

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

SCRAs 150 to 193 of 2015 : The Collector of Customs vs.
1.The Customs Appellate
Tribunal.
2.Pakistan International Airlines

For the Applicant : Ms. Masooda Siraj,
Advocate

For the Respondents : Mr. Khalid Javed,
Advocate along with
Barrister Yousuf Makda,
Advocate
Ms. Farkhanda Shaheen,
Advocate for Respondent No.2

Date of hearing : 01.06.2021

Date of announcement : 01.06.2021

JUDGMENT

Muhammad Junaid Ghafar, J. Through these Reference Application(s) the Applicant department has impugned a common Judgment dated 30.10.2014, passed by the Customs Appellate Tribunal, Karachi, in Customs Appeal Nos.K-1133 to 1176 of 2011, proposing the following questions of law.

“1. Whether in the facts and circumstances of the case the Appellate Tribunal (Bench-III), Karachi did not err to accept all the appeals of M/s. PIAC and set aside the orders simply on the basis of a letter issued by Deputy Collector of Customs, Air Freight Unit who had no authority to waive duty, taxes and Flood Relief Surcharge etc., imposed by his higher authority?

2. Whether the Appellate Tribunal did no err to waive the Flood Relief Surcharge imposed vide Order-in-Original NO.SIB/86/99 dated 04.11.1999 in terms of amnesty SRO-485(I)/2007 and SRO-463(I)/2007 both dated 09.06.2007 although the said SROs only provide waiver of penalty and default surcharge in terms of Section 202A of Customs Act, 1969?

3. Whether the Appellate Tribunal did not err to ignore the judgment of ADRC dated 26.06.2007 wherein the plea of M/s. PIAC in respect of 8 cases of time barred engines was rejected with the remarks that one cannot seek to benefit from one's own aberrant act?

4. Whether the Appellate Tribunal did not err to set aside the cases simply on the basis of correspondence with Legal Advisor of M/s. PIAC & Deputy Collector, Air Freight Unit wherein only Customs duty, Sales Tax & Income Tax were discussed and Flood Relief Surcharge was totally ignored which is although a part of Order-in-Original?

5. Whether in the facts and circumstances of the case the Appellate Tribunal did not err to set aside the Order-in-Original although the charge of mis-declaration was established against them?

2. Learned counsel for the Applicant has read out the order and submits that the Appellate Tribunal has erred in placing reliance on a letter issued by the Deputy Collector, which according to her had no authority to enter into any settlement and exempt payment of the amount due. She further submits that 1% flood relief surcharge remains outstanding and was never paid under the amnesty scheme; therefore, the Respondent is liable to pay the same. She has also relied upon the recommendations of Alternate Dispute Resolution Committee ("ADRC") dated 26.06.2007.

3. On the other hand, learned Counsel for the respondent submits that during pendency of the proceedings, the respondent had availed amnesty scheme notified vide SRO 485(I)/2007 and 463(I)/2007 both dated 09.06.2007 and admittedly paid the duty and taxes as per the said amnesty scheme within the stipulated time i.e. 30.06.2007; hence no question of payment of any further amount arises. According to him the recommendations of the ADRC has no relevance as FBR had never approved or otherwise rejected it and much before that amnesty scheme was announced and availed.

4. We have heard both the learned Counsel and perused the record. It appears that various show cause notice(s) (44 in number) were issued to the respondent demanding payment of duty and taxes on the re-importation of engines sent abroad for repairs. The Applicants stance was that the value of repair has not been correctly declared at the time of re-import of engines, resulting in lesser payment of duty and taxes. On the other hand the Respondents case was that they are willing to pay the duty and taxes on the actual cost of repairs charged to them; however, for the purposes of duty and taxes freight

amount of 20% on such cost and 1% insurance charges are no to be added in the value. Thereafter the said show cause notice(s) were adjudicated vide a common Order in Original dated 04.11.1999. Against the said order, respondent preferred Appeal(s) before the Appellate Tribunal, which were dismissed as time barred vide order dated 27.02.2009. Thereafter Special Customs Reference Application Nos.136 to 179 of 2009 were preferred by the respondent before this Court, which were allowed vide order dated 15.09.2011 holding that Appeals were within time and after setting aside the impugned order; the matter was remanded to the Appellate Tribunal for decision on merits. Through impugned order dated 30.10.2014, Appeal(s) of the respondent have been allowed. Relevant finding of the Tribunal reads as under:

“7. Today, this Tribunal has heard the arguments of both the sides at length and perused the record. In these appeals the issue involved is about the payment of duty and taxes. Learned counsel for the appellants has, inter alia, contended that they had deposited the entire amount of duty and taxes, excluding fine and penalty, under the Amnesty scheme within stipulated period after obtaining permission from concerned authorities. At present, no amount, whatsoever is outstanding against the appellants. The appellants have also referred to a letter dated 21.06.2007, issued by the Deputy Collector AFU, Karachi in support of their contentions. Contesting the arguments of appellants, the respondents have contended that after deducting the entire amount paid by the appellants, a balance of Rs.1,21309,999/- is still recoverable, which the appellants are liable to pay, in addition to the amount of income tax.

8. Federal Government vide SRO 458(I)/2007 (Customs) and SRO 463(I)/2007 both dated 09.06.2007, had issued Amnesty scheme which envisaged that the dues of duty and taxes that any person might have failed to pay, could be deposited by him on or before 30.06.2007, without the payment of penalty, fine and surcharge.

9. Availing of the benefit of above Amnesty scheme, the appellants negotiated with the respondents. On 21.06.2007, the Deputy Collector AFU, Karachi, finally settled the dispute with the appellants and allowed the appellants to deposit the sum of Rs.45,244,923/- on account of outstanding amount. The contents of letter dated 21.06.2007 are reproduced hereunder:

**“GOVERNMENT OF PAKISTAN
COLLECTORATE OF CUSTOMS (PREVENTIVE)
AIRFREIGHT UNIT, KARACHI**

*C.No.SIB-88/99
DEC/50/98-QIT*

Karachi, 21st June, 2007

*G.A. JAHANGIR & ASSOCIATES
Customs, Excise & Sales Tax, Consultants,
421-Clifton Center, Block-5
Clifton,
Karachi-75600*

SUBJECT: SETTLEMENT OF THE DISPUTE ARISING FROM ORDER-IN-ORIGINAL NO. SIB/86/99 PASSED BY THE COLLECTOR OF CUSTOMS (PREVENTIVE), CUSTOMS HOUSE, KARACHI, AGAINST PIAC BEFORE ADRC.

This is with reference to your letter No.Nil dated 14.07.2007 on the subject above. This office confirms the amount (customs duty and sales tax) payable by you as communicated in your aforesaid letter.

02. As regards the recovery of advance income tax is concerned the points agitated for not pressing the same merits consideration. However, since this collectorate is not the final authority for income tax matters, the same shall be forwarded to the income tax wing to the CBR for a final decision. In case the decision is consistent with your contention the matter shall stand finally settled.

*-Sd-
(Iftikhar Ahmad)
Deputy Collector
A.F.U''*

10. In the light of settlement, the appellants vide challan dated 27.06.2007, deposited the outstanding amount in the National Bank of Pakistan, Airport Branch, Karachi.

11. It is pertinent to mention that the letter dated 21.06.2007, in respect of settlement between the parties, was issued by Deputy Collector, AFU, Karachi, who was the competent authority. This letter was never challenged or disowned by the respondents side, giving it a finality. It is also construed as No Objection Certificate on behalf of the respondents.

12. Answering to objections of respondents about the default of appellants in payment of income tax, the learned counsel appearing produced the copies of payment of income tax to the Department; even otherwise the respondents could not claim the disputed amount of income tax, if any.

13. After hearing both the parties at considerable length and minute security of the relevant record, this Tribunal is of the considered opinion that the appellants have deposited the entire outstanding amount of duty and taxes availing the benefit of Amnesty scheme within the period of limitation. No amount, whatsoever, is outstanding against the appellants in respect of subject import and the demand raised by the respondents is unjust and unlawful. All the appeal are accepted and the impugned orders are set aside."

5. After having heard both the learned Counsel and scanning of record before us, we are of the view that insofar as reliance on the recommendation of ADRC is concerned, the same has no nexus with the present proceedings inasmuch as the said recommendations were never approved and notified by the Board. Secondly, notwithstanding, that in terms of Section 195(4)¹ of the Customs Act 1969 and the proviso thereof, if any such order is not passed within 90 days of the decision of ADRC, the recommendations are to be treated as an order passed by the Board; however, in this matter immediately after passing of the recommendations by the ADRC, the respondent was allowed and permitted to avail the amnesty scheme. Further, at the relevant

¹ **(as applicable at the relevant time)**. . (4) The Board may, on the recommendations of the committee, pass such order, as it may deem appropriate within ninety days of the receipt of recommendations of the committee;

provided that if such order is not passed within the aforesaid period, recommendations of the committee shall be treated to be an order passed by the Board under this sub-section.

time, the Appeal(s) of the Respondent were pending before the Tribunal and in that case in terms of section 195(5)² *ibid*, any recommendation or for that matter order of the Board is meaningless unless the procedure thereof is followed and materialized. It may be of relevance to observe that ADRC passed its order on 26.6.2007, whereas, the amnesty scheme was already notified on 9.6.2007, which provided that it is only applicable if duty and taxes are paid by or before 30.6.2007. Again the amnesty scheme by itself and its compliance by making payment of duty and taxes before 30.06.2007 are not in dispute. We have time and again confronted the learned counsel for the Applicant as to from where, the question and or demand of 1% flood relief surcharge has now arisen, as apparently neither in the show cause notice(s) nor in the Order-in-Original, any such amount has been determined or adjudicated independently; however, she has not been able to satisfactorily respond. Moreover, it is also not disputed that the amount of duty and taxes was not only determined by the Applicant itself; but was permitted to be paid before 30.6.2007 in terms of the amnesty scheme. In that case, letter issued by the Deputy Collector concerned which is now being disputed on the ground that he had no authority to do so; is immaterial, and if for the present purposes, is even ignored, the Applicant has no case on this ground. As noted earlier, we have not been assisted as to from where the demand of 1% flood relief surcharge has been created.

6. We have also gone through the show cause notice and it appears that the respondent was confronted only to the extent of alleged short levy of duty and taxes and there is no allegation in respect of any short levy of 1% flood relief surcharge which is now being demanded. Since it was never alleged; as a consequence thereof, the Order in Original is also silent to that effect and it is only the duty and taxes which have been adjudicated along with fine and penalty. In terms of the amnesty scheme fine and penalty stands

² (5) The aggrieved person may make the payment of customs duty and other taxes as determined if any by the Board in its order under sub-section (4), or as per recommendation of the committee in terms of proviso to sub-section (4), as the case may be and all decisions, orders and judgments made or passed shall stand modified to that extent and all proceedings under this Act or the rules made thereunder by any authority shall abate:

Provided that, in case the matter is already sub-judice before any authority or tribunal or the court, an agreement made between the aggrieved person and the Board in the light of recommendation of the committee shall be submitted before that authority, tribunal or the court for consideration and order as deemed appropriate.

remitted, whereas, the duty and taxes so adjudicated stands paid. If the case of the Applicant is that it is included in the total amount adjudicated but has not been paid, then we are afraid this cannot be agitated before us, once the Applicant by itself has accepted the request of the Respondent to grant them the benefit of the amnesty scheme after making payment of duty and taxes calculated by the Applicant on its own. This also would not be a question of law; but a question of fact. Therefore, on this score as well, the Applicant has no case.

7. Lastly, we may add that by now it is settled that an order of adjudication cannot go beyond the allegations mentioned in the show cause notice. Here in this case the show cause notice does not allege any separate or independent short levy of 1% flood relief surcharge, and talks only about duty and taxes for which the Applicant had permitted the availing of the amnesty scheme. An order of adjudication passed on the basis of a ground not stated in the notice is 'palpably illegal and void on the face of it'³. The purpose of serving a notice on a taxpayer is to notify him of the case against him. When such a document contains incomplete information it can seriously prejudice the taxpayer's defence⁴.

8. Notwithstanding the above, it may also be observed that even the recommendation of the ADRC is silent as to the demand of 1% flood relief surcharge now being pressed upon. In fact the said recommendation was in favor of the Respondent as it had waived the levy of penalty; however, the Respondent without waiting for the final decision of FBR on such recommendation applied for availing the amnesty scheme which was allowed and permitted by the Applicant; hence, even otherwise the Applicant is now estopped by its own conduct from demanding any further amount be it on the pretext of any short payment of 1% flood relief surcharge.

³ The Collector Central Excise and Land Customs Vs. Rahm Din (1987 SCMR 1840)

⁴ Fatal Yarn Pvt Ltd v Commissioner Inland Rev C.P No1972-2017 judgment dated 15.1.2021

9. In view of hereinabove facts and circumstances of the case it appears that the Applicant has no case so as to seek interference in the impugned order of the Tribunal which is correct in law and facts and depicts correct legal position; hence, the Reference Applications must be dismissed. However, the proposed questions appear to be irrelevant and against the very facts available on record. They are not even drafted in a manner which could be answered in affirmative or negative. There is only one question which arises out of the impugned order that *“Whether in the facts and circumstances of the case, pursuant to the show cause notice(s) and the order-in-original, any amount in respect of 1% flood relief surcharge was adjudicated independently against the respondent?, and the same is answered in negative, against the Applicant and in favor of the Respondent. All listed Reference Applicants stands dismissed. Let copy of this order be sent to the Appellate Tribunal in terms of Section 196(5) of the Customs Act, 1969.*

JUDGE

JUDGE