

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
 Special Customs Reference Applications Nos. 477 to 541 of 2011

Date Order with signature of Judge

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

Applicant: **Collector of Customs
 Through Mr. Kashif Nazeer, Advocate.**

Respondents: **M/s. Shoaib Enterprises
 & others.**

Date of hearing: **21.01.2021.**

Date of Order: **21.01.2021.**

Muhammad Junaid Ghaffar, J: Through these Reference Applications, the Applicant Department has impugned order dated 02.11.2010 passed by the Customs Tribunal in Customs Appeal Nos.463/2005 [*Shoaib Enterprises v Additional Collector of Customs (38 cases)*], Appeal No.K-319/2005 [*Malik Enterprises v Additional Collector of Customs (15 cases)*], K-474/2005 [*Faisal Impex v Corporation Additional Collector of Customs (8 cases)*], K-663/2004 & 884/2004 [*United Trading Corporation Additional v Collector of Customs (02 cases)*], K-544/2005 [*Muhammad Kamil & Sons v Additional Collector of Customs (01 case)*] and K-546/2005 [*Nasir Qasim v Additional Collector of Customs (01 case)*] proposing the following questions of law:-

- i. Whether the order impugned in Customs Appeal No.K-463/05 being Order-in-Original No. 352/05 dated 10.06.2005 was holding the filed at the time foe haring, if not its effect?
- ii. The Order impugned does not contain any reasons or illegally to set-aside the Order-in-Original No. 352/2005 dated 10.06.2005 as such bad in law.
- iii. The Appeal No.K-463/2005 was not fixed before the bench as the same was valued to Rs.40,31,616/- for pecuniary jurisdiction of Single Bench, the tribunal is pleased to decide the matter without Application of mind.

2. Learned Counsel for the Applicant has read out the order and submits that in the impugned order some concession of the Department's Counsel then appearing before the Tribunal was recorded; however, the matter ought to have been decided on merits and at least a remand order was an appropriate recourse to the proceedings as according to him in an earlier case of similar nature matter was remanded to the department.

3. We have heard the learned Counsel and perused the record. Insofar as proposed questions of law are concerned, time and again despite affording opportunities, the Applicant Department has failed to propose any amended question of law as the aforesaid question are neither properly drafted nor are question of law arising out of the impugned order of the Tribunal. While confronted, today the learned Counsel submits that he has been subsequently engaged in these matters, whereas, these Reference Applications were filed through another Counsel. Nonetheless we have gone through the record and on perusal of the same, it reflects that show cause notices were issued to various respondents and thereafter Order-in-Original No.352/2005 dated 10.06.2005 was passed in respect of one respondent / Importer and was then applied *mutatis mutandis* on 209 independent and separate respondents. The said respondents being aggrieved preferred Appeal and through impugned order, the Tribunal has set-aside the order, which has now been impugned before us. The relevant finding of the Tribunal in the impugned order is as under:-

"7. The perusal of above show cause notice reveals that there are general allegations in respect of under-invoicing but it does not contain any specific detail about the imports made by the appellants. Even in the Order-in-original there is no discussion in respect of the imports with reference to:

- (i) Whether the documents seized from the office of indenter M/s International Business Management related to the imported consignments of the appellant?
- (ii) Whether there is any proof of transfer of under-invoiced value of the goods?
- (iii) Whether value was enhanced on the basis of identical or similar goods within the meaning of sub-section (5) & (6) of Section 25 of the Customs Act, 1969?
- (iv) Whether the valuation of data relied upon by the Department relates to same country of origin (Section 25(13)(e))?
- (v) Whether the valuation date relates, to the period at or about the same time i.e. 90 days prior to importation of within 90 days after the importation (rule 107 Chapter VIII of SRO 450(I)/2001) during which each impugned consignment was imported?

8. It would be relevant to mention that in all these cases that show cause notices had been issued on same pattern, which either do not contain any specific allegations against the appellants or are full of material contradictions. Not only this but also they contain incorrect and irrelevant facts and there are imports from countries other than Indonesia, even some of the show cause notices are totally silent about the name of the import/commodity. In the present cases the appellants in order to substantiate their contention have also filed the copies of the bills of entry in respect of their imports, wherein the customs department itself had enhanced the value of the goods for the purpose of levy and collection of duty and taxes. Moreover, the order-in-original has been passed in the case of M/s. Ikram Brothers, Lahore and the above order has been applied mutates mutandis in the cases of 209 importers without any reference to the facts of the each case. **Looking to these glaring discrepancies and illegalities the learned counsel for respondent has also conceded that the show cause notices issued to the appellant are not only containing incorrect facts, but also not in accordance with the law.**

9. It is well settled law that one cannot go beyond the allegations mentioned in show cause notice and it is the primary documents, upon which whole case of the department against the appellants is based. Therefore in presence of such self-contradictory Show Cause Notices, that too without any supporting evidence, it is not possible to fix the responsibility in such a vague and casual manner.

10. Looking to the above admitted facts, it is established that any further action against the appellants on such premises cannot be sustained.

11. The up-shot of above discussion is that the documentary evidence of transfer of foreign exchange of amounts allegedly under-invoiced or evidence of higher value against each consignment imported by the appellants were not provided at the time of issuance of show cause notices/order-in-original or during pendency of appeals before the Tribunal. The linkage between the imports made by importers and the documents/computerized record recovered from the office of Indenter M/s. IBM could not be established. Even cases were decided without giving opportunity of hearing to the appellants. The respondent department did not furnish comments against points raised by the appellants in their memo of appeals which lead to inference that they do not have any corroborative evidence/record to establish under-invoicing. The learned Department Representative also could not controvert the procedural and legal infirmities point out by the appellants. Consequently, the impugned order-in-original is set aside to the extent related to the following appellants and appeals are hereby allowed.”

4. Perusal of the aforesaid order reflects that in fact the department's Counsel then appearing before the Tribunal while confronted as to the fact that one order passed against M/s. Ikram Brothers, Lahore, has been applied *mutatis mutandis* on 209 different persons without discussing the facts and allegations against such respondents, conceded that the show cause notices issued to the appellants are not only containing incorrect facts; but are also not in accordance with law. It further appears that the Applicant Department also filed application for remand of the matters to the Adjudicating Authority; however, learned Tribunal, after going through the facts of the case, was not inclined to do so. We are also not convinced to consider this argument as apparently it has been conceded by the Applicant Department before the Tribunal that in fact the show cause notices were based on incorrect facts and were not in accordance with law. It has also come on record that despite several opportunities even before the Tribunal, which is the last fact finding authority in hierarchy, no material was brought on record so as to justify the issuance of show cause notices; hence, the Tribunal was fully justified in setting aside the order without any directions of remanding the matter to the Adjudicating authority. It is settled law that order of remand must not be made for the purposes of curing the legal lacunas and defects in the very inception of the proceedings. Moreover, when it has been conceded before the Tribunal that not only the impugned order of the Adjudicating authority was illegal, but so also the show cause notices; hence, any order of remand was then meaningless, as the limitation to issue any fresh show cause notices had already lapsed, whereas, despite several opportunities no material was brought on record. This is notwithstanding the fact that

the tendency of the Customs authorities in passing of orders *mutatis mutandis* has never been appreciated by the Courts¹.

5. In view of hereinabove facts and circumstances of the case and the concession by the Applicant's Counsel before the Tribunal in respect of the illegality in issuing the show cause notices to the respondents, in our considered view, no question of law is arising out of impugned Order of the Tribunal so as to consider the request of remand. Accordingly, these Reference Applications being misconceived, are hereby dismissed in limine. 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 to place copy of this order in connected Reference applications listed at serial No.22 of list as above.

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¹ Pakistan Telephone Cables Limited v Federation of Pakistan [2011 PTD 2849] & Prime Chemicals v Government of Pakistan [2044 PTD 1388]