

IN THE HIGH COURT OF SINDH AT KARACHI
Spl. Cust. Ref. Application No.234/2010

Date	Order with signature of Judge(s)
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BEFORE

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Muhammad Junaid Ghaffar

M/s. Tulip Towel Industries (Pvt) Ltd.....Applicant

Versus

Additional Collector of Customs (Appraisement-I) and another.....Respondents

Date of hearing: 21 May, 2015.

Date of order: 21 May, 2015.

Mr. Naseem Anwer, Director of the applicant present in person.
Mr. Shakeel Ahmed, advocate for the respondents.

ORDER

Aqeel Ahmed Abbasi, J: Being aggrieved and dis-satisfied by an order passed by the Customs, Central Excise & Sales Tax Appellate Tribunal Bench-III, Karachi, in Custom Appeal No.K-559 of 2007/19821 dated 24.06.2010, whereby, the order passed by the Collector of Customs, Sales Tax & Federal Excise (Appeals) Karachi, in favour of the applicant has been set-aside, the applicant has filed instant reference application by proposing following questions:-

- A) *Whether on the facts and circumstances of the case, the learned Tribunal unlawfully upheld the demand for the recovery of sales tax by the respondent Additional Collector of Customs Appraisement, Customs House, Karachi in the impugned show cause notice dated 02.10.2004 when no violation of Sales Tax law was alleged or identified in the show cause notice;*

- B) Whether on the facts and circumstances, of the case, the learned Tribunal unlawfully upheld the recovery of alleged unpaid advance income tax by the respondent Additional Collector of Customs, whereas, Section 162 of the Income Tax Ordinance, 2001, clearly stipulates that such recovery can only be made under and by the orders of a Commissioner of Income Tax appointed under the Income Tax Ordinance, 2001;*
- C) Whether on the facts and circumstances of the case, the learned Tribunal misinterpreted the statutory provisions contained in Section 32 of the Customs Act, 1969, and upheld the demand of customs duty by the respondent Additional Collector of Customs in terms of Section 32 ibid. When no violation of Section 32 had been committed by the applicant firm;*
- D) Whether the exemption from customs duty granted to the applicant firm at the import stage could be recalled when the applicant firm had made substantive compliance of the provisions contained in the exemption notification issued vide SRO 439(1)/2001 dated 18.06.2004 (correct date 18.06.2001);*

2. By consent of the parties, instant reference application is taken up for hearing and disposal at Katcha Peshi stage. Applicant's representative Naseem Anwar, one of the Director of the Company, has contended that he will proceed with the matter in person and has argued that the Customs, Central Excise & Sales Tax Appellate Tribunal has erred in law and fact by setting aside the order passed by the Collector of Customs, Sales Tax & Federal Excise (Appeals) Karachi, which was passed on proper appreciation of facts and correct application of law. The representative of the applicant submits, that the applicant Company, who is engaged in the manufacturing and export of terry towels and other terry products, imported the machinery i.e. weaving machine, by availing the benefit as provided in terms of SRO No.439(1)/2001 dated 18.06.2001, whereby, exemption from customs duty in excess of 5% advalorem was provided subject to minimum

50% export of the production. All the looms were duly installed in the factory premises, whereas, installation certification of the subject looms were obtained from the concerned Assistant Collector/Deputy Collector, Central Excise, SITE, Karachi, and were submitted to the Appraisement Collectorate, except in respect of 4 sets of looms, which are subject matter of the instant reference application. The Director of the applicant further submits, that after installation of subject 04 weaving looms, the applicant applied for issuance of installation certificate in accordance with law, however, the same was not issued by the respondent inspite of repeated requests, whereas, subsequently, on account of their malfunctioning, the applicant took out the useable components and parts of subject looms to be utilized in other power looms, whereas, according to representative of the applicant, the said looms were never removed or transferred from the factory premises nor the same were sold to anyone as alleged by the respondent. It is further contended that such fact has duly been acknowledged by the forums below as well as the Customs, Central Excise & Sales Tax Appellate Tribunal in the instant case, however, the benefit of such exemption has been declined to the applicant by observing that, since the applicant could not obtain the installation certificate, therefore, was not entitled to claim the benefit of aforesaid SRO. The representative of the applicant submits that admittedly the applicant installed the machinery in the factory premises of the applicant after import in the year 2002, whereas, after number of years the respondent initiated malicious proceedings against the applicant on mere presumption that the machinery was not imported to be used in the factory premises of the applicant. It has been prayed by the applicant that the impugned order is erroneous in fact and law and may be set-aside by declaring that the applicant was entitled to the exemption in the rate of duty in terms of Notification i.e. SRO No.439(1)/2001 dated 18.06.2001.

3. Conversely, learned counsel for the respondent contended that since in terms of SRO No.439(1)/2001 dated 18.06.2001, obtaining installation certificate was one of the requirement for claiming exemption in the rate of customs duty, therefore, the applicant was not entitled to the benefit to be extended in terms of aforesaid SRO as the applicant could not obtain the installation certificate from the concerned Collectorate. It is further contended that subject looms were not found duly installed in the factory of the applicant, hence the Order-in-Original passed against the applicant declining such exemption does not suffer from any illegality, whereas, the Customs, Central Excise & Sales Tax Appellate Tribunal, has rightly allowed the appeal filed by the respondent department by setting aside the order passed by the Collector of Customs, Sales Tax & Federal Excise (Appeals) Karachi.

4. We have heard the representative of the applicant and the learned counsel for the respondent, perused the record, the relevant provision of SRO No.439(1)/2001 and also the impugned order passed by the Customs, Central Excise & Sales Tax Appellate Tribunal in the instant case. It appears that the fact regarding import of 14 sets of weaving looms in various consignments in terms of SRO No.439(1)/2001 dated 18.06.2001 and their release by allowing exemption from custom duty in excess of 5% advalorem by the respondent in the year 2002 are not disputed. Similarly, the contention of the applicant for having installed the 14 sets of weaving looms in the factory premises of the applicant during the relevant period and issuance of installation certificate for the subject looms by the Assistant Collector/Deputy Collector, Central Excise, S.I.T.E., Karachi, and its submission to the concerned Collectorate, except in case of four (04) sets of weaving mills is also not disputed. It has been further observed that entitlement of the applicant in terms of SRO No.439(1)/2001 dated 18.06.2001 in respect of their four (04) weaving looms and fulfillment of the

conditions as contained in the aforesaid SRO by the applicant has not been disputed by the respondent except the condition of obtaining installation certificate from the concerned Collectorate. However, it has come on record, and has duly been acknowledged by the forums below as well as by the Appellate Tribunal, in its order that the subject weaving looms after its import along with other similar looms were duly installed in the factory premises of the applicant and were even available in the factory premises when the respondent initiated proceedings against the applicant. However, the only allegation against the applicant is that the applicant did not utilize these weaving looms for the manufacturing and export of terry towels/terry products and allegedly attempted to sold out such weaving looms to some 3rd party by paying reduced rate of customs duty. It will be advantageous to reproduce the relevant finding of the Collector Appeals on the subject controversy as contained in para-5 of the Order-in-Appeal No.546/2007 dated 28.07.2007 as follows:-

“ I have examined the case record and given due consideration to the arguments made before me. It is an admitted position that the impugned machines were neither sold by the appellants nor removed from the factory premises: skeletons of the machines are still lying in the factory and the parts thereof are being utilized in other machines that are employed for export production. Under the circumstances, the only irregularity proved against the appellants is that they did not install the machines as such and obtain the installation certificate from the competent authority. The appellants have produced the relevant income tax returns which show that their final income tax liability, including the position mentioned in the exemption certificates produced at the time of import of the machines, for the relevant period has been settled. Therefore, no income tax liability is outstanding against them for the period under reference. As for recovery the sales tax, the same has not been charged in the show cause notice and, as per repeated verdicts of the superior courts of law, a charge not mentioned in the show cause notice cannot be taken up in order-in-original. As such, order for recovery of sales tax

is not maintainable in law and the same is accordingly set aside. The learned consultant has contested the amount of customs duty chargeable from the appellants in this case. Therefore, it is ordered that the correct amount of customs duty be worked out and charged from the appellants. The impugned order is modified to the aforesaid extent only and the appeal is disposed of accordingly.”

5. The above finding as recorded by the Collector Appeals, reflects that the applicant had produced the income tax return for the relevant tax year when the subject weaving looms were imported, which shows that final income tax liability including the position mentioned in the exemption certificate produced at the time of import of the machines for the relevant period has been settled, hence no amount was outstanding in respect of income tax liability against the applicant. The facts as recorded by the Collector (Appeals) in the aforesaid order was not disputed by the Appellate Tribunal, however, on account of mere non-obtaining of installation certificate from the Customs Collectorate, the exemption available in terms of SRO No.439(1)/2001 in respect of custom duty has been declined. We are of the opinion that the applicant has substantially discharged the onus by fulfilling all the requirements to avail the benefit of reduced rate of custom duty on merits in terms of aforesaid SRO, and, has also admittedly applied for issuance of installation certificate in respect of all the weaving looms at import stage, which was one of the requirement, whereas, such installation certificates were issued by the Customs Department in respect of ten (10) weaving looms out of fourteen (14) weaving looms imported by the applicant, whereas, such installation certificate was not issued by the Customs Authorities in respect of four (04) weaving looms without assigning any reason, inspite of the fact that the import of such machinery and its installation in the factory premises of the applicant has duly been acknowledged. In view of hereinabove facts and circumstances of the case, we are of the considered opinion that the applicant was entitled to the

benefit of SRO No.439(1)/2001 dated 18.06.2001 in respect of four (04) weaving looms as well, which were installed in the factory premises for the purpose of manufacturing and export of its products as the applicant had fulfilled all the conditions as contained in the aforesaid SRO, whereas, the condition of obtaining installation certificate from the concerned Collectorate was also duly complied with as the applicant admittedly applied for issuance of such installation certificate at the relevant point of time to the concerned authorities. However, the Customs Authorities failed to issue such installation certificate in respect of subject weaving looms, without assigning any reason, hence it amounts to default on the part of the Customs Authorities and not on the part of the importer, whereas, for inaction on the part of the public functionary, the taxpayer cannot be held responsible for any default in fulfillment of any provision of law or SRO in this regard.

6. In view of hereinabove facts and circumstances of this case and in order to resolve the precise controversy involved in the instant case, we would reformulate the question of law in the following terms:-

“Whether under the facts and circumstances of the case the Customs Appellate Tribunal was justified to deny the claim of exemption to the applicant in terms of SRO No.439(1)/2001 dated 18.06.2001 and to confirm the charge of misdeclaration in terms of Section 32 of the Customs Act, 1969?”

We would submit reply to the aforesaid question in negative in favour of the applicant and against the respondent, and set-aside the impugned order passed by the Appellate Tribunal in the instant case.

7. Let copy of this order be sent to the Registrar, Customs Appellate Tribunal, Karachi, under the seal of the Court for information.

J U D G E

JUDGE

Nadeem