IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application No. 288 to 291 / 2018

Date	Order with signature of Judge

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

Applicant:	**M/S. Al-Meezan Poultry Feeds.** **Through Mr. Muhammad Nouman Jamali, Advocate.**
Respondents:	**The Collector of Customs, (Adjudication-I), & Another** **Through Ms. Afsheen Aman Advocate.** **Mr. Tariq Aziz Principal Appraiser PQA.**
Date of hearing:	**08.03.2021.**
Date of Order:	**08.03.2021.**

O R D E R

Muhammad Junaid Ghaffar, J: Through these Reference Applications, the Applicants have impugned an identical order / judgment dated 26.03.2018 passed by the Customs Appellate Tribunal at Karachi separately in Customs Appeal No. K-1608 to 1611 of 2017 and had proposed various Questions of Law; however, on 13.12.2018 notice was ordered on the following Questions of Law:-

"b) Whether the clarification letter C.No. 1/369/Mach/ 2001/73310 dated 25.05.2015 issued by FBR on the interpretation of Sr. No. 1 of Table 2 of Eighth Schedule to the Sales Tax Act 1990 is against the norms of interpretation?

c) Whether the clarification letter C.No. 1/369/Mach/ 2001/73310 dated 25.05.2015 issued by FBR applied retrospectively on the subject goods declaration?

d) Whether on the basis of facts and circumstances of the case the applicant has rightly availed the benefit of Sr. No. 1 of Table 2 of Eighth Schedule to the Sales Tax Act 1990?

e) Whether in the facts and circumstances of while interpreting Sr. No. 1 of Table 2 of Eighth Schedule to the Sales Tax Act 1990 the Silos are part of plant and machinery?

f) Whether the learned Tribunal erred in law in ignoring the fact and law that the FBR by subsequent amendment Sr. No. 1 of Table 2 of Eighth Schedule to the Sales Tax Act 1990 has added Silos as plant and machinery?

g) Whether the learned Tribunal erred in law in ignoring the fact that through classification ruling No. 13 modified in 2017 by HS Committee, 58th Session of World Customs Organization has occurred whereby Silos have included in the ambit of machinery and equipment under Chapter 84 of HS tariff?"

2. Learned Counsel for the Applicants submits that the learned Tribunal (Single Bench) has seriously erred in law as well as on facts inasmuch as an earlier Judgment of a Division Bench of the Tribunal dated 06.06.2017 passed in Customs Appeal No. K-432/2016 and other connected matters decided in favour of the Applicants has been ignored; that the Tribunal has failed to appreciate that the clarification of FBR dated 25.5.2015 was issued subsequently after clearance of the consignments and could not have been applied retrospectively; that the earlier clarification of FBR was still in field; that at the time of transposition of exemption SRO's 575 and SRO 722, to 5th Schedule to the Customs Act, 1969, (Custom Act) and 8th Schedule to the Sales Tax Act, 1990 (Sales Tax Act) specific exemption has been granted from customs duty and sales tax on the import of silos; hence even otherwise, a subsequent clarification was immaterial as the exemption was always available under the Acts; that earlier Division Bench of the Tribunal has correctly held that when the exemption was clear and specific under the statute, then there was no occasion for FBR to give any clarification; that in the explanation to the exemption notification as well as the Schedules thereto, no restriction has been provided as to the goods being classifiable under Chapter 84 or 85 and therefore, the order of the Tribunal is liable to be set aside and the Questions of law be answered in favour of the Applicants.

3. We have heard the learned Counsel for the Applicants and perused the record. On perusal of the record, it reflects that the Applicants imported consignments of silos which were allowed release by granting exemption from the customs duty and sales tax under Fifth Schedule to the Customs Act, and Eighth Schedule to the Sales Tax Act. Thereafter, pursuant to some clarification of FBR dated 25.05.2015 Show Cause Notices were issued and an Order-in-Original was passed against the Applicants and in Appeal the same has been maintained by the Tribunal. The relevant findings of the Tribunal in the impugned order reads as below:-

"08) The expression Machinery has been defined under note 5 to Section XVI of First Schedule to Customs Act, 1969. The impugned goods by virtue of their classification in Chapter 94 ibid are excluded from the definition of machinery. Similarly the expression equipment implies a set of tools needed for a specific job. The equipment is essentially devices and machines. The impugned goods cannot be treated as equipment either.

09) The issue regarding use and admissibility of concession from duty as well as sales tax is not new. Previously the nature, use of silos and the admissibility of concession has been a subject matter of clarifications issued by Customs from time to time. In this regard a few of such clarifications were examined,

a. On reference to Board by Chief Collector (South), it was clarified by the Board vide its letter C. No. 1(369) Mach/2001 dated 14.06.2012 that "silos" are not covered under definition of Plant and Machinery, hence, not entitled for benefit of SRO 727(I)/2011.

b. It was clarified by the Board that pre-fabricated structures are not entitled for exemption of Sale Tax. In case of identical imports by M/s. Engro Foods (Pvt) Ltd., under s. No. 2 of the SRO 575 (I)/2006 i.e. machinery and equipment for development of grain handling and storage facility, it has been categorically clarified by the Board vide its letter C. No. 1(369)Mach/2001 dated 21.09.2011 that storage silos are not entitled to the benefit of S. No. 2 of 575(I)/2006 meaning thereby that storage silos do not constitute "machinery and equipments" for the purpose of exemption under S. No. 2 of SRO.

c. In another case of import of pre-fabricated steel structures of PCT heading 9406 imported by M/s. Aisha Steel Mills Ltd., it was clarified by the Board vide its letter C. No. 1(369)Mach/2001 dated 02.09.2008 that "pre-fabricated buildings do not constitute plant, equipment or capital goods as envisaged in S. No. 21 of SRO 575(I)/2006, hence, they do not qualify for exemption".

d. In view of above, the clarification issued by the Board vide its letter C. No. 1(19)STT/2005.Pt-140523-R dated 25.10.2012 allowing thereby benefit of exemption of Sales Tax to storage silos of PCT heading 9406.0030 for poultry industry is apparently contradictory to all earlier clarifications issued by the Board on the subject."

10. It is apparent from the above discussion, that the present clarification by the FBR on 25.05.2015 is just a reiteration of the consistent opinion of the Federal Board of Revenue. The fact of the matter is that Sr. No. 1 of Table 2 of Eight Schedule to the Sales Tax Act, 1990, has been amended through Finance Act, 2016 to read as "Machinery and equipment for development grain handling and storage facilities including silos". By virtue of this amendment, the words silos has been specifically added along with Machinery Equipment. It is evident that law distinguishes "silos". By virtue of this amendment, the word silos has been specifically added along with machinery equipment. It is evident that law distinguishes 'silos' form machinery and Equipment and now it is the intention to give exemption to silos as well. This amendment amply clarifies that reduced rate of sales tax, prior to the Finance Act, 2016 was not available to silos.

> 11. The appellants have also argued that at post importation stage the Customs Authorities, including the Directorate of Post Clearance Audit have no jurisdiction to re-assess the issue pertaining to sales tax and income tax laws. The appellant have lost sight of the legal fiction created under section 6 of the Sales Tax Act, 1990 whereby Sales Tax in respect of imported goods is to be charged and paid as if it were a duty of Customs. The adjudication order therefore does not suffer from defect of jurisdiction.
>
> 12. In view of the above, I do not find any reason to interfere with the impugned order. The appeal is dismissed being devoid of merit."

4. It appears that in Para 9 thereof the Tribunal has come to the conclusion that silos are not covered for exemption based on some clarification of FBR dated 14.06.2012, whereas, the clarification dated 25.10.2012 also issued by FBR was discarded merely on the ground that it is contradictory to all earlier clarifications issued by the Board on the subject matter. We fail to understand as to how the subsequent clarification could have been discarded as naturally, it would be contradictory to the earlier clarifications, and merely on this ground alone it ought not to have been discarded. Moreover, the clarification dated 25.05.2015 was altogether irrelevant inasmuch as the exemption was specifically available under Fifth Schedule to the Customs Act, to grain storage for poultry industry and under the Eighth Schedule to the Sales Tax Act to all sorts of machinery and equipment for development of grain handling and storage facilities, whereas, it was applicable on all respective headings. There wasn't any restriction of classifying the machinery and equipment under Chapter 84 and 85 exclusively. It was applicable to all machinery and equipment pursuant to the definition of capital goods as provided in the Explanation to the 8th Schedule according to which capital goods *means any plant, machinery, equipment, spares and accessories, classified in chapters 84, 85 or any other chapter of the Pakistan Customs Tariff.* In view of this specific exemption in the Eighth Schedule to the Sales Tax Act, there was no occasion for any clarification being issued by FBR and that too after clearance of the consignments and acceptance of the claimed exemption. Not only this, the Tribunal further erred in ignoring the earlier Judgment on the same issue passed by a learned Division Bench of the Tribunal dated 06.06.2017 in Customs Appeal No. K-432/2016 and other connected matters. The findings of the learned Tribunal in that case reads as under:-

"10. By mentioning this development in the preceding Para, the point to bring home is that silos are no more simple standalone large storage binds of the olden pre-industrial days but are automated, motorized integrated, electronically monitored and mechanical controlled equipment which form a part of the plant / machinery in agro-based feed industry. Therefore, the same are now classifiable as a machinery under Chapter 84 and not as a 'miscellaneous manufactured article' and a 'pre-fabricated building'.

11. Logically, as visible and translated into policy, the intent of legislature all through last few decades was also to provide preferential and concessionary treatment to all the grain handling and development machinery and equipment so that the industrial cost is reduced and agro industry proliferates and grows. Such exemptions in the fiscal parlance are also preferred to as 'tax investments' in an economy by the governments which forego a certain portion of their tax by granting exemption and hence investing such a tax loss for the gain and growth of any economic sector of the society and for Pakistan agro-based industry is the most viably growing sector as high-tech farming of poultry, fish, horticulture, herbiculture, dairy and floriculture are our new horizons to look up to for meaningful surplus productions and ultimate export of value-added agri-produce to earn much needed foreign exchange.

12. Therefore, looking at the issue of description of the impugned goods on a larger canvas and in the foregoing perspective we find no difficulty in concluding that silos have been integral part of the grain storage and handling machinery and equipment and his machinery had been explicitly and identically described in both the current Schedules of Customs and Sales Tax Statues and the previous SRO 575(I)/2009 solely for identical tax treatment i.e. simultaneous exemption from sales tax as well as Custom duty on its import. These equipments; as we have seen in the Tables reproduced above, were in fact subject to 0% Customs duty and sales tax but he Statutes since last about four years have consciously and deliberately reduced the pitch of exemptions of customs duty and sales tax, hence the exemption rate is 5% for both the levies in the respective Schedules of Customs Act, 1969 and Sales Tax, 1990.

13. It is pertinent to state now that all the confusion has actually been created due to Board's clarification issued by the Customs Wing vide its letter C. No. 1-368/Mach/2001/73310 dated 25.05.2015 which, inter-alia, states;

> "As regards exemption of sales tax on import of silos in term of S. No. 1 of Table II of Eighth Schedules to the Sales Tax Act, 1969, the matter was referred to IR wing has clarified that silos, altogether a different item neither fall in the category of machinery or equipment, hence excluded from the purview of aforesaid serial number of Eighth Schedule to the Sales Tax Act, 1990, therefore chargeable to sales @ 17%."

14. The respondent being a subordinate organization of FBR went out of raise demand of sales tax after goods had already been assessed and all the adjudication that followed was done mechanically without going into the spirit, intent and the letter of legislation. This clarification is, therefore, found to be ultra-vires, unlawful and irrational for the following reasons;

i. What is given in the Statute has to be conceived as such and it cannot be interpreted or adjudged or restricted through any administrative clarification or ruling unless the Statute goes through judicial scrutiny at the appropriate Constitutional or parliamentary forum;

ii. This very IR Wing has issued two separate clarification in the past vide letters C. No. 1(18)STT/2005(Pt)/154835-R dated 04.11.2011 and 25.10.2012 stating as under;

" I am directed to refer to M/s. Pakistan Poultry Association's letter dated 31.10.2011 on the subject cited above and to say that the issue has been examined in the Board. It is clarified that Poultry Industry is in the business of production of egg and meat, therefore the benefit of exemption from sales tax under SRO 727((I)/2011 dated 01.08.2011 is available to the machinery to be used in any stage / phase of the poultry industry.

AND

"Kindly refer to various representations made by Pakistan Poultry Association to the Board and Board's letter C. No. 1(18)STT/2005(pt)/154835-R dated 04.11.2011 wherein it was clarified that since the poultry industry is in the business of production of eggs and meats, therefore the benefits of exemption from sales tax under SRO 727(I)/2011 dated 01.08.2011 was available to the machinery to be used in any stage/phase of the poultry industry.

The issue of storage poultry fees silos has also been examined by the Board. It is pointed out that poultry feed silos are a pre-requisite industry and are used by the Poultry Feed Mills and for the production of eggs and meat. Hence the benefit of exemption of sales tax under SRO 727(I)/2011 dated 01.08.2011 is also available to silos for poultry as well.

This issues with the concurrence of the Customs Wing of Board"

It can be seen that these two favorable clarifications were tax-payer friendly and still in the legal sense the same had no force of law as the same exercised no statutory powers (i.e. not notified through any Notification);

iii. This SRO 727(I)/2011 dated 01.08.2011 was issued in the backdrop of creation of Inland Revenue Service (and also IR Wing of FBR) hence the matters pertaining to sales tax were divorced from the erstwhile Sales Tax Wing manned and administered by Customs. Plan reading of this notification shows that it was a blanket and broad-based exemption allowing import of all plant and machinery, not manufactured locally on exemption. It had five conditions for different types of importers and did not mention any description or PCT heading of the goods so exempted, thereunder;

iv. Even an interpretation of a notification by the FBR administration may be tolerable but the clarification dated 25.05.2015 actually passes an adverse ruling on the contents of Sales Tax Act, 1990 as Eighth Schedule thereto is a part of this Statutes and it can only be altered, modified or amended by statutory provision with the explicit approval of the Parliament of Pakistan (and not even the Federal Government of Pakistan). Hence the impugned ruling has no strength of law; and

v. The said ruling also takes away the constitutional right of the effected citizens enshrined in Article 25 of the Constitution of the Islamic Republic of Pakistan by being discriminatory and harming.

15. In view of the foregoing, we find no legal substance or any rationale in the impugned order which is misconceived and passed hastily without any application of mind and blindly following the Board's said clarification. Therefore, we have reasons to conclude that appeal has substance and merit, hence it succeeds. Consequently, the impugned order is hereby set aside as not maintainable."

5. On perusal, the aforesaid findings appears to be correct in law and is based on the settled principles of interpretation inasmuch as any interpretation of FBR which is against the statute cannot be accepted and applied, whereas, a consistent view of FBR was already in field through clarification dated 25.10.2012 in respect of SRO 727(I)/2011 dated 01.08.2011 (before its transposition to 8th Schedule to the Sales Tax Act); hence, the learned Tribunal in the impugned order was not justified to take a contrary view as against the very judgment of a Division bench of the same Tribunal. The earlier judgment was not only binding on the single bench, but so also was a more reasoned and elaborative one as well.

6. It is also a matter of record that in somewhat similar circumstances the issue of exemption on silos came before this Court in C. P. No. D-462/2013 and the said Petition was allowed vide order dated 23.11.2018 and was then impugned before Hon'ble Supreme Court through Civil Petition No. 02-K/2019 and vide order dated 28.05.2019 the Department's Petition for Leave to Appeal was dismissed. Subsequently, the same issue came before us though in the context of the earlier notifications and before transposition of the said exemption into the Customs Act and the Sales Tax Act; however, in our considered view the controversy is the same that whether silos are entitled for exemption from the Sales Tax or not. The issue in that case was in respect of SRO 727(I)/2011 dated 1.08.2011 and was decided by this bench in Special Customs Reference Application No. 342/2013 vide order dated 01.03.2021. We had also followed the aforesaid Judgment of the learned Division Bench and the Hon'ble Supreme Court in the following terms:-

"4. Perusal of the aforesaid findings reflects that the issue has cropped up just because of difference of opinion between two wings of FBR i.e. Customs and Sales Tax. It further appears that the issue was taken up by Pakistan Poultry Association with FBR and the Sales Tax Wing of FBR had issued a clarification dated 25.10.2012 (reproduced in Tribunals order as above) in respect SRO 727

which pertains to exemption from Sales Tax and it has been clarified that storage poultry feed Silos are a pre-requisite of Poultry Industry and are used by the Poultry Feed Mills for the production of eggs and meat; hence, the exemption of sales tax is also available to Silos for poultry, whereas, the said clarification was issued with *concurrence of Customs Wing of FBR*. It further appears that Customs Wing of FBR pursuant to some letter of Director General of Intelligence took a different position and vide Letter dated 24.01.2013 stated that since Silos does not fall under PCT heading 84-85 of the Customs Tariff; hence, is not machinery so as to be entitled for exemption under SRO 575. The Tribunal after considering clarification of both the Departments of FBR has been pleased to allow the Appeals on two grounds. The First is that this matter pertains to exemption of Sales Tax and the clarification of the Sales Tax Wing at the behest of whom the SRO in respect of Sales Tax was issued shall prevail. Further, even though subsequently the Customs Wing of FBR took a different view; but at the same time, the earlier view of the Sales Tax Wing was never withdrawn by FBR; hence, the same is still in field would apply to the case of the Respondents as the matter pertains to sales tax. Moreover, in the SRO in question the explanation states that for the purposes of this notification, plant and machinery means such plant and machinery as is used in the manufacture or production of goods, and this is not restricted to any heading of chapter 84 or 85 as contended on behalf of the Applicant, which apparently was the case in terms of SRO 575; whereas, here it is an independent SRO 727 which is under consideration. And lastly the Hon'ble Supreme Court in the case of Fauji Fertilizer[1] has been please to allow grant of exemption on catalyst being plant and machinery.

5. Secondly, the Tribunal came to the conclusion that since subsequently, the SRO in question was also amended by putting in a specific exemption of Sales Tax on the import of Silos; hence, notwithstanding, even otherwise, the said notification could be applied retrospectively as per settled law. As a consequence, thereof, lastly, the Tribunal came to the conclusion that this was a matter of interpreting an SRO and the exemption available therein; hence, the matter was never covered under Section 32 of the Customs Act, 1969 so as to initiate proceedings of misdeclaration. After going through the findings of the learned Tribunal we are fully in agreement with such findings and have not been able to persuade ourselves to agree with the arguments of the Applicants Counsel as despite being confronted, he was not able to satisfy as to how the subsequent view of the Customs Wing which had initially concurred with the opinion of the Sales Tax Wing, could be suddenly changed and applied in a case, wherein, the issue pertains to exemption from Sales Tax. Here the matter was never of classification in its strict sense; but of exemption of sales tax to Silos under the SRO issued in terms of the Sales Tax Act, 1990. Therefore, we do not see any reason to interfere with the order of the learned Tribunal.

6. It further appears that the issue of exemption under SRO 575 in respect of storage Silos (though pertaining to another category of Industry) also came before a learned Division Bench of this Court in C.P. No. D-462/2013 and the precise

[1] 21.……As mentioned herein above the Catalysts being an integral part of the plant and machinery could not be separated for the purpose of levying customs duty and sales tax being inseparable part of the plant and machinery for the reasons that it is a metallic compound and thus is a part and parcel of the reactors of the plant which converts the nitrogen and hydrogen gases by a chemical reaction into ammonia and without Catalysts it cannot be made functional. Thus it can safely be considered as an integral part of the plant and machinery. It may be added here that ammonia is the basis for nearly all commercial nitrogenous fertilizers and about 85% of industrial ammonia is produced in fertilizers plant. As mentioned herein above the Catalysts being an integral part of the fertilizer plant and machinery shall be exempted from the customs duty and sales tax. The S.R.O.959(I)/89 dated 23-9-1989 made the position abundant clear which indicates that `plant and machinery' not manufactured locally and imported for the expansion of the existing units manufacturing fertilizer shall be exempted from whole of the customs duty and sales tax subject to the conditions specified under S.R.O.515(I)/89 dated 3-6-1989….(**Collector of Customs v Fauji Fertilizer Ltd. (PLD 2005 SC 577**)

facts involved were similar in nature to the extent of issuance of amending SRO during pendency of the proceedings and its retrospective benefit, and the learned Division Bench vide its Judgment dated 23.11.2018 had allowed the petition with the following conclusion:-

> "Moreover, it is also an admitted position that when SRO ___(I)/2012 dated 23.10.2012 was issued, whereby, the words "including Silos" were added in Column No. 2 after the word "facilities" in the relevant head, the case of Petitioner was pending before the concerned Authorities, therefore, it being a clarificatory and beneficial Notification would otherwise apply to the pending case of Petitioner. Reliance in this regard is placed in the case of *Army Welfare Sugar Mills Limited V. Federation of Pakistan and others (1992 SCMR 1652), Elahi Cotton Mills Limited V. Federation of Pakistan and Others (PLD 1997 SC 582) and M/s. Polyron Limited V. Government of Pakistan and others (PLD 1999 Karachi 238).* In view of hereinabove factual and legal position as emerged in the instant case, we are of the considered view that the case of the Petitioner is covered by the said SROs, hence entitled to exemption."

7. The said judgment was impugned by the Department before the Hon'ble Supreme Court through Civil Petition No. 02-K of 2019 and vide order dated 28.05.2019 the Hon'ble Supreme Court has been pleased to dismiss the Department's Petition for Leave to Appeal in the following terms:-

> "4. We have heard the learned Counsel for the Petitioners and perused the record of the case.
>
> 5. The Respondent No. 1 has in respect of the subject consignment sought exemption in terms of SRO 2006 which grants complete exemption from customs duties and sales tax on the importation of "Machinery and equipment for development of grain handling and storage facilities", however, as noted above, the exemption was declined as the consignment according to the Petitioners did not fall within the description of the goods mentioned in the SRO 2006. They contended that the amending SRO is not relevant to the subject consignment, as the same came after the assessment of the subject consignment, and further that at the time of release of the consignment the Respondent No. 1 has furnished an undertaking to abide by the decision of the respondent No. 3 in the matter.
>
> 6. However, in view of the amendment made by SRO___/(I)/2012 dated 23.1-0.2012, the description of the relevant goods mentioned at S. No. 2 of the SRO 2006, read "Machinery and equipment for development of grain handling and storage facilities including Silos", under which description the subject consignment clearly fit in. It is an admitted position that the amending SRO was issued while the question of exemption with regard to the subject consignment was pending decision before respondent No. 3 and thus the benefit of such amendment, which in view of the language of the main as well as the amending notification, and the facts and circumstances of the case, was / is an explanatory and beneficial notification and therefore, should have been extended to the subject importation. An undertaking to abide by the decision of the respondent No. 3 cannot operate to prevent the consignee from seeking his legal remedy against such decision. We therefore, find the impugned judgment to be just, fair and lawful which calls for no interference. The Petition is accordingly dismissed."

8. Accordingly, in view of the above no case is made out on behalf of the Applicant warranting interference in the impugned order of the Tribunal which appears to be correct in law and facts depicting correct legal position as settled by the Superior Courts. The questions of law proposed are not proper; hence, are re-formulated in the following manner;

(a) Whether in the facts and circumstances of the case the Tribunal was justified in holding that clarification given by Sales Tax Wing of FBR was binding upon Customs Wing of FBR in respect of an exemption pertaining to Sales Tax?

(b) Whether in the facts and circumstances of the case the Tribunal was justified in holding that exemption from sales tax was available on the subject goods in terms of SRO 727?

9. Question No.(a) & (b) are answered in the affirmative; against the Applicant and in favor of the Respondents. 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."

7. In view of hereinabove facts and circumstances of this case, question (b) is answered in the affirmative; in favor of the Applicants and against the department; Question (c) in negative, in favor of the Applicants and against the department; Question (d) in affirmative, in favor of the Applicants and against the department; Question (e) in affirmative, in favor of the Applicants and against the department; Question (f) in affirmative, in favor of the Applicants and against the department, whereas, Question (g) is not relevant. As a consequence, thereof, these Reference Applications are allowed and the impugned order(s) are hereby set-aside. Let copy of this order be sent to the Tribunal in terms of s.196(5) of the Customs Act, 1969, and shall also be placed in all connected files.

J U D G E

J U D G E

Arshad/