

IN THE HIGH COURT OF SINDH AT KARACHI

Present

Mr. Justice Irfan Saadat Khan.

Mr. Justice Zulfiqar Ahmad Khan.

C.P. No.D-529 of 2022

[Flying Paper Industries Limitedvs.....Federation of Pakistan & others]

Date of Hearing : 08.03.2022

Date of Decision : 14.03.2022

Petitioner through M/s. Haider Waheed & Munim Masood, Advocates.

Respondents through : Ms. Afsheen Aman, Advocate a/w Mr. Muzaffar Ali, Advocate.

Mr. Kafeel Ahmed Abbasi, DAG.

Ms. Syeda Sadaf Ali Shah, D.C. (East), MCC (East), Karachi.

JUDGMENT

Zulfiqar Ahmad Khan, J:- Petitioner is limited liability company part of a public listed Group of Companies running Industrial Unit in Khushab, Mangowal district, Punjab over an area spread over 127 Acre where the Petitioner chose to set up a Waste Heat Recovery Power Plant (hereinafter called WHR Power Plant) having been promised concessions by the respondent No.1, (Government of Pakistan) under her alternative and renewable energy promotion policies, which per learned counsel entitled import and setting up of such plants to zero percent duty/taxes under the well drawn Government Policy for Development of New Energy for Power Generation 2006 aimed to increase deployment of alternative energy sources throughout the country. Per learned counsel, as a part of said Policy, respondent No.1 introduced amendments in the Fifth Schedule of the Customs Act, 1969 exempting import duty at Sr. No.11 for

machinery, equipment and spares meant for initial installation, balancing, modernization, replacement or expansion of projects for power generation through nuclear and renewable energy sources like solar, wind, micro-hydel, bio-energy, ocean, waste-to-energy and hydrogen cell etc, as well as similar concession was also provided for in the Sixth Schedule of the Sales Tax Act, 1990. The petitioner being one of the largest cement manufacturers of Pakistan operating in this field at least for last 35 years intended to install a WHR Power Plant at its manufacturing unit having gross capacity of 7.5 Mega Watts, per learned counsel. Court has been advised that a typical co-generation WHR Power Plant consists of two components (i) Steam Boiler, and (ii) a Steam Turbine Generator which are arranged together to generate electricity. Learned counsel contends that these two components of the project are being procured from the People's Republic of China where the Boiler was imported from Hangzhou Boiler Group Co. Ltd. (HBG) and the Steam Turbine Generator from Hangzhou Chinen Steam Turbine Power Co. Ltd. (HCTC). Per learned counsel, the installation of the project is also handed out to the Chinese engineers. Upon finalization of the specification, the petitioner entered into an agreement with HBG on 08.09.2017 and with HCTC on 14.05.2018. Both the components per learned counsel were to be shipped depending upon installation timeline at the project site. Per learned counsel, the Turbine and Generator was imported through GD No. KEWB-HC-1311 on 25.07.2019 (page 303) and these goods were declared under HS Code 8502.3900. As the said consignment was covered by the Fifth Schedule of the Customs Act, 1969 and Sixth Schedule of Sales Tax Act, 1990, zero percent duties and taxes were payable. Per learned counsel, the said consignment

was released giving benefit of these concessions without any let or hindrance. Learned counsel specifically mentioned that even in the said GD, the petitioner mentioned that the imported consignment was partial shipment of the project's shipments (Item 43 - page 303). Per learned counsel, as per timeline for the Boiler component, which even otherwise got delayed on account of COVID pandemic, the petitioner imported the said component vide IGM No.82 dated 21.04.2020 and filed G.D No. HC-5631-30-04-2020 and when, notwithstanding a proper delay and detention certificates having been issued in respect of the said delayed import, learned counsel states that when KPT refused to accept the said certificates, the petitioner was constrained to file a Civil Suit bearing No. 1359/2021 seeking waiver of the demurrage charges, where this Court through its order dated 23.06.2021 directed release of the said consignment of Boiler upon deposit of the disputed amount of demurrage with the Nazir of this court. Nonetheless, per learned counsel, the respondents/Custom Authorities later on chose to decline benefit of the Policy, 2006 to the Petitioner on the said partial consignment and rather commenced process of assessing the consignment in isolation. Per learned counsel, a communication received from the respondent showed that the Custom Authorities has chosen to assess the import of Boiler outside the concessional regime alleging that the said import did not form part of plant's total consignment, and the Department also alleged that the Boiler in question was already available in the local market, therefore, the benefit of CGO No. 02/2017 will not be given to the petitioner for the said Boiler. Per learned counsel, notwithstanding that a request was made to the Pakistan Engineering Development Board to find status of the Boiler

imported viz-a-viz the other such Boilers available in the market, but that letter of the EDB dated 29.06.2021 still has not been effectively replied. Learned counsel contends that the acts of the respondents are causing huge losses to the petitioner's project at the cost of environmental degradation and heavy expenses of the petitioner are also incurring for keeping the Chinese Engineers and Technical Experts wait for the Boiler consignment to be released. This petition accordingly raised the key prayer that the said consignment which is a partial shipment of the entire WHR Power Plant should be given concession and exemption as promised in the Fifth Schedule of the Customs Act, 1969 and Sixth Schedule of the Sales Tax Act, 1990 and be released forthwith.

2. Learned counsel for the respondents No.2 & 3 have appeared upon notice and affirmed the contention of the learned counsel for the petitioner that the respondents are treating the import as an isolated import and not part of the complete WHR Power Plant and at the same token cannot be granted concession since the Boiler in question is available in the local market.

3. Learned DAG stated that since the assessment has already been made, therefore, appropriate remedy available to the petitioner is to challenge the said assessment in the Departmental hierarchy. He has placed reliance on a judgment of this court rendered in the case of Fauji Cement Company Limited v. Deputy Collector of Customs (Appraisement-V) (2021 PTD 949).

4. Heard the parties and perused the record. Admitted position is that the petitioner entered into a contract for the supply of Waste

Heat Recovery Boiler for Waste Heat Power Project with HBG China. Copy of the said contract is available at page 183 where objective of the contract is to construct a Waste Heat Power Generation System at petitioner's cement plant along with services enabling erection of the said plant. To setup the said project, it appears that the petitioner sought all requisite permissions from Environmental Protection Department as well as those needed under the Boiler & Pressure Vessels Ordinance, 2002. The Boiler permission available at page 315 dated 12.03.2021 specifies model of the Boiler as detailed out in the G.D. manufactured by HBG Ltd. China. Questions posed to this Court are (a) whether the import of a partial consignment being part of a project under Policy, 2006 could be treated as individual (isolated) import and (b) if the imported partial shipment is locally available, could the importer be forced to replace imported original component [Original Equipment Manufacturer (OEM) part] with one that is locally available. To answer these questions, it would be appropriate to look at the relevant text of the policy for Development of Renewable Energy for Power Generation 2006 (page 49), which encapsulated possibilities of enhancing use of renewable energy sources within the country and as a part thereof, encouraged import and installations of Waste Heat Recovery Power Plant in the country. Policy, *inter alia* provides incentives for renewable power generation. Para-8.6.1(i) of the said policy (page 91) provides for fiscal incentives, which are reproduced hereunder:-

“8.6.1 Fiscal Incentives: No customs duty or sale tax for machinery equipment and spares (including construction machinery, equipment, and specialized vehicles imported on temporary basis) meant for the initial installation or for balancing, modernization, maintenance, replacement, or expansion after commissioning of projects for

power generation utilizing renewable energy resources (specifically, small hydro, wind, and solar), subject to fulfilment of conditions under the relevant SRO”

5. Para(ii) also provides for exemption from income tax, including turnover rate tax and withholding tax on imports. As evident from the foregoing, the concessional regime provided in clause 8.6.1 makes promised concessions conditional to the fulfillment of the requirement of an SRO. In this regard, SRO (i) of 2005 was mentioned in the original version of the Policy, 2006 which specified Zero Customs duties and Sales Tax (page 93). The Fifth Schedule was accordingly amended under Section 18(1A) of the Customs Act, 1969 permitting Imports of Plant, Machinery, Equipment and Apparatus, including Capital Goods for Various Industries/Sectors where custom duty of zero percent is payable for machinery, equipment and spares meant for initial installation, balancing, modernization, replacement or expansion of projects for power generation through nuclear and renewable energy sources like solar, wind, micro-hydel, bio-energy, ocean, waste-to-energy and hydrogen cell etc.

6. Full text of section 18(1A) of the Customs Act is reproduced hereunder:

“18(1A). Special Customs duty on imported goods:-
The Federal Government may, by notification in the official Gazette, levy a special customs duty on the importation of such of the goods specified in the First Schedule as are of the same kind as goods produced or manufactured in Pakistan, at a rate not exceeding the rate of duty of excise leviable under the Federal Excise Act, 2005, on the goods, produced or manufactured in Pakistan:

Provided that the exemption of any goods from the whole or any part of the duty of excise for the time being in force shall not prevent the Federal

Government from levying a special customs duty on the importation of goods of the same kind:

Provided further that, for the purposes of the Sales Tax Act 1990 (VII of 1990), the special customs duty shall not constitute a part of the value of supply.”

7. Item 11 of the Table issued under Section 18(1A) of the Customs Act, 1969 in Part I deals with Machinery, equipment and spares meant for initial installation, balancing, modernization, replacement or expansion of projects for power generation through nuclear and renewable energy sources like solar, wind, micro-hydel, bio-energy, ocean, waste-to-energy and hydrogen cell etc. It is of paramount importance to observe that in the said Item 11, an explanation for the expression “Projects for Power Generation” is provided to mean such project to be “any project for generation of electricity whether small, medium or large and whether for supply to the national grid or to any other user or for in house consumption”. Para (iii) of Part I of the said Schedule considers the possibility of partial shipments of machinery and equipment, however, requires that details of the entire plant machinery, equipment and components etc. supported by the contract, lay out plan and drawings to be furnished at the time of arrival of the first shipment. As the said paragraph is of relevance, it is reproduced hereunder:-

“(iii). in case of partial shipments of machinery and equipment for setting up a plant, the importer shall, at the time of arrival of first partial shipment, furnish complete details of the machinery, equipment and components required for the complete plant, duly supported by the contract, lay out plan and drawings;”

8. Facilities made available under item 11 of Table-I are even extended to the Contractors upon making compliance of the following requirements:-

“1.This concession shall also be available to primary contractors of the project upon fulfillment of the following conditions, namely: -

(a)the contractor shall submit a copy of the contract or agreement under which he intends to import the goods for the project;

(b) the chief executive or head of the contracting company shall certify in the prescribed manner and format as per Annex-A that the imported goods are the project’s bona fide requirements; and

2. temporarily imported goods shall be cleared against a security in the form of a post-dated cheque for the differential amount between the statutory rate of customs duty and sales tax and the amount payable under this Schedule, along with an undertaking to pay the customs duty and sales tax at the statutory rates in case such goods are not re-exported on conclusion of the project.

3. The goods shall not be sold or otherwise disposed of without prior approval of the FBR. In case such goods are sold or otherwise disposed of after Ten years of their importation, the same shall be subject to payment of duties & taxes as prescribed by the FBR. In case these goods are sold or otherwise disposed of without prior approval of the FBR or before the period of Ten years from the date of their importation, the same shall be subject to payment of statutory rates of duties & taxes as were applicable at the time of import. The construction machinery may, however, be allowed to be transferred to other entitled projects of the sector, with prior approval of the FBR, subject to payment of duties and taxes, if applicable. The re-export of these goods may also be allowed subject to prior approval of the Chief Collector of Customs.”

9. Also of relevance is the Table 3 of the Sales Tax Act, 1990 where import of such machinery is exempted from whole of sales tax (Pages 169-171). In the case at hand, petitioner admits having supplied to the customs authorities complete details of the

machinery equipment and component required for the complete plant. It was only after provision of these information/document that first consignment of the petitioner for Turbine and Generator was released at zero percent duty and taxes, therefore, during subsequent import of a partial shipment of the same plant, Custom Authorities treating it as an independent and isolated import seemingly is ignorance of the concession promised to the petitioner under Part-I of the Fifth Schedule (page 151). With regard to the condition of local manufacturing as claimed by the respondent, while the said Schedule considers this aspect in para (i) of Part-I in respect of new Power Unit of 25 Mega Watts and above, however, a serious illegality is witnessed from the communication made to the Engineering Development Board by the respondent No.3 in its letter dated 29.06.2021 where the said respondent sought permission of the EDB. For the ease of understanding, full text of said letter is reproduced hereunder:-

“GOVERNMENT OF PAKISTAN
COLLECTORATE OF CUSTOMS APPRAISEMENT (EAST)
CUSTOM HOUSE, KARACHI

No.SI/MISC/334/2021/DC-VI

Dated 29.06.2021

General Manager (Tariff),
Engineering Development Board,
Ministry of Industries, Production & Special Initiatives,
EDB Building (STP), 5-A, Constitution Avenue,
Islamabad.

Subject:- LOCAL MANUFACTURING STATUS OF THE
STEAM GENERATING BOILERS WATER TUBE
TYPE FOR WHR POWER PROJECT IMPORTED
VIDE GD NO. KEWB-HC-5631-30-04-2020

Please refer to the subject cited above.

2. Briefly stated that M/s Flying Paper Industries LTD. imported a consignment vide GD No. KEWB-HC-5631-30-04-2020 declared to contain “Partial shipment of Plant and Machinery for WHR Power Project consisting of Steam Boiler with all Standard Accessories” and claimed under Serial 11 of Part-I of 5th Schedule of Custom duty and Serial 7.1 to the 6th Schedule of Sales Tax Act which is not

admissible on goods that are manufactured locally mentioned as per CGO02/2017 dated 19.04.2017.

3. On Scrutiny of the documents and manufacturer catalogue/drawing provided by the importer, the goods were found to be WHR Water type tube boilers i.e AQC boiler with rated Steam Output of 23.6 t/h and SP boiler with rated steam output of 29.5 t/h and both having pressure rating of 1.1 MPA (11.2 kg/cm²). However, the importer contended that boiler is able to produce multiple pressure i.e. LP (3.5 t/h) and HP (53.1 t/h) and rated pressure of boiler does not fall under Serial 544 of the CGO 02/2017. The Collectorate is of the opinion that at any given point in time, the individual steam production capacity of the boilers does not exceed 50g/h. Therefore, falls under Serial No. 544 of the CGO 02/2017 i.e. Waster Heat Recovery Boilers, 1.5 to 50T/PH Capacity & pressure upto 6 bar to 50kg/cm² inclusive of Parts & equipment.

4. In view of the above, it is requested to confirm whether the aforementioned boilers are manufactured locally or not. All the documents (i.e. manufacturer layout, drawing) are enclosed for reference purpose.

Sd
(Shakeel Ahmed)
Deputy Collector-VI

10. It could be witnessed from the third para of the above letter that the writer has himself chosen to conclude that while the imported Turbine was of 53.1 t/h capacity, the said Boiler was to never exceed pressure of 50 t/h, hence Boiler available within the country of 50 t/h could be substituted in place of the said OEM product. Such a dangerous assumption in a country where time and again one is confronted with the painful news of Boiler explosions, least to say is very reckless. In fact it is for these purposes the Boiler & Pressure Vessel Ordinance, 2002 was enacted where prior approval of a Boiler, before its installation is made mandatory by registration of the Boiler with the registration authority. In the case at hand, the Boiler which is a subject matter of the import has been specifically licensed by the Boiler Inspector under Section 7 of the Said Ordinance. The certificate dated 12.03.2021 issued by the Chief Inspector of Boiler to the petitioner is only in respect of the Imported

Boiler, which cannot be changed by a Revenue officer. The type of Boiler being imported is also important which is a Waste Heat Recovery Steam Boiler which operates in totally different heat-cycle as compared to a typical Boiler. The Boiler being imported by the petitioner has unique specifications given between page 241 to 263 which make it a specialized AQC Boiler used to capitalize on the Waste Heat Generated from cement kilns during cement production line, ECON flow of the said Turbine is 54.7 t/h as evident from the data sheet available at page 241. Critical specifications of the imported Boiler are reproduced hereunder just to exemplify how minute data-match is required to equalify a generic boiler to the instant OEM product.

PERFORMANCE DATA SHEET

| Item | Description | Unit | Design case |
|------|--|--------|---------------|
| A | AQC Boiler | | |
| 1 | Flue gas inlet temp. | C | 380 |
| 2 | Flue gas inlet volume | Nm3/h | 202000 |
| 3 | Flue gas boiler inlet pressure | Pa | -3000 |
| 4 | Flue gas dust content | g/Nm3 | 15 |
| 5 | Air leakage factor | % | ≤2 |
| 6 | Boiler design case flue gas resistance | Pa | ≤700 |
| 7 | Feedwater temp | C | 40 |
| 8 | HP Steam section | | |
| | Calculated steam output | t/h | 20 |
| | Steam temp. | C | 360 |
| | Steam pressure (a) | MPa(a) | 1.1 |
| 8 | LP Steam section | | |
| | Calculated steam output | t/h | 3.7 |
| | Steam temp. | C | 180 |
| | Steam pressure (a) | MPa(a) | 0.28 |
| 9 | Water section | | |
| | ECON flow | t/h | 54.7 |
| | ECON temp | C | 128 |
| 10 | Flue gas outlet temp | C | 80 |
| | | | |
| B | SP Boiler | | |
| 1 | Flue gas inlet temp. | C | 311 |
| 2 | Flue gas inlet volume | Nm3/h | 454000 |
| 3 | Flue gas boiler inlet pressure | Pa | -5720 |
| 4 | Flue gas dust content | g/Nm3 | 60 |
| 5 | Rated steam pressure (a) | MPa | 1.1 |
| 6 | Feedwater temp. | C | 125(From AQC) |
| 7 | Calculated steam output | t/h | 29.5 |
| 8 | Steam temp. | C | 290 |

| | | | |
|----|--|----|------|
| 9 | Flue gas outlet temp. | C | 205 |
| 10 | Flue gas leak factor | % | ≤2 |
| 11 | Boiler design case flue gas resistance | Pa | <800 |
| 12 | Flue gas composition | | |
| | CO2 | % | 25 |
| | O2 | % | 4.5 |
| | N2 | % | 66 |
| | H2O | % | 4.5 |

11. In the circumstances, treating the recent import of the Boiler as an independent and isolated import, away from the entire plant is illusory and the fear the said Boiler will not be attached to the Turbine and Generator at the project site can be ensured by deployment of a suitable officer during such erection, hence treating the said partial shipment when it is clearly so mentioned in the GD as an independent import seems to be mala fide aimed to only foster revenue collection at the cost of human lives.

12. With regard to the contention of learned DAG that once the assessment has been made, the appropriate remedy would be to challenge the same under the Departmental hierarchy and the case law relied thereon, the facts of the case at hand are totally different. First of all that the cited judgment was rendered in the Special Custom Reference alongwith C.P. where the court held that the question of law raised by the applicant was not relevant as there was a factual determination having been given after a committee constituted in this regard. In the case at hand the partial shipment of the machinery and equipment used for setting up the WHR Power Plant are in consideration which has been fully covered by the Fifth Schedule of the Customs Act, 1969 and the Schedule of the Sales Tax Act, 1990 making provision for clearance of such partial shipment at zero duties and taxes. Guidance in this regard can be

sought from the judgments of the Hon'ble Supreme Court in the case of Usmania Glass Sheet Factory Limited v. Sales Tax Officer (PLD 1971 S.C. 205) and M/s. Alpha Chemicals (Pvt.) Ltd. v. Federation of Pakistan and 4 others (PTCL 2014 CL.103).

13. Also of importance is the performance guarantees' aspect of the project, which can only be accomplished if entire OEM products are used. Fishing expedition seeking look-alike and make-alike boilers for replacement of vital OEM parts with local components may largely reduce thermal efficiencies of the project the very purpose for which the entire exercise is being under taken to take advantage of heat lost to the atmosphere. Least to say Boilers, being high pressure components, not to be taken lightly at any occasions. The treatment meted out to the petitioner by Customs Authorities seemingly is on account of non-inclusion of Engineers and Material Scientists in the Customs Preventive and Examination Department, where specific mention of Engineers and Material Scientists is given for such posts, for example through SRO 202(I)/2015 dated 09.03.2015 and SRO 377(I)/2015 dated 27.04.2015. Respondent No.1, Chairman FBR is to ensure such specialist deployment as per above and send a report to MIT-II within two months for consideration of the same by us in Chambers.

14. Resultantly, this petition is allowed with directions to the respondents to forthwith release the said consignment of the Boiler while treating it as partial shipment of WHR Power Plant's equipments per terms of the consignments already released by

giving concession of the Fifth Schedule of the Customs Act and Sixth Schedule of the Sales Tax Act.

JUDGE

JUDGE

Aadil Arab