

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Special Customs Reference Application No. 543 to 596 / 2020

Date _____ Order with signature of Judge _____

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

S. No.	Case No.	Parties
1.	SCRA No. 543 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Bin Saeed Enterprises
2.	SCRA No. 544 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Four Star International
3.	SCRA No. 545 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I, Traders
4.	SCRA No. 546 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I, Traders
5.	SCRA No. 547 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I, Traders
6.	SCRA No. 548 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Usman Traders
7.	SCRA No. 549 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Usman Traders
8.	SCRA No. 550 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Usman Traders
9.	SCRA No. 551 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Four Star International
10.	SCRA No. 552 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Bin Saeed Enterprises
11.	SCRA No. 553 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Global Enterprises
12.	SCRA No. 554 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Global Enterprises
13.	SCRA No. 555 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Global Enterprises
14.	SCRA No. 556 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Jundial Traders
15.	SCRA No. 557 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Al Amna International
16.	SCRA No. 558 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Sons Traders
17.	SCRA No. 559 / 202	Director, D. G. of Post Clearance Audit Customs

		Vs. M/s Sons Traders
18.	SCRA No. 560 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s J. R.
19.	SCRA No. 561 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Farid Brothers
20.	SCRA No. 562 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s PC Globe International
21.	SCRA No. 563 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s PC Globe International
22.	SCRA No. 564 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Raim Enterprises
23.	SCRA No. 565 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Jawed Traders
24.	SCRA No. 566 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Chocolate House
25,	SCRA No. 567 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Chocolate House
26.	SCRA No. 568 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s J. R. Traders
27.	SCRA No. 569 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Sons Traders
28,	SCRA No. 570 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Sons Traders
29.	SCRA No. 571 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I. Enterprises
30.	SCRA No. 572 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I. Enterprises
31.	SCRA No. 573 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I. Enterprises
32.	SCRA No. 574 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I. Enterprises
33.	SCRA No. 575 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I. Enterprises
34.	SCRA No. 576 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Four Star International
35.	SCRA No. 577 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Four Star International
36.	SCRA No. 578 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Four Star International
37.	SCRA No. 579 / 2020	Director, D. G. of Post Clearance Audit Customs

		Vs. M/s Al Amna International
38.	SCRA No. 580 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Al Amna International
39.	SCRA No. 581 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Al Amna International
40.	SCRA No. 582 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Al Amna International
41.	SCRA No. 583 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Global Enterprises
42.	SCRA No. 584 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Global Enterprises
43.	SCRA No. 585 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Global Enterprises
44.	SCRA No. 586 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Global Enterprises
45.	SCRA No. 587 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Global Enterprises
46.	SCRA No. 588 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Bin Saeed Enterprises
47.	SCRA No. 589 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Bin Saeed Enterprises
48.	SCRA No. 590 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Bin Saeed Enterprises
49.	SCRA No. 591 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Bin Saeed Enterprises
50.	SCRA No. 592 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Bin Saeed Enterprises
51.	SCRA No. 593 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Bin Saeed Enterprises
52.	SCRA No. 594 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s Jundial Traders
53.	SCRA No. 595 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I. Traders
54.	SCRA No. 596 / 2020	Director, D. G. of Post Clearance Audit Customs Vs. M/s M. I. Traders

Applicant(s) : **Through Ms. Masooda Siraj, Advocate.
A/W Mr. Farrukh Sajjad Additional
Collector, Post Clearance Audit.**

Respondent(s) : **Through Mr. Obaidullah Nadeem Advocate**

Date of hearing: 08.04.2021.

Date of Order: 08.04.2021.

ORDER

Muhammad Junaid Ghaffar, J: Through these Reference Applications, the Applicant Department has impugned order dated 04.06.2020 passed by the Customs Appellate Tribunal Karachi in Customs Appeal No. K-1332/2019 (against Order in Appeal Nos.2389-2454/2020) and other connected matters by proposing various Questions of Law. On 22.3.2021, after arguing at length learned Counsel for the Applicant, in response to our query had requested for some time to call the concerned Official to assist the Court as she was unable to respond to certain questions pertaining to facts of the case. On 25.03.2021 Mr. concerned official¹ was in attendance and made his submissions along with Counsel and sought further time to prepare a statement for withdrawal of certain SCRA's wherein certain orders were passed during pendency of the proceedings. Subsequently, on 01.04.2021 again time was sought and today the concerned Official is in attendance along with learned Counsel for the Applicant and despite our categorical orders for filing statement of withdrawal of the SCRA's a detailed argumentative statement has been filed with certain Annexures, and not only this, even fresh Questions of Law have been placed before us which in the given facts must be deprecated. We are constrained to observe that no proper assistance of whatsoever nature has been provided to us in these matters and while deciding these References we have been compelled to go through the entire material before us without such assistance. We expect that at least on facts we should be fully assisted by the Applicants Counsel; and if not, then by the representative of the Applicant; but unfortunately this has been lacking not only in this case; but in a number of other cases filed by various departments / wings of FBR.

2. In today's statement there are various Annexures including Annex "A", "C" & "D" wherein, it has been informed that before passing of the impugned order, and even thereafter, various Orders in Original have been passed by the Adjudicating Authority in various listed

¹ Farrukh Sajjad, Additional Collector, Directorate General of Post Clearance Audit

SCRA's². It is informed that all these orders are in favour of Respondents and against the Applicant Department. It has been further stated that in at least three cases³ the Order has been passed in favour of the department. While confronted, the departmental representative states that this has seriously prejudiced the interest of his department as no orders ought to have been passed by the Adjudicating Authority; however, we are not inclined to take notice of the same inasmuch as these proceedings before us in terms of section 196 of the Customs Act, 1969, ("Act") only require us to answer questions of law arising out of the order of the Tribunal, and any subsequent developments are irrelevant, and for that the contesting parties are required to take necessary steps in accordance with law, including further impugning any such orders. Therefore, all these Reference Applications⁴ for all legal purposes have become infructuous and are dismissed accordingly.

3. Insofar as the remaining set of Reference Applications is concerned, no since further proceedings (presumably) have taken place by the concerned Adjudicating Authority after passing of the impugned order by the Tribunal; hence, they are being decided by us through this order. It appears that the imported consignments of the Respondents were assessed to duty and taxes which were released and subsequently, the Applicant Department conducted Post Clearance Audit and through a computer message, some audit observations were generated⁵ and while doing so, apparently, some re-assessment was

² SCRA Nos. 588/2020, 591/200, 561/2020, 554/2020, 568/2020, 560/2020, 546/2020, 563/2020, 553/2020, 555/2020, 583/2020, 584/2020, 585/2020, 586/2020, 580/2020, 582/2020, 544/2020, 576/2020, 578/2020, 587/2020, 573/2020, 545/2020, 547/2020, 595/2020, 596/2020

³ SCRA Nos. 581/2020, 565/2020 & 562/2020

⁴ SCRA Nos. 588/2020, 591/200, 561/2020, 554/2020, 568/2020, 560/2020, 546/2020, 563/2020, 553/2020, 555/2020, 583/2020, 584/2020, 585/2020, 586/2020, 580/2020, 582/2020, 544/2020, 576/2020, 578/2020, 587/2020, 573/2020, 545/2020, 547/2020, 595/2020, 596/2020

⁵ "Whereas, a credible information received through Director, Directorate General of Post Clearance Audit, Karachi that various unscrupulous commercial importers are importing "TANG" Brand drink powder in various packing under PCT 2106.9090, in compliance, the data relating subject product was retrieved, which reveals that certain commercial importers are importing "TANG" brand drink powder manufactured in Bahrain and shipped for Karachi via Dubai, and getting it declared / released @ 0.40 per kilogram. The case was taken up for initial probe for initiating audit observation which reveals that the same item is imported by M/s. Mondelez Pakistan Ltd. Karachi vide GD No. KAPW-HC-68841 dated 23.10.2017, KAPE-HC-109430 dated 20.12.2017, KPPI-HC-99445 dated 26.06.2018, KPPI-HC-53374 dated 17.01.2019, KPPI-HC-53370 dated 10.01.2019 and many other directly from, Mondelez, Bahrain, W.LL (formerly Kraft Foods, Bahrain, W.LL) at a different value according to different flavor. Average price in terms of kilogram is calculated @ US\$ 1.40/kilogram as against the declared / assessed value of US\$ 0.40 kilogram by commercial importers Mondelez, Bahrain, W.LL (formerly Kraft Foods, Bahrain, W.LL), if the original manufacturer of the Tang Brand products at Bahrain. The difference between these two values (US\$ 1.40 & US\$ 0.40/KG) is calculated as 250%, which is fetching on quite of normal size and tantamount to the observations that the values being declared by the commercial importer for same product is fictitious concocted and managed group under invoicing resulting huge loss to the Government Exchequer in the shape of duty / taxes. The evaded amount of duty and taxes in the GD is worked out to be Rs. 2,285,178/- approx. 02. In view of the above, since the importer have deliberately under invoice the actual value of the same product from same source or origin and commercial quantity to avoid correct assessment and payment of duty and taxes, therefore, they are guilty an offence in terms of Section 32(3-A) of the Customs Act, 1969, read with other relevant provision of Sales Tax Act, 1990 and Income Tax Ordinance, 2001. 03. Therefore, in exercise of powers conferred upon vide Section 32(3-A) of the Customs Act, 1969, the importer are advised to submit their detail written reply for substantiating the value declared in the light of documentary support within 15 days of the receipt of this Audit Observation. They may also informed, if they are intended to appear for hearing or otherwise. In case, no reply received within stipulated time period, it shall be construed that importer has nothing to substantiate and the case shall be then be proceeded for initiating contravention proceedings under the relevant provision of law."

intended to be made along with an explanation from the Respondents. The Respondents instead of responding to the audit observations felt aggrieved and impugned such alert or computer message received in their Inbox treating it as a Re-assessment order under section 80(3) of the Act, and filed appeals before the Collector of Customs (Appeals) which were decided on 17.01.2020 in the following terms:-

“3. I have examined the case record. The appellant has wrongly assumed that the Directorate of Post Clearance Audit has re-assessed the Goods Declaration. The Directorate of Post Clearance Audit is in fact in process of Auditing the instant Goods Declaration. They have no power or even module to re-assess the G.Ds. The Directorate of Post Clearance Audit has neither issued any assessment order under Section 80 nor have passed Order in Original under Section 179 of Customs Act, 1969. Hence, no appeal can be admitted. The case is remanded back to Directorate of Post Clearance Audit for providing hearing opportunity to the importer before finalizing the Audit observation.”

4. The Respondents still felt aggrieved and the said order was then challenged before the Tribunal and through impugned order, the Appeals have been allowed by setting aside all the orders of the forum below including that of the Collector (Appeals) as above. It appears that the primary grievance of the Applicant is in respect of adverse findings of the Tribunal regarding their authority and jurisdiction in conducting Post Clearance Audit, which according to them has been entrusted pursuant to SRO 500(I)/2009 dated 13.6.2009 (“SRO 500”).

5. It further appears that after passing of the Order by the Collector Appeals, even certain Show Cause Notices were also issued; but were not adjudicated on merits and were disposed of on the ground that matter was already pending before the Tribunal. This has been brought on record through statement in SCRA No.543/2020. After having perused the entire material before us and whatever little assistance which has been provided to us, in essence, it appears that the finding of the learned Tribunal that the Applicant has no jurisdiction to conduct post clearance audit and report recovery proceedings to the adjudicating authority in terms of the relevant provisions of the Act has compelled them to file these Reference Applications. Besides this on merits as well the finding is also against the Applicant. However, in our considered view the pertinent question is only that **“whether the Tribunal was justified in entertaining and deciding the Appeals on merits in terms of s.194A of the Act against an order of remand passed by the Collector Appeals”**.

6. It is pertinent to mention that the very Appeals before the Tribunal had originated from the order of the Collector Appeals dated 17.01.2020 which in fact *per-se* was not an adverse order against the Applicant; rather was a remand order for conducting the proceedings in accordance with law. We may say that the said order was perhaps in favour of the Respondent. The learned Collector Appeals had observed that *"They (Applicant) have no power or even module to re-assess the G.Ds. The Directorate of Post Clearance Audit has neither issued any assessment order under Section 80 nor have passed Order in Original under Section 179 of Customs Act, 1969"*. In that case Respondents had no case to agitate any further. In fact, it ought to have been the Applicant to feel aggrieved, and impugn the same further. However, this is not the case. Coming to the impugned order of the Tribunal, with respect, we are not at all in agreement with the same. This has seriously prejudiced the very authority and jurisdiction of the Applicant department as it may be an impediment for them to proceed not only against the present Respondents; but so also against others as it would then be a binding precedent insofar as the Applicant department and its functioning is concerned. The Tribunal while passing the impugned order has indulged into, entirely unnecessary issues which were not germane to the proceedings before it. Therefore, in all fairness, the Tribunal appears to have been swayed with some unexplained reasons, and the findings in the impugned order are wholly unwarranted. We cannot subscribe to the same as they were neither relevant; nor were required to be passed. What the Tribunal had before it in terms of s.194A of the Act was the order of Collector Appeals, which had no adverse finding against the Respondents. It had only remanded the matter to the relevant authority. Neither till such time, any adjudication proceedings had taken place, nor had the question of competency of the Applicant department to conduct post clearance audit was before it. The learned Tribunal has taken pains to deeply appreciate the entire legal and factual aspect of the case, without their being any adverse order or action before it. It seems that the action of the Applicant department was presumed to be a Re-assessment order in terms of s.80(3) of the Act; however, it is the stance of the Applicant that no such order was ever passed; nor they had any intention to do so. If that had been their case, then they would have impugned the order of Collector (Appeals). But this is not so, as their case is that after conducting audit, they can forward the case to the authority having jurisdiction in the matter to adjudicate in terms of relevant provisions of the Act and SRO 500.

This has not been appreciated by the learned Tribunal, and before any finding could have been recorded on the objections of the Respondents, the entire controversy has been decided including legal and factual as well as the merits of the case. This does not seem to be proper and just in the given facts and circumstances of the case in hand. The Tribunal was misdirected in concluding that the audit observation was in fact a re-assessment order in terms of s.80 (3) of the Act being disguised in its format. Even if it was correct, then the proper recourse was to set-aside the same and remand it to the concerned authority as had been done by the Collector (Appeals). However, it could not have set-aside the entire proceedings without any proper adjudication of the same by the competent forums below.

7. In view of hereinabove facts and circumstances of the case the question rephrased as above⁶ is answered in negative; in favour of the Applicant and against the Respondent. The impugned order passed by the Tribunal is set-aside, and the order of Collector (Appeals) is restored. All Reference Applications, wherein, orders are yet to be passed and are pending are allowed in the above terms. The matters may be proceeded with by the relevant authority before whom they are pending and shall be dealt with and decided in accordance with law. 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 is further directed to place copy of this order in all listed Reference Applications.

J U D G E

J U D G E

Arshad/

⁶ *“whether the Tribunal was justified in entertaining and deciding the Appeals on merits in terms of s.194A of the Act against an order of remand passed by the Collector Appeals”*