

IN THE HIGH COURT OF SINDH, KARACHI

**Spl. C.R.As No. 328,329,330, 331,332, 333,
334, 335, 336,337,338,339,340,341,342,
343, 344, 345,346,347,348 and 349 of 2010.**

Present

Mr. Justice Faisal Arab

Mr. Justice Aqeel Ahmed Abbasi.

M/s Niaz Muhammad & Company and others..... Applicants

Versus

Customs Excise and Sales Tax, Appellate Tribunal & others... Respondents

Date of hearing : 08.03.2012

Date of order : 08 .03.2012

Mr. Khawaja Shamsul Islam, advocate for the applicants.

O R D E R

Aqeel Ahmed Abbasi, J: Through this common order, we intend to dispose of the above referred twenty-two Special Customs Reference Applications arising out of the common order dated 04.02.2010, involving similar controversy, passed by the Customs Appellate Tribunal, Bench-III, Karachi in Customs Appeal Nos.K-300-302 & 307 to 313/2009 filed by M/s. Al-Sadat, Custom Appeal Nos. K-303 to 306 & 321/2009 filed by M/s. Niaz Muhammad and Custom Appeal Nos.K-314 to 320 of 2009 filed by M/s. FFK & Construction.

2. Following common questions are said to have arisen from such order.

1. Whether the learned Appellate Tribunal has erred in interpreting the provision of Section 32 of the Customs Act, 1969 without determining whether the applicant made an untrue statement in relation to material particulars before the Customs Authorities?

2. Whether the learned Appellate Tribunal has erred in upholding the proceedings initiated by respondent no.4 as he was not competent authority to initiate such proceedings under the provision of Customs Act, 1969, as the law mandatory requires the reopening of the matter in cases of any illegality or irregularity committed by the Assessing Officer by the Collector of Customs under section 195 of the Customs Act, 1969?
3. Whether the learned Appellate Tribunal has failed to apply the principal laid down by the dictum given in the case of M/s Ziptech (Pvt) Ltd., through director and another vs collector of Customs, Model Collectorate and reported as 2009 PTD 246, in as much as the assumption of jurisdiction by the respondent no.4 was ab-initio wrong as the respondent No.4 was Corum non-judice, being not authorized to reopen a past and closed transaction?
4. Whether or not the Appellate Tribunal has erred in deciding the matter initiated through an illegal proceeding in respect of a matter which had attained finality in terms of section 83 of the Customs Act, 1969?

3. Brief facts as recorded by the learned Tribunal in its impugned order are that the applicants imported different consignments of old and used dump trucks as per IGMS and Index numbers of different dates as mentioned in their appeals and filed their G.Ds for clearance of the same and paid concessionary customs duty @ 5% vide SRO 567(I)/2006 dated 05.06.2006 and got the same cleared. As per said SRO the concession in customs duty on the On/Off Highway dump trucks of 320 HP and above if imported by construction companies was subject to the following four conditions:-

- i) CEO of the company shall certify that the imported dump trucks are company's bonafide requirement.
- ii) These shall be registered as On or Off Highway Dump Trucks, as the case may be and shall be used exclusively for the construction purpose.
- iii) Registration details shall be furnished to the Collector of Customs within three months of the clearance.
- iv) These shall not be sold or otherwise disposed of within next 10 years except to another construction company after NOC from the Collector of Customs concerned.

4. The applicants, therefore, filed their undertakings to the following effects before the clearance:-

- i) The dump truck imported under this notification shall be registered with Motor Registration Authority in their respective categories and shall be used exclusively for construction activities.
- ii) The registration detail of the dump truck's shall be furnished to the Collector of Customs within three months of its clearance.
- iii) The dump truck shall not dispose of for a period of ten years from the date of its import.
- iv) In case of any violation or non-fulfillment of any of the above conditions, we will be liable to pay the exempted duty along with any penalties/additional surcharges etc. imposed by the Customs authorities.

5. The respondents issued show cause notice to the applicants to the effect that they being the importers wrongfully claimed the benefit of the concessionary SRO 567(I)/2006 dated 05.06.2006. The applicants in Appeal No.300, 301, 302, 303, 304, 305, 306, 312 and 313 of 2009 imported the said dump trucks, which were less than 320 H/Ps capacity and (ii) they also failed to provide registration details within the stipulated period of three months. Whereas in Appeals 307, 308, 309, 311, 314, 315, 316, 317, 318, 320 and 321 of 2009, the applicants failed to provide the registration details of the imported dump trucks to the Collector of Customs within the stipulated period, therefore, they committed offences in terms of sub-section (3-A) of Section 32 of the Act, read with SRO 567(I)/2006 dated 05.06.2006 punishable under clauses 10A and 14 of section 156 (1) of the Customs Act, 1969. The applicants filed replies to the show cause notices and after hearing the parties, the Adjudicating Officer vide order-in-original as mentioned in the schedule directed the applicants to make payment of leviable customs duty and other taxes as mentioned in the respective orders with additional duty and penalty equivalent to the value of the goods within 14 days under clauses (10-A), 12 and 14 of Section 156(1) of the Customs Act, 1969, besides imposition of penalty against the Clearing Agent.

6. The applicants filed appeals against these orders but the same were dismissed by the Collector (Appeals). Thereafter applicants preferred appeals

before the Customs, Excise and Sales Tax Appellate Tribunal, who vide its consolidated order dated 04.02.2010 also dismissed all the appeals. Being aggrieved by such order the applicants have preferred instant reference applications by raising common questions for opinion by this Court.

7. Summarizing the contention of the learned counsel for the applicants, it has been contended that the applicants opted for 1st Appraisal System, therefore, if there was any discrepancy in respect of Horse Power of the dump trucks, it was on account of mistake of the officials of the respondents and the applicants could not be held liable under Section 32 of the Customs Act, 1969, (ii) that the value of the dump trucks ascertained by the respondents is exorbitantly high as compared to the declared value and the same is in violation of section 25 of the Customs Act, (iii) that registration dates of the dump truck were supplied to the respondents during hearing of the cases, therefore, compliance of the condition was made, (iv) that the allegation of sale of dump truck in violation of one of the conditions of the concessionary SRO was not mentioned in the show cause notices hence cannot be made basis of reopening past and closed transaction. Learned counsel has prayed that impugned orders of the Tribunal is erroneous hence the same is liable to be set aside.

8. We have heard the learned counsel for the applicants and perused the record. From perusal of the record and the impugned order passed by the Tribunal, it is seen that the applicants imported the dump trucks and paid the concessionary customs duty in terms of SRO 567(I)/2006 dated 05.06.2006. Perusal of the SRO reveals that the Federal Government exempted the imported goods specified in column (3) of the table therein falling under the HS code specified in column (2) of that table provided for so much of the customs duty specified in the first schedule to the Act, as in excess of the rates specified in column (4) thereof subject to different conditions mentioned therein. The relevant

entry of these dump trucks is at Serial No. 37 of the table and in column (3) thereof the imported goods is On/Off Highway Dump Trucks of 320 H.P and above. The applicants availed the benefit of concessionary SRO by mentioning the said SRO in their goods declarations. At no stage, the applicants declared before the respondents that these dump trucks were of less than 320 HP, whereas in the registration documents produced by them during the hearing, it transpired that the same were of less than 320 HP. Since the applicant with an intention to claim exemption/concessionary duty claimed the benefit of SRO 567(I)/2006 dated 5.06.2006 by mentioning the same in their goods declarations, it cannot be presumed that the applicants were not aware of all the conditions as mentioned in the said SRO to claim such exemption/concession. The required horse power of the imported dump trucks was one of the pre-condition which in the case of the applicant was not fulfilled. In terms of section 79 of the Customs Act, 1969, it is the duty of every importer to make true and correct declaration regarding description, value, quantity, origin and PCT heading etc. in goods declaration. It would suffice to mention that in terms of Section 79(I) of the Act, for availing such benefit of first appraisement a special request in this regard is to be made to the customs officer not below the rank of an Assistant Collector before filing the GD but in this case there is nothing on record that any such request was made by the applicants. G.Ds were filed by the importer on the basis of self assessment and were got cleared accordingly, however, on checking it was found that applicants have misdeclared the Good declaration by paying lesser amount of concessionary duty and taxes in terms of SRO 567(I)/2006, which was not attracted in the instant case. In view of the above facts, it is seen that the applicants made the declaration in respect of H.Ps of the dump trucks in their GDs knowingly or having reasons to believe that such declaration was false in that regard and, therefore, committed offence under section 32 of the Customs Act, 1969. As regards the value of the dump trucks shown in the show cause notice is concerned, it may be noted that

admittedly, it was the same value as determined by the respondents initially when customs duty was charged against which the applicants did not raise any objection and payment of customs duty was made thereon, therefore, the applicants would be estopped under the doctrine of estoppel from raising any such objection at later stage in terms of Article 114 of the Qanoon-e-Shahadat Order, 1984. The applicants have violated one of the conditions of the concessionary SRO by not providing details of the registration of the dump trucks to the Collector of Customs within three months of the import. It will suffice to observe that the applicants have not disputed that such details were supplied only after the adjudicating proceedings were initiated against them.

9. Learned counsel for the applicant has not been able to show any discrepancy or error in the impugned order which is based on proper appreciation of facts and application of correct law. Moreover, there is concurrent finding of fact by the forums below, which unless proved to be perverse cannot be interfered by this Court in its reference jurisdiction. Reference in this regard can be made to the judgments of the Hon'ble Supreme Court in the case of **Lungla (Sythet) Tea Co. v. CIT (1975) 31 Tax 64 SC**, **S.M. Ilyas & Sons v. CIT PLD 1982 SC 259**, **Japan Storage v. CIT 2003 PTD 2849** and **CIT v. NIT 2003 PTD 589**. Nothing has been brought on record to show that the impugned finding recorded by the forums below on facts of the case is contrary to the material available on record. We are of the opinion that no substantial question of law arises from the impugned order, whereas the questions proposed are questions of fact. Accordingly, we do not find any substance in the instant reference applications, which were dismissed in limine by our short order dated 08.03.2012 and these are the reasons of such short order.

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