

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Reference Application Nos. 178 to 206 of 2020

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on office objection No.6.
2. For orders on CMA No.984/2020
3. For hearing of main case.
4. For orders on CMA No.985/2020

06.09.2021.

Mr. M.R. Sethi, Advocate for the Applicant.

These references have been pending since 2020 and it is demonstrated from the orders dated 03.02.2021, 17.02.2021 & 26.04.2021 that the applicant was abjuring its duty to proceed herewith. Upon caution being recorded on the last date of hearing, the matter was finally proceeded with today.

Briefly stated, Show Cause Notices dated 28.08.2018 were issued to the respondents wherein it was claimed that collusive mis-declarations had been detected in a post clearance audit. The show cause notices culminated in an aggregated order-in-original dated 28.02.2019, wherein the respondents were found liable to duties, taxes and penalty.

The matter was escalated before the Collector Appeals and vide judgment dated 07.05.2019 it was held that the charge of mis-declaration could not be justified, hence, the imposition of personal penalty was set aside. It is considered illustrative to reproduce the operative constituent of the aforementioned judgment.

“ I have examined the case record and the arguments of both the sides and have given careful consideration to the facts of the case. The item i.e. “Cyclogest 200 MG” is a drug used for the treatment of infertility. The appellants’ contention is that since the drug contain natural hormone (progesterone) hence it should be treated as an immunological produce. The perusal of description provided in Customs Tariff at heading 3002 and 3004 as well as chapter notes shows that heading 3002 covers the products like “Human blood prepared for therapeutic use; anti sera; etc while more especially heading 3002.2000 (which is declared by the importer) classify only “Vaccines for human medicines”. The study for product, “Cyclogest’s” literature clearly provides that it is not a “Vaccine” and is a medicine used for therapeutic purposes, hence, is to be classified in heading 3004. Since, the exemption of custom duty is provided to the products which are immunological produces (vaccines) likes rabies vaccines, therefore the instant item which is a medicine does not attract exemption under 5th Schedule of Customs Act, 1969. The Collectorate has therefore rightly denied the exemption of 5th Schedule. However, the importer’s as well as clearing agent’s stance carries weight that the classification is a matter of interpretation and does not fall within the definition of mis-declaration. Hence, the charge of mis-declaration is not justified and eventual imposition of personal penalty on importer and clearing agent is not justified. The personal penalties imposed on importer and clearing agent by the adjudicating authority is set aside. The appeal is allowed to the extent only”.

It thus transpired that the issue of penalty was decided in favour of the respondents by the Collector Appeals, however, the findings in so far

the imposition of duties and taxes are concerned were assailed before the learned Customs Appellate Tribunal and vide judgment dated 12.12.2019 (“Impugned Judgment”) the learned Tribunal held as follows:

“10. A critical perusal of Section -18(1A) reveals that subsection-(1A) of Section -18 has an overriding effect on subsection(1) of Section-18 which means that Fifth Schedule is independent of First Schedule. Subsection-18(1A) begins with the word ‘Notwithstanding anything contained in subsection (1)’. This terms has categorically been discussed in hon’ble Supreme Court of Pakistan’s judgment reported as 2017 SCMR SC 1218’ which providing it an overriding effect.

11. In fact, First Schedule (Pakistan Customs Tariff) is governed by subsection (1) of Section 18 whereas Fifth Schedule is governed by subsection (1A) of Section 18 of the Customs Act, 1969. By virtue of the term ‘Notwithstanding’ used in subsection (1A) of section-18, Fifth schedule shall have an over-riding effect on First Schedule to the Customs Act. The provisions of Fifth Schedule provide concession of duty to the ‘goods or class of goods’ irrespective of their PCT classification. The class of goods in the instant case are immunological and biological products and are very much entitled to the benefit of Serial No.8 of Fifth Schedule, to the Customs Act, 1969.

12. Representative of the respondent vehemently argues that the orders of the respondent No.1 and 2 are quite legal and based on cogent grounds and nothing is there in that order to be interfered with. When he was asked whether it was the fault of the responsible officer who acted and exercise his powers under section 80 of the Customs Act, 1969, who has physically examined the goods, compare it with the GD cleared and out of charge and now it is past and closed transaction and that whether any action has been taken against the responsible officer for imposing wrong PCT heading, he replied that it was the responsibility of the officer of the customs who was associate with the exercise of powers under section 80 of the Customs Act, 1969 but no disciplinary action has been taken till date against him. Section 80 of the Customs Act, 1969 is reproduced as under:-

“Checking of goods declaration by the Customs:-

(1) On the receipt of goods declaration under section 79, an officer of Customs shall satisfy himself regarding the correctness of the particulars of imports, including declaration, assessment, and in case of the Customs Computerized System, payment of duty, taxes and other charges thereon.

13. The goods were properly brought to the country in accordance with law prevailing at that time, the PCT heading was quite proper just for nothing the Preventive Collectorate made the case against the taxpayer and did not take action against the officer involved for wrong done by him, which means that nothing unjust and wrong had been done by the importer/taxpayer and he was quite correct.

14. All these appeals are allowed and the orders dated 26.07.2019 of the Collector Customs (Appeals), dated 28.02.2019 of the Deputy Collector Customs (Adjudication), Karachi are set aside. The show cause notices issued in this case is vacated.

It is apparent that the issue of whether there was a mis-declaration or otherwise has already been determined on the basis of evidence led before the respective fora. The Impugned Judgment has dwelled upon the issue of availability of exemption to the respondents and delivered its findings in favor of the respondents. It is essential to record at this stage that the applicant remained unable to dispel the preponderance of record / evidence to such effect before the subordinate fora and more importantly the applicants’ counsel has articulated no cavil in such regard before us, during the course of the arguments today.

The applicant has proposed various questions of law which we, respectfully, consider extraneous and dissonant to the Impugned Order. The learned Collector Appeals had appraised the evidence and concluded that no case for mis-declaration was borne from the record / evidence and even otherwise the necessary element of *mens rea* was never established, hence, no penalty was liable to be imposed upon the respondents. The learned Appellate Tribunal maintained such findings, however, went further and gave the respondents the benefit of the exemption claimed, on the basis of the record / evidence there before. It is

trite law that the learned Tribunal is final arbitrator of facts¹ and that factual controversies are not amenable before the reference jurisdiction of this court.

It has already been recorded supra that the applicant's counsel has raised no argument to call into question the findings of fact rendered by the tribunal. In view hereof, we are of the considered view that the applicant has failed to raise any question of law arising out of the Impugned Judgment meriting the consideration of this court, therefore, the present reference is hereby dismissed *in limine*.

A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Customs Appellate Tribunal, as required per section 196(5) of the Customs Act, 1969.

J U D G E

J U D G E

Amjad/PA

¹ Per *Munib Akhtar J* in *Collector of Customs vs. Mazhar ul Islam* reported as 2011 PTD 2577.