

Judge

Judge