IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Application No. **471 to 484 of 2017**

Date	Order with signature of Judge

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

Applicant:	**The Collector of Customs,** **Through Dr. Shahab Imam, Advocate**
Respondent(s):	**M/s. Victory Pipe Industries (Pvt) Ltd.**
Date of hearing:	**08.04.2021.**
Date of Order:	**08.04.2021.**

O R D E R

Muhammad Junaid Ghaffar, J: Through these Reference Applications, the Applicant has impugned Order dated 18.07.2017 passed by the Customs Appellate Tribunal in Customs Appeal Nos. K-1560 to 1573 of 2016, proposing the following questions of law:-

i. Whether in the light of facts and circumstances of the case and considering the provisions of Section 19-A of the Act, read with last paragraph of the Hon'ble High Court's order dated 04.05.2015, the Appellate Tribunal has not erred in law to hold that differential guaranteed amount is to be returned without invoking the aforesaid provision of law?

ii. Whether in view of the law settled by the Hon'ble Superior courts in the various cases as reported at 2005 PTD 2286, 2007 PTD 426 and 2011 PTD 1594 (as also upheld by the Hon'ble Supreme Court in Civil Petitions Nos. 825 & 826 of 2011) read with the Order dated: 04.05.2015 passed by the Hon'ble Sindh High Court in CP No. 3816/13 & Other connected matters, the findings of the Appellate Tribunal to the effect that the adjudication of the matter by the customs authorities in relation to Section 19-A of the Act is a defiance of the Hon'ble Court's order dated: 04.05.2015, are erroneous and not sustainable under the law and facts ?

iii. Whether in the light of facts and circumstances of the case and considering the provisions of Sections 19-A of the Act read with the aforesaid judgments, the Appellate Tribunal has not erred in law to hold that the provisions is only applicable on the application for refund of duty / taxes paid and not on the duty & taxes deposited provisionally?

iv. Whether the Appellate Tribunal while passing the single consolidated order in all appeals by applying the principle of mutatis mutandis, has not erred in law as settled by this Hon'ble Court's in the case reported at 2011 PTD 2849?

v. Whether in view of the established facts & relevant provisions of law, the findings of the Customs Appellate Tribunal are not perverse of non-reading and / or mis-reading of the available record also detrimental to the revenue

> and the consequent benefit merely on technicalities, to the respondent importer, who has failed to satisfy the authority about the passing of incidence of duty / taxes paid / deposited for the imported goods sold subsequently?

2. Learned Counsel for the Applicant has read out the Order and submits that in view of Order dated 04.05.2015, passed by this Court in C.P No.D-3816 of 2014 and other connected matters, the Applicant's right to invoke the provisions of Section 19-A of the Customs Act, 1969 (Act) was accepted; hence the Tribunal has erred by holding otherwise. According to him until burden as contemplated under Section 19-A (ibid) is discharged; the respondent cannot claim refund or return of their securities. He has prayed for answering the questions in favour of the Applicant.

3. We have heard the learned Counsel and perused the record. After such perusal, we are not inclined to even issue pre-admission notices. It appears that pursuant to some dispute regarding classification of goods, the consignments of the respondent were released after securing Bank Guarantees / Pay Orders /Cheques or otherwise which were deposited either with the Nazir of this Court in their respective Petitions; or before the department till such time the controversy is finally decided. The said Petitions were disposed of by a learned Division Bench of this Court vide Order dated 04.05.2015, which reads as under:-

> "After hearing the learned counsel for respective parties at length, these petitions are disposed of through following consent order:-
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> 1. All the consignments of the Hot Rolled Steel Sheet in Coils the laboratory test report whereof reflect that it contain more than 0.0008% boron as inherent part of the steel would qualify as Alloy Steel, which would not attract payment of any duties. The respondents after examining this aspect in the light of the test reports would issue letters to the respective importers whose consignments of Hot Rolled Steel Sheets in coil contain more than 0.0008% of Boron for release of the bank guarantees, pay-orders, cheques, or cash deposited with the Nazir of this Court against release of consignments.
> 2. In case the respondents are of the view that boron is not inherent part of the Hot Rolled Steel Sheets in Coils and is sprayed to avoid payment of duties they would be at liberty to get consignment re-examined from M/s. A.Q. Khan Research Laboratory (KRL). However, not more than four samples of one importer having any number of consignments would be sent at the cost of the importer.
> 3. The cases in respect of those consignments which are sent for re-testing would be finally decided within a period of 90 days and of those cases in which samples are not re-sent would be decided within a period of 60 days.

At this juncture respondent pleaded that they are entitled to invoke the provisions of section 19(a) of the Customs Act, 1969, as the burden might have passed on to end user. In our opinion, it is an independent issue and has nothing to do with controversy in hand. However, the respondent would be at liberty to act in accordance with law in case they are of the view that the burden has been passed on to end user."

4. Perusal of the aforesaid order reflects that after giving certain directions, the matters were disposed of and after the order had been dictated, the department raised a question regarding their authority and powers to invoke Section 19-A of the Customs Act, 1969. Thereafter the department in compliance of the above, passed an Assessment order dated 5.11.2015[1], wherein, though the contention of the Respondents was accepted as to merits of the case; however, the officer held that the Respondents were required to fulfil conditions of section 19A read with section 33 of the Act. Subsequently, separate orders were passed in all cases whereby the refund applications were dismissed on the same analogy against which the respondents preferred further appeals and finally learned Tribunal vide impugned Order has decided the matter in favour of the respondents. The Tribunal's finding reads as under:-

"8. Heard, case record's and relied upon citation perused. Prior to emanating on the merit of the case, it is felt appropriate to determine that what is the essence and spirit of the Order of the Hon'ble High Court of Sindh dated 04.05.2016 and as to whether any direction in regards to the compliance of Section 19A was given to the Respondent in the decided petition. Upon examination of the order of the Hon'ble High Court of Sindh. I have observed that the Order is vividly clear and contain no ambiguity in regards to issue before it. The Honourable High Court in its Order stated that in case on test samples of the petitioner consignments from KRL, if the percentage of the contents of Boron is found 0.0008 or more, the goods are deem to be alloy as defined in Chapter Notes of First Schedule to the Customs Act, 1969 and Explanatory Notes of World Customs Organization (WC0), thereupon the CCAE shall issue tiers to the respective importers whose consignments of Hot Rolled Steel Sheets in Coils were ordered to be released by the High Court, for release of bank guarantee, pay order, cheques or cash deposited with the Nazir of this Court against the release of consignments. In compliance of the order, it was mandated upon the CCAE to direct the Deputy Collector of Customs, Group-V, to issue letters to the importers and the appellant for submission with the Nazir of High Court of Sindh for release of 50% amount of duty and taxes deposited with him as security for obtaining release of consignments. To the contrary, the CCAE & his subordinate flouted the Order of the Hon'ble High Court of Sindh and direction was issue dot the Deputy Collector of Customs, Group-V to pass a

[1] "3. Furthermore, since the differential amount was partly paid to the department and partly secured with the Nazir though pay order/cheque, therefore, in terms of the section 19-A read with section 33 of the Customs Act, 1969, in order to discharge the burden of proof, you are required to file claim in respect of each Goods Declaration for release / refund of the differential amount along with all the corroborative documents (proving thereby that the incidence of the differential amount of duty / taxes has not been passed on to the end consumer), so that in compliance with the Hon'ble Courts Order, the appropriate letter for release / refund may be processed accordingly.

manual Assessment Order dated 05.11.2015, which was otherwise not warranted under the regime of WeBOC together with any other law in force, under which Assessment Order has to be passed online, which could had been done, instead the said mechanism was discarded and purposely. manual assessment order dated 05.11.2015 was forwarded to the Appellant, inserting para 3 having no mandate of law and.in utter defiance of the Order of the High Court and this stood validated from the fact that the Hon'ble High Court of Sindh in its Order dated 04.05.2015 inscribed in clear terms that invoking of provision of Section 19A of the Act is an independent issue and has nothing to do with the controversy in hand. Meaning thereby that the Hon'ble High Court of Sindh was clear in mind that provision of Section 19A is not applicable in the cases under consideration with it, which revolves around the controversy of alloy or non-alloy iron and steel sheets and CCAE and his subordinates were only required to issue letter to the importers, whose goods qualified s alloy steel. The CCAE and his subordinates instead of issuing the letter, clubbed two matters and passed an assessment order on 05.11.2015, directing the importers and appellant to prove that the incidence of duty/taxes have not been passed on to the end consumer, so that in compliance with the Hon'ble Court's Order. The appropriate letter for release/refund may be processed accordingly. Later, on 31.05.2016, this Order is further saddled, with another order, whereby it has been held that incident of duty and taxes to the end consumer has been passed on and the refund claim was rejected. Astonishingly, record of the case was not checked, which would had confirmed that no refund claim has been filed by the appellant, which is pre-requisite, the CCAE and his subordinate also lost sight of the fact that the appellant imported the goods as raw material for their self-consumptions. Resultant, no occasion was available with either CCAE and his subordinate for raising such absurd and unwarranted /called for objection/query. Therefore, I in the capacity of custodian of law hold that 1 have no hesitation to hold that the CCAE /his subordinate and respondent interpreted the Order of the Hon'ble High Court of Sindh in accordance with their whims/wishes and evil designs instead of its true essence .and spirit and while doing so they not only flouted/defied the Order of the Hon'ble High Court of Sindh also committed blatant contempt of court's order, which is not allowed, to be perpetuated under any circumstances/conditions and need to be dealt with iron hands, so that in future no Officer of the Revenue ever think to defy the orders of the Superior Judicial Fora.

Reverting back, to the main issue emerged from the order passed by the Respondent, through which he rejected the alleged refund of the Appellant. Non presenting the copies of refund applications despite directed in categorical terms on 18.10.2016, validate the stance of the Appellant that they have not filed refund applications. For rejecting the existent of refund application is vital, in the absence of that rejecting of refund, is without any substance and renders the orders as of no legal effect and as such void and ab-initio. Notwithstanding, the Section 19A of the Act applicable in a case here refund application has been filed by an importer against payment of duties, taxes and other levies either upfront at the time of filing GD or additional amount of duty and taxes and other levies, after passing of Assessment Order under Section 80 and Rule 438 of the Act/Rules, due to inadvertence, error or misconstruction. Whereas, on the refund arouse from the order of Appellate Authority/Tribunal, High Court of Sindh and Supreme Court of Pakistan, the provision of Section 19A of the Act is not applicable and if invoked i.e erroneous and without lawful authority. My opinion is strengthened from the language of Section 19A, reading as **"every person who has paid the Customs duties and other levies on any goods under this Act shall, unless contrary is proved by him, deems to have passed on full incidence of such customs duty to the buyer as the part to the price of such goods."** The expression itself denotes that customs duties and other relies on any goods under this Act, meaning thereby that the customs duty and levies should and must be in accordance with the notified duty and taxes

in Firs Schedule to the Act, and Rules and Regulations framed there-under. Question arise that if there exist a dispute between the importer and the Customs in regards to levies on the basis of description, weight, PCT or Valuation and the contravention report in this context framed for adjudication proceedings and which resolved subsequently by either Appellate Authority Tribunal, High Court or Supreme Court, either in favour of the customs or importer, on the very day of the decision/judgment actual payable of duty and taxes and other levies are determined, in case the decision in favour of importer, he is eligible to file refund application against the excess paid duty and taxes and levies against the clearance of the consignments, which was not otherwise due under the First Schedule to the Act. On the said refund Section 19A is not applicable due to the fact that the amount so paid by the importer was not the right of the customs to receive from him, invoking of the provision of Section 19A in that case is manifestly illegal as Customs cannot retain the amount which is not due to it in terms of First Schedule to the Act, if this is allowed to be invoked, i.e. tantamount to awarding premium to the Customs and undue enrichment to the Government of Pakistan. If importer is not entitled for undue enrichment, Government of Pakistan is as well not entitled to enrich itself from the money of importer/citizen of Pakistan. This concept has found expression in our jurisprudence by the judgment of the Supreme Court of Pakistan in *M/s. Pfizer Laboratories Ltd, v FOP & other (PTCL 1998 CL. 354)* Syed Mansoor Ali Shah Chief Justice of High Court of Punjab in the capacity of Judge as he was then brought forth this concept eruditely in *Sui Northern Gas Pipelines v. Deputy Commissioner Inland Revenue & others (PTCL 2015 CL. 652)* in the following words:

> **"This deprivation result in unjustly enriching and benefiting the departments. W.P. No. 14832/2014 enrichment is retention of a benefit by a person that is unjust or inequitable. The Supreme Court of Canada has recently taken the opportunity of reviewing the law regarding: unjust enrichment in Garland v. Consumer's Gas Co:…, wherein, Iacopucci J held: "As a general matter, the test for unjust .enrichment is well established in Canada. The cause of action has three elements (1) an enrichment of the defendant: (2) corresponding deprivation plaintiff; and (3) an absence of juristic reason for enrichment … "thus, for recovery to lie, something must have been given, whether goods, services or money, The thing which is given must have been given, whether goods, service or money. The thing which is given must have been received and retained by the defendant and the retention must be without juristic justification one of the more prominent statements of the principal of unjust enrichment includes the early and often repeated *dictum* of Lord Mansfield in Mosses v Macferlan "the gist of this kind of action if, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." Another is that of Lord Wright in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. "… Any civilized system of law is bound to provide remedies for the cases of what has been called unjust enrichment or unjust benefit that is to prevent a man from retailing the money of or some benefit derived from another which is against conscience that he should kee. The American Restaurant of the Law of Restitution: Quasi Contracts and Constructive Trust, 1937, states the principal of unjust enrichment in the following simple terms. "a person who has been unjust enriched at the expense of another is required to make restitution to the others". And, one of the leading Common Wealth Texts on restitution elaborates on the notion as follows: "[the principle of unjust enrichment] presupposes three things. First, the defendant must have been enrichment by a receipt of a benefit. 'Secondly, the benefit must have been gained at the**

> **plaintiff's expense. Thirdly, it would be unjust to allow the defendant to retain that benefit..." "Unjust enrichment occurs when a person retains money or benefits which in justice, equity and goods conscience belongs. To someone else". The doctrine of unjust enrichment therefore is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of unjust enrichment arises where retention of a benefit is considered contrary to justice or against equity. Unjust enrichment is, *inter-alia,* anchored in our fundamental premabular constitutional value of economic justice. Our constitution abhors any form of economic exploitation…."**

5. Perusal of the aforesaid finding reflects that the learned Tribunal has arrived at a just and fair conclusion as in the peculiar facts and circumstances of this case, the order passed by this Court[2], as above, cannot be construed in a manner so as non-suit the respondents. It was only observed that the department can invoke Section 19-A; however, it can only be done in accordance with law and when the entire facts as available in these cases are examined, it appears that if the contention of the Applicants is accepted then it would amount to add premium to their wrong actions. The respondents had agitated the unilateral action of the department and sought release of their goods either from the Court or directly before the department by securing the disputed amounts. Finally the Petitions were disposed of with certain directions and the respondents were otherwise found entitled for the relief as contained in the three paragraphs of the above order dated 04.05.2015, then merely for the observations, as recorded in the concluding paragraph, they cannot be burdened to discharge any such onus. It is not a case, which would be squarely fall within the ambit Section 19-A[3] of the Act as the same only applies on a person who has ***paid the customs duty*** and other levies on any goods under this Act and not secured it pursuant to orders of the Court or even by the department itself. This would only come into force when a person seeks refund of a duty which according to him had been paid erroneously and comes after clearance of the same, and then he could be asked to discharge this burden. The present facts are not fully covered by this provision. None of the claimed amounts were ever paid to the department. It

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[2] Dated 4.5.2015

[3] **[19A. Presumption that incidence of duty has been passed on to the buyer.-** Every person who has paid the customs duty and other levies on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such customs duty and other levies to the buyer as a part of the price of such goods.

was in dispute from day one. The Hon'ble Supreme Court[4] has dealt with an identical situation, wherein, the importer had disputed certain actions of the department and pending proceedings before the Appellate forum had got the consignments released after making the requisite payments. Thereafter, the Collector (Appeals) decided the matter in its favour and when he approached for refund of the amount, the same was refused on the ground that he is not entitled for the same under Section 19-A of the Act. The relevant finding of the Hon'ble Supreme Court reads as under:-

> "Therefore the proviso to section 33 has to be confined to the particular sub-section to which it is attached, i.e. subsection (1), and if the case does not fall within the purview of such subsection in that the customs duty was not paid as a result of inadvertence, error or misconstruction then obviously the proviso would not be relevant. Before a proviso can have any application, the section itself must apply. A holistic reading of section 33 of the Act, particularly the provisions of subsection (3), clarifies that where a refund becomes due as a result of any decision or judgment passed by a customs officer, Appellate Tribunal etc., the proviso to subsection (1) would not be applicable because no such proviso is attached to subsection (3), ***meaning thereby that the refund has to be made notwithstanding the fact that the incidence of customs duty had been passed onto the customer and therefore section 19A of the Act would not be attracted***. Resultantly we do not find any merit in this appeal which is accordingly dismissed."

6. In view of hereinabove facts and circumstances of this case, since the question already stands answered by the Hon'ble Supreme Court against the Applicant as above; hence, all Reference Applications stands 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 is directed to place copy of this order in connected Reference Applications as above.

J U D G E

J U D G E

Ayaz

[4] **2017 SCMR 339 (Collector of Customs Vs. Gul Rehman)**