IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Reference Application No.512 of 2022

Present: Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

Applicant:	The Collector of Customs, Enforcement, Karachi Through Sardar Muhammad Azad Khan, Advocate
Respondents:	Abdul Razzaq & Another Through Ms. Dil Khurram Shaheen, Advocate
Date of hearing:	12.01.2023
Date of Order:	12.01.2023

O R D E R

Muhammad Junaid Ghaffar, J.- Through this Reference Application filed under Section 196 of the Customs Act, 1969, ("**Act**") , the Applicant Department has impugned Judgment dated 26.05.2022, passed in Customs Appeal No.K-7406 of 2021 by the Customs Appellate Tribunal Bench-III, Karachi, by proposing 4 (four) questions of law purportedly arising out of the impugned judgment; however, vide order dated 16.11.2022, this Reference Application was admitted for regular hearing on the following two questions of law:-

> "1. Whether the Customs Appellate Tribunal has erred in law to allow release of foreign origin fabric on payment of taxes after admitting that it was smuggled and fabric is a notified item under SRO 566(I)/2005 dated 06.05.2005 read with section 2(s) of the Customs Act, 1969?
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> 2. Whether the learned Bench of the Customs Appellate Tribunal, Karachi has failed to conclude that respondent No.1 was under the statutory obligation to provide the material evidence to justify his position with regard to legal import as well as locally procured confiscated goods under the provisions of the Customs Act, 1969 and such evidence was successfully provided by the respondent No.1 to establish the case in accordance with law?"

2. Learned counsel for the Applicant Department submits that the learned Tribunal has failed to appreciate the material available on record, whereas, the order for release of the confiscated goods against payment of duty and taxes is impermissible, as the goods in question were smuggled goods as notified vide SRO 566(I)/2005 dated 6.6.2005; hence, warranted an outright confiscation, which was accordingly done by the

adjudicating authority. He further submits that an inspection of the goods was also ordered by the learned Tribunal through its own clerk and the inspection report of the said clerk is not in conformity with the available material and documents. He has prayed for setting aside the Judgment of the learned Tribunal as above.

3. On the other hand, respondent's counsel has supported the impugned Judgment and submits that the learned Tribunal was fully justified in releasing the confiscated goods against payment of duty and taxes as the Respondent was a bona fide purchaser of the seized goods. However, while confronted she was not able to refer to any provision of law in support thereof. She further admitted that the confiscated goods could only have been released after payment of redemption fine and for that, matter may be remanded to concerned authority. She has further admitted that insofar as the Bill of Entry of imported goods being relied upon by the Respondent is concerned, it was not verified; however, respondent is still willing to pay duty and taxes in accordance with law. In support she has placed reliance on the case of *Abu Bakr Siddique*[1].

4. We have heard both the learned counsel and perused the record.

5. It appears that the goods in question were seized by the Enforcement and Compliance Collectorate on 26.10.2020 from the godown situated in Karachi and it was reported that 40,500 kgs of assorted brands and types of foreign origin cloth was stored and it is the case of Applicant Department that these goods were smuggled goods and accordingly an FIR was also registered, whereas, show cause notice was issued on 28.10.2020 and the adjudicating authority vide its Order-in-Original No.894 of 2020-2021 dated 30.06.2021 came to the conclusion that the respondent had failed to provide any lawful defence as to the charge of smuggling in respect of the seized goods, and therefore, an order for outright confiscation of the seized goods was passed, against which the Appeal preferred by the Respondent has been allowed through impugned Judgment in the following terms:

> "6. The claimant/owner of seized cloth who was arrested by the respondent Collectorate in the same case provided two GDs alongwith cash memo to the Collectorate in support of his plea that he purchased the same from the importers and local sources as detailed in para 10(1) of impugned Order-in-Original but his claim was not accepted by the respondent Collectorate on the grounds that the claimant could not produce invoices and purchase receipts issued by the said importer. It was further asserted by the respondent Collectorate that the invoices provided by the claimant regarding locally manufactured cloth purchased by him did not tally with the description and quantity mentioned in the invoice(s).

[1] 2006 SCMR 705

7. During the course of hearing of the instant appeal, it was felt appropriate by the Bench on specific request of the counsel of the appellant to independently verify the quantity of locally made cloth as well as the quantity of foreign origin cloth. Therefore, a local commission was appointed namely, Mr. Muhammad Ilyas, LDC of this Tribunal, who inspected the seized consignment and reported that approximately 40% seized cloth is of Pakistan Origin whereas the remaining 60% quantity consists of foreign origin cloth.

8. We have given due consideration to facts of the case and the arguments advanced by authorized representatives of the both sides. The learned counsel representing the claimant / owner is adamant that the whole quantity of cloth seized by the respondent Collectorate was legally acquired/purchased by the owner from the importers as well as the local seller(s). On the other hand, the Departmental Representative vociferously claimed that then origin cloth recovered from the godown has been smuggled into the country on which no duty and taxes have been paid and therefore the said cloth was rightly confiscated by the Adjudication Officer under clause (8) & (89) of Section 156(1) of Customs Act, 1969. However, the Departmental Representative could not convince this Bench about the seizure of cloth locally purchased/ acquired by the claimant / owner.

9. In view of above position taken up by the both parties, the Bench is left with no option but to decide the case in light of facts presented before it. Notwithstanding the above divergence of opinion, there is broad agreement on both sides as also attested by the local commission that the seized cloth consists of an admixture of locally produced as well as foreign origin cloth in the ratio of 40/60 percent. Moreover, as the cloth has been seized quite a distance away from the border and the owners of cloth were caught unawares, so to speak, therefore, mixing of cloth of both local and foreign origin is not unusual at all.

10. In view of what has been stated above, we are convinced that the Collectorate has not been able to conclusively prove the main charge of smuggling of seized cloth as a considerable part of the seized cloth has been confirmed to be of local origin which casts doubt on the whole exercise which was at any event carried out without obtaining any search warrants as provided under section 162 of the Customs Act, 1969. The respondent Collectorate is therefore, directed to release the portion of foreign origin cloth on payment of leviable duty and taxes to be ascertained by the assessing officer of the Collectorate after physical inspection of the goods. Locally purchased cloth, however, shall be released forthwith as the appellant has furnished sufficient evidence regarding legal purchase of the same cloth manufactured locally further strengthened by the report of local commission. Fine and penalty imposed vide Order-in-Original No.894/2020-21 dated 30.06.2021 is hereby waived as no clear *mens rea* for evasion of duty and taxes can be proved against the appellant / owner of seized cloth in the circumstances of the case. The Order-in-Original is modified accordingly."

6. From perusal of the aforesaid findings, it appears that there are two aspects of the case in hand. One is on the factual plane i.e. in respect of the inspection carried out on the directions of the learned Tribunal and the report of the learned Commissioner on the basis of which it was concluded that out of total lot of the consignment so seized, 40% of the goods are of local origin, whereas the remaining 60% are of foreign origin. As to the factual aspect of the inspection carried out by the learned Tribunal is concerned, we in our Reference jurisdiction in terms of Section 196 of the Act, despite Applicant's contention to the contrary, cannot interfere and reach to some other conclusion as against the Tribunals finding. The Tribunal, per settled law, is the last fact finding forum and only questions

of law are to be examined by the High Court in its Reference jurisdiction[2]. Moreover, the objection regarding the inspection order is also belated inasmuch as, if aggrieved, the Applicant Department ought to have impugned the same when the said order was passed. Lastly, we may observe that in terms of Section 194C (7)(a) & (d) of the Act, the learned Tribunal for the purposes of discharging its functions is even vested with powers of inspection and issuance of commission; hence to the extent of findings of fact, as above, the same cannot be interfered with or altered in this Reference jurisdiction.

7. Coming to the second issue which is covered by question No.1 as above, we may observe that the learned Tribunal after coming to the conclusion that 60% of the quantity of the seized goods consisted foreign origin cloth, and once there is an admission that no substantial documents were produced as to the ownership and payment of duty and taxes on the seized goods, then there was no occasion for the learned Tribunal to permit or allow release of the said goods on payment of duty and taxes. The goods were either smuggled, or lawfully imported. And once a conclusion has been drawn that they were not lawfully imported, otherwise duty and taxes were not to be paid, then 60% of the seized goods were nothing; but smuggled goods. The release of smuggled goods (which stand confiscated) on payment of duty and taxes, and that too without any redemption of the said goods does not appear to be correct and supported by any provisions of law. The confiscation and redemption of seized goods is covered by Section 181 of the Act, read with SRO 499(I)/2009 dated 13.06.2009, relevant provision thereof reads as under:

> "181 Option to pay fine in lieu of confiscated goods. —
> Whenever an order for the confiscation of goods is passed under this Act, the officer passing the order may give the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as the officer thinks fit.
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> Explanation. —Any fine in lieu of confiscation of goods imposed under this section shall be in addition to any duty and charges payable in respect of such goods, and of any penalty that might have been imposed in addition to the confiscation of goods
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> ***[Provided that the Board may, by an order, specify the goods or class of goods where such option shall not be given:***
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> Provided further that the Board may, by an order, fix the amount of fine which, in lieu of confiscation, shall be imposed on any goods or class of goods imported in violation of the provisions of section 15 or of a notification issued under section 16 [or in violation of any other provisions of this Act], or any other law for the time being in force.]"
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> **SRO 499**

[2] Commissioner Inland Revenue v Sargodha Spinning Mills Limited (2022 SCMR 1082)

> "Notification No. S.R.O. 499(I)/2009, dated 13th June, 2009. —In exercise of the powers conferred by section 181 of the Customs Act, 1969 (IV of 1969), and in supersession of its Notification No. S.R.O. 487(I)/2007, dated 9th June, 2007, the Federal Board of Revenue is pleased to direct that no option shall be given to pay fine in lieu of confiscation in respect of the following goods or classes of goods, namely: --
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> (a) smuggled goods falling under clause (s) of section 2 of the Customs Act, 1969 (IV of 1969);…"

8. Perusal of the above provision reflects that whenever an order for the confiscation of goods is passed under the Act, the officer passing the order may give the owner of the goods an option to pay fine in lieu of confiscation of the goods as the officer thinks fit. However, this power of redemption of confiscated goods is qualified and the first proviso is relevant for the present purposes, which states that though confiscated goods can be released by an option to pay fine in lieu of the confiscation; however, the Board may by an order specify goods or class of goods where such option shall not be given by the adjudicating authority. SRO 499 as above has been issued for such purposes and provides that no option shall be given to pay fine in lieu of confiscation of smuggled goods falling under clause (s) of Section 2 of the Act. This clearly reflects that insofar as the smuggled goods are concerned, they cannot be released or redeemed even upon payment of fine and are to be confiscated out rightly. Moreover, FBR has also notified the goods in question as goods falling within the contemplation of Section 2(s)(ii) of the Act, vide SRO 566(I)/2005 dated 6.6.2005. Learned Tribunal has failed to dilate upon the said provision and has not stated that as to how and in what manner the goods which are admittedly smuggled goods have been released on payment of duty and taxes even without any redemption fine which otherwise is a mandatory requirement for release of all confiscated goods, other than the goods notified vide SRO 499. The provisions of Section 181 of the Act and its proviso along with SRO 566(I)/2005 dated 6.6.2005 and SRO 574(I)/ dated 6.6.2005 (the earlier SRO under section 181 ibid) came for scrutiny before the Hon'ble Supreme Court in the case of ***Collector of Customs, Peshawar***[3], and it was held that the requirement to give option to pay fine in lieu of confiscation in respect of confiscated goods is not absolute and is subject to the Notification issued by FBR under Section 181, and the order of the Tribunal for imposition of redemption fine in lieu of outright confiscation of smuggled goods was held to be unlawful and in violation of section 181 ibid. It appears that the learned Tribunal has miserably failed to appreciate the law as well as the dicta laid down by the Hon'ble Supreme Court in the above case and has passed the impugned judgment in a vary slipshod manner. Such conduct on the part of the

[3] 2017 SCMR 585

Tribunal cannot be appreciated which is in fact a special Tribunal created under the Act. Perhaps extra care ought to have been taken by the Tribunal in passing such orders which on the face of it appear to be in violation of the Act and the dicta laid down by the Superior Courts. Therefore, the impugned judgment of the learned Tribunal appears to be devoid of any basis, merits and support from law; rather is in direct conflict with the above provision of law; hence, cannot be sustained to the extent of 60% of the goods in question i.e. foreign origin goods which are admittedly, smuggled goods warranting an outright confiscation. As to any reliance on the case of *Abu Bakr Siddique* (Supra), it may be observed that even in that case the Hon'ble Supreme Court had not directed release of such smuggled goods, but had remanded the matter to the appropriate officer. Moreover, at the point of time notification issued by FBR in terms of proviso to section 181 of the Act was not under consideration; hence, the judgment is not relevant for the present purposes.

9. In view of herein above facts and circumstances of this case, question No.1 as above is answered in the affirmative, in favour of the Applicant and against the Respondent, whereas the second question in view of the above, now remains a mere academic exercise; hence need not to be answered. The impugned Judgment is set aside / modified to the extent of 60% foreign origin goods as above and the order of the Adjudicating authority is restored to that extent. The Reference Application stands allowed in the above terms.

10. Let copy of this order be sent to the Customs Appellate Tribunal in terms of sub-section (5) of Section 196 of the Customs Act, 1969.

JUDGE

JUDGE

Khuhro/PA