

IN THE HIGH COURT OF SINDH AT KARACHI
(Extraordinary Reference Jurisdiction)

Special S.T.R.A. No. 21 of 2018

Date	Order with signature of Judge
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Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Zulfiqar Ahmed Khan.

Fresh Case

1. For orders on Misc. No. 256/2018.
2. For hearing of Main Case.

07.10.2019:

Mr. Ameer Bakhsh Metlo, advocate for the applicant.

ORDER

1. Through instant Reference Applications, following two questions have been proposed, which according to learned counsel for the applicant, are questions of law, arising from the combined impugned order dated 05.10.2017 passed by the Appellate Tribunal Inland Revenue (Pakistan) at Karachi, in STA No.184/KB-2014 [Tax Period July 2011 to June 2012], and require opinion of this Court:-

“A. Whether, under the facts and the circumstances of the case, the learned ATIR has failed to deliberate upon the applicability of Section 24 of the Customs Act, 1969 in the instant case and deleting the demand by only relying upon the declaration of the recipient of goods i.e. Pakistan International Airline?”

B. Whether the order of ATIR, is in conformity with the provisions of Section 4(b) of the Sales Tax Act, 1990 read with the Section 24 of the Customs Act, 1969?”

2. Learned counsel for the applicant, after having read out the proposed questions, and the impugned order passed by the Appellate Tribunal Inland Revenue, has submitted that Appellate Tribunal was not justified to dismiss the appeal of the department, as according to learned counsel, respondent failed to produce

sufficient evidence to the effect that provisions of Section 24 of the Customs Act, 1969 have been complied with. Per learned counsel, the burden was upon the taxpayer to get the determination from the Customs Officer with regard to entitlement of exemption/zero rating from payment of sales tax in respect of supplies of aluminum goods.

3. We have heard the learned counsel for applicant, perused the record with his assistance and also gone through the impugned order passed the Appellate Tribunal Inland Revenue in the instant case, as well as the orders passed by the two authorities below. From perusal of the record, it appears that only dispute, which has been created by the Taxation Officer is in relation to determination by the Customs Officer in terms of Section 24 of the Customs Act, 1969, whereas, there has been no dispute regarding entitlement of exemption/zero rating of the aluminum products, which were supplied by the respondent to the PIA. It further appears that the fact regarding utilization/consumption of aluminum goods outside the territorial limits of Pakistan i.e. foreign port, airport or station could only be determined by the PIA in the instant case, whereas, PIA has issued a certificate to this effect, which has not been disputed by the Taxation Officer. It has been further observed that the Taxation Officer has not asked for further details with regard to consumption of aluminum goods by the PIA, whereas, on the basis of technical requirement i.e. determination by the Customs Officer regarding exemption/zero rated supply provisions of Section 24 of the Customs Act, 1969 has been invoked in instant case. This aspect of the matter has been examined detail by the Commissioner-IR (Appeals-I), Karachi in the order dated 17.10.2014 in the following terms:-

“ I have considered the submission of the AR and perused the impugned order as well as order-in-original passed by the Additional Collectorate Adjudication, LTU, Karachi in the appellant's own case for the tax period 2004-2005, wherein the said issue was settled in the favour of the appellant and against the department. When the appellant has continuously making supply of Aluminum foil under supply contract to PIA for the usage in International Flights which is evident from the sales tax invoices that bore PIA stamp for such utilization on International Flights and admission on their part that these supplies covered under zero-rating as section 4, then the insistence of the officer for producing direct other evidence is not found reasonable. The certificate from the PIA whereby the contention of the appellant was supported as well as copy of letter issued to the appellant issued by procurement and logistic department of PIA bearing reference No. GMPC/APIIL/14 dated 09.10.2014 also confirmed the contention of the appellant. The relevant portion of the letter is reproduced as under:-

“Since the appropriate custom officers to determine the quantity of goods being dispatched on the International flights with regard to the size of conveyance, the number of passengers and the duration of flights was not practicable hence the matter was referred to the Collectorate of sales tax and excise Karachi in the year 2012. The reply from the sales tax directorate vide letter no 2(6) Audit-II/TaxInfor/ST&Cb2002 dated 25.01.2002.

In the light of above discussion, the inference drawn by the officer on the premise that the appellant failed to substantiate that the goods supplies at zero-rated were consumed in international flights is not found correct apprehension of facts and law. In case of any doubts PIA could be held responsible as it was PIA who had declared the said supply consumed on International Flights. In case of further doubts PIA should be asked as under which authority PIA had declared the said supply under zero-rating. Under these circumstances the appellant had performed within business norms and under the Impression that PIA, where major shareholder is Govt. of Pakistan cannot issued zero rating declaration without backup of legal authority. Hence, the impugned order-in-original is therefore, set-aside being not

sustainable in the eyes of law and demand raised at Rs. 4.990 million is deleted.”

4. The Appellate Tribunal Inland Revenue has also been examined in detail the factual and legal aspect relating application of Section 24 of the Customs Act, 1969 in detail in the impugned order, in following terms:-

“13. Keeping in mind the phraseology of above section we bring forth section 24 of the Customs Act 1969 as under:-

24. Provisions and stores may be exported free of duty. - Goods produced or manufactured in Pakistan and required as provisions and stores on any conveyance proceeding to any foreign port, airport or station may be exported free of customs duty, 30[***] in such quantities as the appropriate officer may determine having regard to the size of the conveyance, the number of passengers and crew and the length of the voyage or journey on which the conveyance is about to depart.

14. From the phraseology of above sections it is evident that it grant amenity/exemption to some specified goods which are produced or manufactured in Pakistan and which are required as provisions and stores for any conveyance proceeding to any foreign Port, Airport or Station so the said provisions may be exported free of custom duty appropriately considering size of conveyance, number of passengers, crew and length of journey on which the conveyance is about to depart.

15. Keeping in mind above phraseology we examine the facts of the case. In the instant case the taxpayer is committed with the business of aluminum processing and he made supplies to Pakistan International Airlines. Precisely the stance of the taxpayer is that the supplies which made to the PIA were zero rated for consumption abroad on conveyance for destination out of Pakistan, in support of its contention the taxpayer produce Certificate issued by PIA in favour of taxpayer for the safe administration of justice the contents of said Certificate are reproduce as under:-

TO WHOM IT MAY CONCERN

This is to certify that the copies of Purchase Order (attached) duly certified against which supplies

were made to us were issued by Pakistan International Airlines (PIA), Karachi to M/s Aluminum Processing Industries S.I.T.E., Karachi for the procurement of Aluminum goods on zero rated GST were utilized on International flights during the period 2011-2012.

PIA Sales Tax Registration No. 12-00-9801-241-82 applies to procurement of the above goods.

Sd/-
Shahid Ejaz Chaudhary
DGM (Purchase Commercial)

16. From the above contents of the letter issued by the DGM (Purchase Commercial) it is evident that the Aluminum goods which were supplied to Pakistan International Airline were utilized on International flights during the period of 20.11.2012. Keeping in mind above mentioned prospects we consider the original order, we observe that the officer himself mentioned in Order-in-Original:-

“Goods supplied to PIA for consumption in international flights shall be treated as zero rated only to the extent of such quantity as determined by an appropriate officer of customs according to the size of the conveyance, number of passengers and the length of voyage on which the conveyance is about to depart. There is no other way to determine or confirm whether goods supplied @ zero rated were consumed in international flights or otherwise. In this case, respondent has clearly failed to follow the specified procedure and supplied goods @ zero rated without observing the procedure as laid down in the Section 24 of the Customs Act,, 1969. Registered person has, therefore, violated the provisions of the section 4(b) of the Sales Tax Act, 1990 read with section 24 of the Customs Act, 1969.

17. He himself mentioning that there is no way to test that position, then how he come on the conclusion that the taxpayer failed to follow the prescribed procedure. In our view, it was the burden of PIA to maintain prescribed details so also as per section 24 of Customs Act 1969, it was duty of concerned Custom officer to determine prescribed details, record in this respect is silent and it is very illogical from the part of officer he disbelieved the Certificate of P.I.A. which is already mentioned/reproduced above and has fixed the liability upon the taxpayer, this is only P.I.A. who could affirm that the goods were used or consumed in international flights. Beside this record reveal that

order No. 58/2007 was also passed in the case of taxpayer prior to Order-in-Original No. 58/2007, it was held by the Additional Collector (Adjudication) that the supplies of stores and provisions to P.I.A. for consumption on conveyance proceedings out of Pakistan are zero rated such order passed in the case of taxpayer for the tax year 2004-2005.

18. We also observed that the officer has not assigned any reasonable cause for deviating from the previous findings/stance of the department taken in Order No. 58/2007.

19. So for question of input tax claim against the invoices of suspended supplier is concerned the officer himself mentioned in Order-in-Original that the said supplier M/s. Sohail International) was suspended w.e.f. 30.6.2013 as per e-FBR web portal whereas the taxpayer did purchases in July 2011 and March 2012. Since it is evidence that the supplier was suspended in 2013 and the present taxpayer did business with suspended supplier in July 2011 and March 2012 so this point not need consideration.

20. So keeping in mind above circumstances we are of the view impugned judgment does not require interference hence the same is upheld, in the result appeal of the department dismissed.

21. The appeal stands disposed of in the manner as indicated above.

22. I fully agree with the findings of learned Judicial Member however I would only like to add that as per section 24 of the Customs Act whatever action with respect to provisions and stores on any conveyance proceeding to any foreign port, airport or station may be exported free of custom duty in such quantities as custom officer may determine considering the size of conveyance, the number of people travelling on conveyance and length of travel time. Obviously any adverse finding can only be determined by custom officer concerned. Further the word used may in the provision is worth considering meaning thereby if there is anything on checking or on some information or on conduct of any such exercise the officer may determine the quantity of goods not covered in the provision of law. Usually the practice is that such

date can only be certified by carrier which in the instant case is a national carrier. The question before us was also who will benefit if the provision of law is violated, PIA being a national carrier the question of taking benefit is not there. There is no adverse finding by custom officer who has power to go into the matter. Considering these facts disregarding the certificate issued by PIA action of the officer is not understandable consequently, I fully endorse the findings of the learned Judicial Member on all the issues.”

5. From perusal of hereinabove concurrent findings of both the appellate forums, it appears that after examination of correct factual position regarding consumption of aluminum goods by PIA on International Flights, the claims of zero rating in terms of Section 24 of the Customs Act, 1969 has been duly approved in the instant case. Moreover, the above factual and legal position was also approved by the Customs Authorities in the case of respondents for Tax Year 2004 and 2005 vide Order-in-Original No. 58/2007. No reason whatsoever has been assigned in the Order-in-Original in the instant case for deviating from earlier decision in respect of some zero rated supplies to PIA by the respondents.

6. Accordingly, we do not find any substance in the instant Reference Application, which is devoid of any merits, therefore, dismissed in limine alongwith listed application. Resultantly, Question “A” proposed hereinabove is answered in ‘NEGATIVE’ against the applicant and in favour of respondent, whereas, Question “B” proposed hereinabove is answered in ‘AFFIRMATIVE’ against the applicant and in favour of respondent.

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