

IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application No. **448/2019** along with
SCRA Nos. 332 to 337, 449, 451, 452, 453 & 469 of 2019.

Date Order with signature of Judge

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

Applicants: The Director through Additional Director of PCA (Law) & Collector of Customs & Collector of Customs, through Additional Collector of Customs (Law) Through Mr. Khalid Mahmood Rajpar, Advocate.

Respondents: M/s. R.J. Corporation in SCRA No. 448/19 & others.

Date of hearing: 17.02.2021.

Date of Order: 17.02.2021.

ORDER

Muhammad Junaid Ghaffar, J: These Reference Applications, have been preferred by the Director of Post Clearance Audit and Collector of Customs (“**Applicant hereinafter**”) have impugned an Order dated 22.02.2019 passed by the Customs Appellate Tribunal at Karachi in Customs Appeal No. K-666/2017 & others connected Appeals (6 Appeals) proposing the following questions of law:-

- i. Whether the learned Appellate Tribunal has considered the provision of Section 79(1)(b) read with Section 32(1)(c) of the Customs Act, 1969, the less payment of revenue through wrong self-assessment is also not a case of mis-declaration within the meaning of Section 32 of the Customs Act, 1969 read with SRO 499(1)/2009?
- ii. Whether the learned Appellate Tribunal has not erred in law to accept claimed benefit of Part 1-24 of Part-I of Fifth Schedule to the Custom Act, 1969, Sr. No.15(2) of Table 3 of the Sixth Schedule to the Sales Tax Act, 1990 under PCT 9405.1090?
- iii. Whether on the facts and circumstances of the case the learned Appellate Tribunal has failed to consider that the respondent importer has deliberately mis-declared the exemption of the goods and trying to clear at lower rate of duty meaning thereby the respondent has mis-declared the same in terms of Section 32 of the Customs Act, 1969?

- iv. Whether the Appellate Tribunal has not erred in law by not declaring the offence of the respondent as “gross mis-declaration” of exemption to Fifth Schedule to the Customs Act, 1969 and Sixth Schedule to the Sales Tax Act, 1990 within the meaning of Section 32 of the Customs Act, 1969?
- v. Whether any person who is not with clean hand is entitled for any equitable relief?

2. Learned Counsel for the Applicant(s) has read out the Order and submits that the consignments imported by the respondents were not entitled for any exemption, whereas, this is a case of mis-declaration as the Respondents got the goods cleared at a lower rate of duty; hence the proposed questions be answered in favour of the Applicants.

3. We have heard the learned Counsel and perused the record. Perusal of the record reflects that the respondents had imported LED Panel Lights under HS Code 9405.1090 and filed Goods Declaration claiming benefit of customs duty vide Sr. No.24 of Part I of the Fifth Schedule to the Customs Act, 1969 and exemption of sales tax vide Sr. 15(ii) of the Table 3 of Sixth Schedule to the Sales Tax Act, 1990 and that of Income Tax vide CL77 PT-IV of second Schedule to Income Tax Ordinance, 2001 and after examination of the goods, it was observed that they are not meant to work and operate with the renewable energy sources like Solar Energy or Wind Energy, whereas, they were to be operated on alternate current rather than direct current, and as a consequence thereof, it was alleged that the above concession is not available. Based on these allegations show cause notices were issued and thereafter Order-in-Originals were passed against the respondents. The said order was then impugned before the Appellate Tribunal and through impugned order, the Appeals of the respondents have been allowed. The operative part of the order passed by the learned Tribunal reads as under:-

“7. Now we shall look into the merits of the case. The crux of the case is that the appellant imported LED lights of various Watts. The SMD/LED lights were cleared by the department under PCT Heading 9405.1090 and extended exemption of customs duty in terms of 5th Schedule of the Customs Act, 1969 and Sixth Schedule of the Sales Tax Act and part IV of the Second Schedule to the Income Tax Ordinance, 2001. After release of the consignment the department made observation that subject goods did not qualify for the exemption as it was only available to SMD, LED with or without ballast and fixtures for the promotion of renewable technologies. The exemption was more restrictive and allowed to the items within dedicated use

of renewable source of energy which includes sources like solar and wind power only (DC Light). The advocate of appellant contended that the subject goods are LED Lights which are duly covered under the ambit of 5th Schedule of the Customs Act 1969, under serial No.24.2 which allows the exemption on SMD, LEDs with or without ballast with fittings and fixtures classifiable under PCT Heading 9405.1090 chargeable to 0% custom duty with no condition. The Table No.3 serial No.2 of the Sixth Schedule of the Sales Tax Act, 1990 allows the exemption of sales tax on items namely SMDs, LEDs with or without ballast with fitting and fixtures classifiable under PCT Heading 9405.1090 against nil condition. The clause 77 of part iv of second Schedule to the Income Tax Ordinance, 2001 also allows the exemption on above items and further contended that the appellants were entitled to get the benefit of above referred exemptions. The clearance Collectorate had extended the benefit of exemption legally and lawfully. The language of 5th schedule to Customs Act, 1969 and Sales Tax, 1990 and that of Income Tax Ordinance, 2001 are same and given as under:

“Following items for promotion of renewable energy technologies or for conservation of energy:

i)	<i>SMD/LED/LVD lights with or Without ballast with fittings and fixtures</i>	<i>9405.1090</i>	<i>0%</i>
ii)	<i>SMD/LED/LVD street lights, Having in built/integral PV Module with or without solar batteries.</i>	<i>9405.4090</i>	<i>0%</i>
iii)	<i>Tubular Day Lighting Device</i>	<i>9405.5010</i>	<i>0%</i>
iv)	<i>Wind Turbines including Alternators and mast.</i>	<i>8502.3100</i>	<i>0%</i>
v)	<i>Solar torches.</i>	<i>8513.1040</i>	<i>0%</i>
vi)	<i>Lanterns and related instruments</i>	<i>8513.1090</i>	<i>0%</i>
vii)	<i>LVD induction lamps.</i>	<i>8539.3990</i>	<i>0%</i>
viii)	<i>LED Bulb/Tube Lights</i>	<i>8543.7090</i>	<i>0%</i>

9. These cases were made out on the basis of the FBR's letter No. 11(56)/Mach/95/20835R dated 12th February, 2016 which stated that the exemption shall be allowed on the LED lights upto 60 Watts. The FBR's letter is reproduced as under:

I am directed to refer to Collectorate's letter No. SI/Misc./IDP/82/2Q15W22 dated 22nd September, 2015 seeking clarification whether LEDs/SMDs with or without ballast with fittings and fixtures, having specification 3W, 6W, 7W, 12W etc., having 50/60 Hz, 85 - 265V, qualify for exemption from the duty in terms of Sr. No. 24 (2) of Part -1 of Fifth Schedule to the Customs. Act, 1969. The Directorate General of I & I, FBR, Islamabad, has also issued an alert dated 9.10.2015 about the LED lights qualifying under said provisions. Similarly, Collectorate of Appraisement (West), Karachi, vide letter dated 30.10.2015 has circulated an assessment alert on this issue. Hence, warranting a clarification on the subject. The varying practices being followed by the field formations on imports of LEDs/SMDs viz. aforesaid exemption are causing

hardships for the importers leading to unnecessary controversy, delays and- litigation. So far as consignments having a EOB allowing the exemption. However, there appears to be a lack of consensus on extending the benefit to such LEDs/SMDs imported as standalone consignment. The issue has been examined in consultation with stakeholders i.e. AEDB, ENERCON and other experts in this field. Keeping in view the existing formulation, there is a need to have an objective criterion in limiting benchmark for allowing exemptions in a uniform, transparent and smooth -manner. Board is therefore, pleased to clarify that only such consignments of LEDs/SMDs would be eligible for exemption of customs duty under So No. 24 (2), Part-I, of the Fifth Schedule to the Customs Act, 1969, where the operable voltage of LEDs/SMDs does not exceed 60 Volts.

(Faisal Khan)
Secretary (Tariff-II)

10. First of all the FBR conceded through above letter that exemption of duty & taxes is available to impugned SMD/LED lights, etc. This means the department had correctly extended the benefit. Similarly the main department / ministries AEDB & ENERCON also agreed on exemption. However, we fail to understand that under what authority the Board can limit an exemption or enhance exemption. This is the prerogative of parliament only. This clarification was later withdrawn on 28th November, 2017. The above clarification given by the Board also suffers from the improprieties as it narrows and restricts the scope of statutory exemption given by the legislature to the taxpayers, which is against the Rules of Statutory Interpretation. Moreover, the Board is not empowered strictusensu to give clarification on the statute which has been passed by the legislature. Parliament is the only competent authority to clarify the laws passed by it. This view is supported by the landmark judgment of IHSAN SONS (PVT.) LTD., KARACHI Versus FEDERATION OF PAKISTAN through Secretary Revenue Division, Ministry of Finance, Islamabad and 2 others 2006 PTD 22099 the honourable Sindh High Court, the operative para is reproduced below:

"We would like to add further that the exemption notifications are issued by the Federal Government in exercise of the powers conferred by Section 19 of the Customs Act, 1969. There are certain other provisions in the Customs Act which empower the C.B.R. also to issue certain notifications. In matter pertaining to the delegated legislation, the power has to be exercised strictly in accordance with the statutory law conferring such powers. The exemptions and the scope and extent thereof under section 19 of the Customs Act, 1969 are exclusively within the competence of Federal Government and therefore the C.B.R. being an attached department has no authority to add anything or subtract or expand or restrict the scope of exemption by way of clarifications. All such alterations, additions, modifications, expansions and restriction made by the C.B.R. in exercise of its administrative jurisdiction is not warranted in law and has no legal validity. Thus the C.B.R. is neither empowered to interpret any law nor is authorized to add anything to the S.R.Os issued by the Federal Government in exercise of the delegated authority under particular provision of law. The addition omission, alteration or modification in any S.R.O/notification issued by the Federal Government can be made by the Federal Government only and not by C.B.R., an attached department. The question Nos. 5 and 6 are answered accordingly."

12. This entry was given retrospective effect as the Board vide letters No. 1/53- STB/2013(PA)/52995-2 dated 01.08.2016 and dated 27.04.2017 issued instructions to extend benefit of this entry to the importers claiming benefit and may be assessed u/s 81 of the Customs Act, 1969 (provisional assessment section). Later benefit was given retrospectively and financial securities were released. This clause read with Board's letter where exemption was allowed on 60 watt lights, amply clarifies that exemption was available to LED lights and other goods falling under this exemption clause.

13. Further it was rightly contended by the appellants that the Board's letter No C.No 1(56)Mach/95/20835-R dated 12.2.2016 is not operative retrospectively, even if it is accepted as legally correct as the GD KAPW-HC-171756 dated 5.5.2015 relates prior to the Boards letter dated 12.2.2016. It was further argued that since this had been the spirit and intention of the legislature translated by the Board that's why the language was amended subsequently in the Finance Act of 2017 and 2018. The Board's interpretation about exemption on operable voltage of SMD/LED which does not exceed 60 volts was not incorporated in the statute i.e. Fifth Schedule of Customs Act and Sixth Schedule of the Sales Tax Act, 1990. It is a principle and settled law that the statute always prevails and the Board is not empowered to issue such clarifications.

14. What has been stated, discussed and observed herein above particularly the interpretation of the legal proposition referred in the prescribed law and to follow the ratio decided in the judgments of Superior Courts along with the additional observations made thereon, it is hold[sic] that the impugned order passed during the hierarchy of the customs suffers from grave infirmities and are declared void, ultra-viral[sic] ab-intio, illegal and hereby set-aside and appeals are allowed with order as to cost.”

4. Perusal of the aforesaid finding reflects that earlier the respective Collectorates had cleared the subject goods by extending the benefit of the above exemption, and after releasing of the same it was alleged that the said exemption is not available. It appears that such proceedings were initiated pursuant to some letter of FBR dated 12.02.2016, wherein, it was clarified that the exemption would only be available where the *voltage of LED lights does not exceed 60 Watts*. Responding to this the Tribunal has been pleased to observe that such clarification or finding of FBR in respect of an exemption available under the Act comes from nowhere, as FBR has no role to play in such matter. It has been further observed that FBR has no authority either to enhance or restrict an exemption. It has been further observed that in any case this letter of FBR could not be applied retrospectively on the Respondents goods which were already cleared after accepting the claim of exemption. We are fully in agreement with such finding in the given facts and circumstances of the case in hand. It is further reflected that the above clarification which was adversarial, was later on withdrawn on 28.11.2017. It is also a matter of record that insofar as the exemption in question is

concerned, there was no such restriction as to the limit of watts or voltage of the LED lights in question, whereas, the related department i.e. National Energy Conservation Centre and Ministry of Water and Power had also supported the case of the respondents. Not only this even otherwise, the relevant entry in the 5th Schedule provides "*Following items for promotion of renewable energy technologies or for conservation of energy;*, whereas the Applicant is of the view that the lights in question were never meant for promotion of renewable energy; however, has lost sight of the fact that after this the words "**OR**" has been used which here in the given facts and circumstances is to be read as "**and**"; hence, applies to all items for promotion of *conservation of energy*, which makes it irrelevant that as to whether what is the capacity in watts or voltage; or for that matter whether it is to be used in solar or wind energy; or in AC current or DC current.

Based on these facts the Tribunal has come to the conclusion that the Applicant(s) had no case to rely upon an interpretation given by FBR inasmuch as the same was against the very Statute and cannot be accepted, and therefore the entire case as set-up by the Applicant department including allegations of mis-declaration within the contemplation of s.32 of the Act has no basis. We do not see any reason to differ from the conclusion so drawn by the Tribunal; hence we are of the view that there appears to be no justifiable cause with the Applicant(s) to challenge such finding of the Tribunal, which, in the given facts and circumstances of the case, is in line with the settled principles of law, and therefore, apparently no question of law arises out of the order of the Tribunal.

5. In view of such position, we are not inclined to entertain these Reference Applications as no substantial questions of law arise out of the impugned order, and therefore, they are dismissed in limine. Let copy of this Order be sent to Customs Appellate Tribunal in terms of sub-section (5) of Section 196 of Customs Act, 1969.

Office to place copy of this order in connected Reference applications as above.

J U D G E

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