IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Reference Jurisdiction)

Special C.R.A. No. 27 of 2017

&

Special C.R.A. No. 28 of 2017

Date	*Order with signature of Judge*

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Mahmood A. Khan.

Fresh Case

21.10.2019:

Ms. Dil Khurram Shaheen, advocate for the applicant(s).

O R D E R

1. Following seven common Questions were proposed in both the Reference Applications, out of combined impugned Order dated 24.09.2014 passed by Customs Appellate Tribunal, Karachi Bench-I, Karachi in Custom Appeal Ns. K-732 & K-733/2011.

1) Whether the learned Appellate Tribunal erred in law to hold that the provisions of Section 32 of the Act cannot be invoked in a case where short payment has been made through an assessment decision of Section 81 of the Act?
2) Whether the assessments finalized under Sections 81(2) or 81(4) of the Act, as the case may be, can be treated at par with the assessment of Section 80 of the Act?
3) Whether the provisions of Section 81 of the Act have any over-riding effect on the provisions of Section 32 of the Act?
4) Whether release/assessment of the goods, without any security/deposit, can be considered as provisional assessment, within the meaning of Section 81 of the Act?

5) Whether in terms of SRO 509(1)/2007 dated 09.06.2007, the exemption of duties/taxes was available to the goods, of a kind as specified in PCT Heading 3906.9040?

6) Whether in the presence of an “Undertaking” and in view of the provisions of Section 72 of the Contract Act, 1872, the respondent importer was/is bound to pay the short levied amount?

7) Whether in view of the law settled by the Hon’ble Courts in the case of Collector of Customs v/s. Shaikh Shakeel Ahmad (2011 PTD 495) and Collector of Sales Tax and Central Excise, Lahore v/s. Zamindara Paper & Board Mills (PTCL 2007, CL 260) the Appellate Tribunal erred in law to hold that as per Paras 2 and 74 of CGO 12/2002 no recovery can be made?

2. However, after having read out the proposed questions and the order passed by the Customs Appellate Tribunal in these cases, learned counsel for the applicant, while confronted to assist the Court as to how the above proposed questions arise from the impugned order, as there has been no discussion or any decision by the Tribunal on the application of Section 32 of the Customs Act, 1969, or reference or reliance on the case law as referred in the proposed question No.7, has candidly conceded such factual position and submitted that the only dispute involved in both the References, relates to examining the scope of provisional assessment under Section 81 of the Customs Act, 1969, and the effect of finalization of assessment in terms of Section 81(3) of the Customs Act, 1969, on the basis of decision of PCT Committee vide Public Notice No. 06/2009 dated 29.07.2009, keeping in view the undertaking given at the time of provisional assessment by the importer to the effect that disputed amount of duty and taxes will be paid at the time of final assessment. Learned counsel for the

applicant has requested that questions of law may be allowed to be reformulated in the following terms:-

> ***"a) Whether the Customs Appellate Tribunal was justified to set-aside the Order-in-Original passed by the Customs Authorities under Section 81(3) of the Customs Act, 1969 while observing that the provisional assessment has not been made within the stipulated period as provided under Section 81(2) of the Customs Act, 1969?***
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> ***b) Whether the Customs Appellate Tribunal was justified to hold that the application of duty and taxes in the case of the respondent on the basis of Public Notice No. 06/2009 dated 29.07.2009 would not apply retrospectively in the case of the applicant, where goods were released provisionally under Section 81 of the Customs Act, 1969?"***

It has been prayed that above proposed questions may be answered in favour of the applicant. We have heard the learned counsel for applicant, perused the record with her assistance and also gone through the impugned order passed by the Appellate Tribunal Inland Revenue in the instant cases, as well as the orders passed by the two authorities below. Brief facts of the case as narrated by the Appellate Tribunal in the impugned order are as under:-

> *" that the appellant imported a consignment declared to contain Floprint TA-160 (pigment thickner) weighing 91000 kgs from the UAE and filed a Goods Declaration (GD) bearing no. HC-KAPR-HC-1864 dated 21.08.2008 for clearance thereof at declared value @ US$ 26845/- (Pak Rs. 20,12,485/-) under PCT heading 3906.9030 attracting customs duty @ 0% sales tax @ 0% in terms of SRO 509(I)/2007 dated 09.06.2007. The goods were cleared against an undertaking to the effect that the matter would be referred to the Classification Centre for determination of classification of the goods and that the appellant would pay the differential amount of duty / taxes if required as a consequence of the aforesaid determination of classification. Subsequently, the PCT Committee rules, vide Public Notice No. 06/2009 , that the goods imported in this case were correctly*

classifiable under PCT heading 3906.9040. Since the goods were subject to 10% customs duty and benefit of notification SRO-509(I)/2007 dated 09.06.2007 was also not available to the same, the appellant was asked to pay the differential amount of Rs. 1,273,140/- vide the impugned order."

4. Admittedly, the provisional assessment was made in terms of Section 81 in the month of September and November 2008, however, such assessment could not be finalized within six months or within the extendable period of ninety days in exceptional case, as provided under Section 81(2) of the Customs Act, 1969. On the contrary, by issuing a Show Cause Notice to the respondent in the month of March 2010, the respondents was required to make payment of duty and taxes on the basis of a Public Notice No. 06/2009 dated 29.07.2009, while invoking the provision of Section 81(3) of the Customs Act, 1969. It is pertinent to note that except aforesaid Show Cause Notice issued under Section 81(3) of the Customs Act, 1969, neither Notice under Section 32 has been issued, nor adjudication in terms of Section 179 of the Customs Act, 1969 has been made. Therefore, the questions No.1 to 7 as proposed by the applicant in the instant reference applications, are neither relevant, nor do they arise from the impugned order passed by the Customs Appellate Tribunal in both the References, and have been righty not pressed by the learned counsel for the applicant.

5. We may now examine the two reformulated questions as mentioned in paragraph 2 in both these cases. It is clear from the record that the provisional assessment made in both the cases in the months of September and November, 2008 respectively, was not finalized within the statutory period of six months' as provided under Section 81(2) of the Customs Act, 1969, nor this is a case, where the

Collector of Customs has extended the period for another ninety days to finalize the provisional assessment under Section 81(3) of the Customs Act, 1969. On the contrary, by issuing a notice under Section 81(3) of the Customs Act, 1969, after expiry of statutory period, provisional assessment has been finalized under Section 81(3) of the Customs Act, 1969. It has been further observed that determination of customs value has been based upon a Public Notice No. 06/2009 dated 29.07.2009, which was issued subsequently, after expiry of statutory period of six months from the date of provisional assessment, which otherwise, could not be applied retrospectively to the case of the respondent, who filed the GDs in the months of September and November, 2008, which were provisionally assessed in terms of Section 81 of the Customs Act, 1969. Both these factual and legal aspects have been ably dealt with by Customs Appellate Tribunal in the instant cases in Para: 8 to 10 of the combined impugned order in the following terms:-

> *"8. It is further observed that methodology of ruling in order to implement the recommendations regarding the introduction of the program for binding pre-entry classification, information and improvement required to be done under certain procedure as laid down in Chapter II Para-2 of CGO 12 of 2002. In this instant case the PCT Committee after detailed deliberation assailed that the pigment thickner shall be classified under PCT heading 3906.9030 through a Public Notice No.06/2009. It is mandatory under the aforesaid CGO that, the classification determined by the Committee shall be subject to approval by Collector of Customs Appraisement. After approval by the Collector the Ruling shall be communicated in writing to the importer and all Customs Collectorates as soon as possible but not later than 10 days of the approval by the Collector. It is also mandatory that the importer or their representative shall also invite for discussion by*

Classification Committee before making any decision. The decision of the said Classification Committee will be binding on the authorities for a period of one year from the date of its issue. It is also mandatory under the Rules that in certain cases whether the Ruling constitute a change in the existing practice, such change in practice will not have retrospective effect but will be applicable from the date of the Ruling. In this case all prescribed para-meters and rules are vividly denied and found derogatory through their acts and omissions. In the light of the interpretation of law which is a continuous process and till a period it is not altered it shall be effective from the date of its doing so, such orders would have no retrospective effect.

9. Now coming the point of Section 81 of the Customs Act, 1969 the provisional determination of the liabilities were evidently performed by the department at the time of release of the said impugned goods and the importer accordingly submitted the undertaking and the department accepted the importers request. It is the mandatory duty of the respondent and have legal obligations when the goods were released provisionally under Section 81 of the Customs Act, 1969, department could have issued the notice for demand/recovery under Section 81 for any discrepancy which was found in the case subject to the period of limitation prescribed under/by Section 81, on that particular point the Honourable High Court in the case of M/s. Abdul Aziz Ayoub Vs Assistant Collector reported at PTC 1990 CL 1041 which confirmed in M/s Hussain Trading Vs Central Board of Revenue reported as 2004 PTD 1979. The same point has also been observed by the Honourable High Court of Sindh in the case of M/s Abdul Sattar Vs Federation of Pakistan and 2 others reported as 2000 PTD 2006 CL 456 where it was held that "any agreement for the payment of the tax not recoverable under the tax statue would be repugnant to

Article 77 of the Constitution of Pakistan, after expiry of its period of one and half years neither the final assessment can be made under Section 81 of the Customs Act ibid nor any action for the recovery by so-called short levy duty and taxes can be initiated under Section 32 or Section 72 of the Contract Act 1872. In case of any violation that should be declared as violation of statutory obligations and in any manner when such kind of violations should be caused that shall never been considered or to be declared as technical violation, but it should be considered and declared only as legal violation.

10. It is well settled law that if the matter there-under is not finalized within the stipulated period, then the provisional determination was deemed to have become final. The Honourable Sindh High Court had came to the same conclusion as before, namely that if the matter under section 81 was not finalized within the stipulated period, the provisional determination attained finality. Since the Rehan Umar case was decided by a Division Bench, the matter of the proper interpretation of section 81, as presently relevant, stood decided. This position has been reconfirmed in the Dewan Farooque case (supra) and to Collector of Customs v. Pak Arab Refinery 2010 PTD 900. Therefore, the provisional determination has attained finality in the impugned case as well and final assessment by the learned Respondent which militates this legal position has no legal value."

6. From perusal of hereinabove finding as recorded by the Customs Appellate Tribunal, it is clear that the only legal issue involved in the instant cases i.e. final determination of customs value in respect of the consignments which were allowed provisional release under Section 81 of the Customs Act, 1969, could not be finally assessed while invoking the provisions of Section 81(3) of the Customs Act, 1969, after expiry of the statutory period of six months

or the extended period which is not attracted in these cases, and if such assessment is not finalized within that period the provisional assessment becomes final. Reliance in this regard has been placed by the Customs Appellate Tribunal in various judgments, including the case of *Collector of Customs v. Pak Arab Refinery* [**2010 PTD 900**]. While confronted with hereinabove factual and legal position as emerged in the instant cases, learned counsel for the applicant could not point out any error or illegality in the impugned order passed by the Tribunal.

7. In view of above facts and circumstances of the case, we do not find any factual error or legal infirmity in the combined impugned order passed by the Customs Appellate Tribunal in these reference applications. Consequently, questions reformulated hereinabove are answered in "***AFFIRMATIVE***" against the applicant and in favour of the respondent.

Instant Reference Applications stand disposed of in the above terms alongwith listed applications.

J U D G E

J U D G E

Nadeem/A.S.