

## IN THE HIGH COURT OF SINDH AT KARACHI

Present

Mr. Justice Irfan Saadat Khan.

Mr. Justice Zulfiqar Ahmad Khan.

SCRA No. 326 of 2017

[Collector of Customs .....vs.....Mr. Kristof W. Duwaerts]

Date of Hearing : 29.09.2022

Applicant through : Ms. Masooda Siraj, Advocate a/w  
Mr. Jawed Hussain, Advocate  
Mr. M. Ishaque Pirzada, Advocate.

Respondent through *Nemo*

### ORDER

**Zulfiqar Ahmad Khan, J:-** This Special Customs Reference Application has been filed by the department on the questions of law which was reframed later on and vide order dated 29.03.2022 it was decided that matter will be proceeded *ex parte* against the respondent for the reason that despite service having been held good, the respondent did not appear either himself or through a counsel. With the consent of learned counsel for the applicant following questions were reframed to be answered through this SCRA:-

1. Whether learned Appellate Tribunal has erred in law while granting exemption of custom duties and allied taxes on the import of Saloon Car under PCT Heading 9903 as the said heading clearly bars exemption for saloon cars.
2. Whether in the light of facts and circumstances of the case, the learned Appellate Tribunal erred in law having failed to consider that even if the respondent was entitled for exemption of custom duties and taxes, the said car was

imported in violation of para-5(vii) of Import Policy Order, 2013, Sr. No.10 of Appendix "C"?

2. In order to illustrate the legal background, we find it pertinent to reproduce the relevant constituent of the findings of the order-in-original and the impugned order of the Tribunal herein below:-

Order-in-original

"I have gone through the case and heard the written as well as oral submission of the Authorized Representative of the Importer. The issue in this case is two-pronged, that is importability and concession or exemption of customs duty. The first issue is critical since unless the impugned vehicle is importable the question of concession or exemption does not arise. In this regard, the comments of the - Group - DC are quite comprehensive that the Import Order vide Para 5(vii) further read with Serial No.10 of Appendix - C prohibits import of old and used vehicle. Exception in this regard is provided under Para 5(i)(b), which the importer does not qualify for. The second issue for which the importer has submitted FBR Booklet, the Board condonation, the Agreement between the two Governments and reply thereof - does not require exemption, at this stage, since the vehicle is found to be prohibited under the Import Policy Order. In the light of aforesaid facts and law, I hereby confiscate the vehicle in terms of clause 9, 10(j), 14, 14(A), 43, 44 and 48 of section 156(1) of the Customs Act, 1969 in addition to imposition of personal penalty amounting to Rs.50,000/- on the Clearing Agent. The case is disposed of on the above terms".

Impugned Order

"6. I have heard the Appellant Department, however, nobody represented the Respondent. I have also perused the relevant record. The Appellant has made out case against the Respondent on the basis of relevant provisions of Import Policy Order which does not allow import of old and used car. On the contrary, the learned Collector, Customs (Appeals), Karachi has provided relief to the Respondent (Mr. Kristof W. Duwaerts) on the ground that the vehicle in question was imported in the light of a Grant-In-Aid Agreement concurrent by F.B.R etc. The Collector, Customs (Appeals), Karachi has rightly observed that as per said Agreement between the Government of Pakistan and Federal Republic of Germany on Technical Cooperation dated 25.11.1972, the persons referred in Article 6 thereof, are allowed to import duty and tax free articles of their personal use, household goods and personal effects, which includes one motor vehicle, refrigerator, electric appliances etc. under article 7(3)(a). I am also inclined to subscribe to plea of the learned Collector that the same Agreement also

allows import of alcohol, tobacco and foodstuff which are likely to be hit by Appendix A of the Import Policy Order. He further adds that the same concessions are envisaged under Chapter-II, rule 39 (a) and (b) of the Customs Rules, 2001. Based on aforesaid observations, the learned Collector has justifiably held that the application of Appendix-C of the Import Policy Order on goods imported by the privileged persons working under Grant-In-Aid Agreements is unfounded. It has been further added that the Appellant (present Respondent No.1) have placed on record specific Goods Declarations (GD No. KAPR-HC-33653 and KAPR-HC-1392 under which used saloon cars were released to visiting Expatriates, free of duty/taxes against C.B.R booklets.

7. I entirely agree with the observations and findings of the learned Collector, Customs (Appeals), Karachi as detailed in the preceding para. The Grant-In-Aid Agreements are signed between the two Governments. In Pakistan the Economic Affairs Division (EAD) is assigned the said task to represent the Government of Pakistan. These Agreements meant for certain Projects as specified therein, are fully funded by the other Government. The Government of Pakistan does not spend any funds against such Agreements except to facilitate the Expatriates who visit and stay in Pakistan for a certain length of time to execute the projects specified in the Agreements. Furthermore, the Agreements are finalized by the E.A.D after seeking concurrence from all relevant Ministries/Divisions including the F.B.R. In other words, the provisions of such Agreements have over-riding effects, as such, the Appendix-C is not relevant in this context. The Collector, Customs (Appeals), Karachi has passed a lawful Order. Therefore, I donot find any reasons legal or factual to interfere with the impugned Order-In-Appeal. The Appeal is dismissed being devoid of merit.”

3. Background of the case is that respondent imported a used vehicle Toyota Corolla Axio Car, 2012 Model, classifiable under HS Code 8703.2290 vide GD No. KAPE-PP-1 3400 dated 29.07.2015 through his clearing agent Oriental Shipping Services claiming exemption of relevant duties & other ancillary taxes by using green channel facility allegedly without proceeding/examination of documents/goods by the customs. It unfurls from the documents that the clearing agent filed GD in the name of Embassy of Germany, as against the clearly mentioned name of the respondent (Mr. Kristof W.

Duwaerts) allegedly to facilitate the clearance of the car made in the year 2012, import of which (being old vehicle) was not permissible under the Import Policy Order, 2013, thereafter, a show-cause notice was issued. Pursuant to the said show-cause notice, matter was adjudicated by the adjudicating authority, whereby, an order in original dated 05.10.2015 was passed in terms of which the said car was ordered to be confiscated. The respondent being aggrieved by the said Order, impugned it before the appellate forum, whereby, appeal was allowed and the order in original was set aside. The present applicant impugned the said order before the Appellate Tribunal and vide order dated 28.02.2017, the said appeal was also dismissed, hence the present reference application has filed against the said order.

4. Learned counsel for the applicant assailed the impugned order through aforementioned questions of law submitting that the impugned order was passed in *prima facie* dissonance with the law. While summing up her submissions, Ms. Masooda submitted that the imported car was a 2012 model which could not have been imported under the Import Policy Order as at maximum three years' old cars could be imported, therefore, findings contained in the impugned order are violative of law as well as the import policy.

5. We have heard the submissions of learned counsel for the applicant, whereas, none represented the respondent and service against it as mentioned earlier was held good and we have also perused the documentation to which our attention was drawn.

6. There is no cavil to the fact that an exemption of duties and taxes could be claimed by eligible persons under grant-in-aid agreement; such an exemption is a privilege only that can be enjoyed by diplomats and other dignitaries subject to rules. If we trace history of last 50 years, we come across SRO 53(I)/70 issued in exercise of powers available under Section 19 of the Customs Act in respect of the vehicles of the Rulers of Gulf states. After establishment of the Vienna Convention on Diplomatic Relations 1961 and Vienna Convention on Consular Relation 1963, Federal Government acceded to these conventions and legislated the Diplomatic and Consular Privileges Ordinance, 1972 which was followed by Act No.IX of 1972 called Diplomatic and Consular Privileges Act, 1972 which provided restriction and conditions on all such privileges and immunities enjoyed and a certificate of Federal Government was required to ensure such privileges and immunities to be availed by such dignitaries. First schedule to the Act of 1972 provides some of the Articles incorporated from the said conventions for Diplomatic relation and Second Schedule is in respect of consular relations. It is thus in pursuance of such privileges that concerned ministries from time to time extended such exemptions by introducing various SROs including SRO 450(I)/2001 dated 18.06.2001.

7. With regards the Republic of Germany it appears that both the countries entered into an agreement dated 25.11.1972 with the objectives of fostering technical co-operation. Article 7 (3)(a) of the said agreement dealt with the issue of import. The said Article is delineated hereunder:-

**Article 7(3)(a)**

The Government of the Islamic Republic of Pakistan shall

3. permit the persons referred to in Article 6(1)(1) of the present Agreement to import upon first taking up their duties in Pakistan, duty and tax free and without providing security.

(a) articles intended for their personal use as well as personal effects and household goods; such articles shall include for each household, one motor vehicle, one refrigerator, one deep freeze, one washing machine, one cooker, one radio, one television set, one record player, one tape recorder, small electrical appliances, as well as for each person air conditioner, one heater, one fan, and one set of photographic and cine equipment; it shall also be permitted to import replacements, duty and tax free and without providing security, for such articles imported upon first entry as have become unserviceable or been lost;

8. It is a case of Mr. Duwaerts that the subject vehicle was imported under Article IV and V of an Agreement which his Foundation known as “Hanns Seidel Foundation” signed with Government of Pakistan on 15.09.1993. Article IV and V of the said Agreement called “Cooperation in Selected Areas Agreement” are reproduced as under:-

**“ARTICLE IV**

The import and export of all equipment, articles and vehicles imported by the Foundation, for the projects and programs, as well as for the Foundation’s office in Islamabad under this Agreement shall be treated in accordance with the Agreement between the Government of the Islamic Republic of Pakistan, and the Government of the Federal Republic of Germany regarding Technical Collaboration dated 25<sup>th</sup> November 1972, and its amendments of 16<sup>th</sup> October 1977, 13<sup>th</sup> July 1978, 7<sup>th</sup> April 1980 & 28<sup>th</sup> June 1980).

Therefore no import and export duties, harbour dues, storage and license fees, taxes and other fiscal charges shall be imposed on the above mentioned items.

**ARTICLE V**

The status of the representative and the advisors of the Foundation, both being referred to hereinafter as experts, shall be accorded equal status to the experts under the Agreement between the Government of the Islamic Republic of Pakistan and the Government of the

Federal Republic of Germany regarding Technical Collaboration dated 25th November 1972, and its amendments of 16th October 1977, 13th July 1978, 7th April 1980 & 28th June 1980.

This especially refers to Article VII of the Agreement which should be fully valid for this Agreement between the Government and the Foundation.”

9. As witnessed from the foregoing, cumulative effect of reading of the Cooperation in Selected Areas Agreement alongwith Technical Cooperation Agreement alongside Vienna Convention of Diplomatic Relations 1961 suggests that to avail such concessions, permission from FBR is necessary. Seemingly FBR issued Certificate No.D096187 dated 27.07.2015 to Mr. Duwaerts qualifying him for such exemptions particularly in terms of SRO 540(I)/2001, which defines Privileged personnel to mean all foreign experts, consultants or technicians visiting and resident in Pakistan under a proper Aid Agreement in which provision for application of customs concessions be made. These experts include not only personnel directly in the employment of the foreign or the donor country or Agency, but also those who have served in Pakistan under direct or agreement with such Government or Agency and whose salary and travelling expenses to and from Pakistan are paid by the Foreign Government or Agency.

10. In the light of the above, we hold that Mr. Duwaerts had the competency to import the subject car without payment of any duty taxes as being foreign expert/consultant engaged through the Cooperation in Selected Areas Agreement. In this regard, it is also pertinent to mention that the said vehicle was imported under HS Code 8703.2319/9903. HS Code 9903 pertains to goods imported by Privileged Personnel/Organization under grant-in-aid agreements

signed by Government of Pakistan through Economic Affairs Division and duly concurred by the Federal Board of Revenue. The permission granted by FBR bearing No.D006187 also finds mention in the G.D meaning thereby the said car was importable under PCT heading 9903 as there is no bar of Saloon car in the said PCT heading therefore question No.1 is answered in **Negative** i.e. in favour of the importer and against the department.

11. Now coming to the second question as to whether a vehicle importable under PCT heading 9903 could still be imported if it contravenes para 5(vii) of the Import Policy Order, 2013, Sr.10 of Appendix-C. To answer this question, it must be kept in mind that vehicles having age of less than 5 years were importable in Pakistan up to year 2012, which age was later on reduced to 3 years. One of the reason for such amendment dated 14.12.2012 was on account of environmental degradation, where it was believed that a vehicle as old as 5 years when plyed on the road degrades environment to a greater extent as compared to a vehicle whose engine is being turn on for the first time in the last 3 years. This stance however dilutes when we consider that even today under gift, personnel baggage and transfer of residence schemes detailed out in Appendix-E of Import Policy Orders, vehicles which are up to 5 years old are still importable. Also to keep in mind is that under paragraph 20 of the Import Policy Order, 2013 Federal Government had enjoyed powers to allow import in relaxation of any prohibition or restriction under Import Policy Order, 2013 and in this regard it appears that Federal Board of Revenue issued letter dated 22.09.2015 condoning the said period to a period of one year and nine months in respect of import



of the car in favour of Mr. Duwaerts. Full text of the said is reproduced as under:-

GOVERNMENT OF PAKISTAN  
REVENUE DIVISION  
FEDERAL BOARD OF REVENUE  
(CUSTOMS WING)  
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C.No.5(18)/2001.Cus.Exm  
Islamabad the 22<sup>nd</sup> September, 2015.

To  
Mr. Kristof W.Duwaerts,  
Resident Representative,  
M/s Hanns Seidel Foundation,  
14-Street 61, F-6/3,  
Islamabad.

Subject:- CONDONATION OF TIME PERIOD FOR  
PURCHASE/IMPORT OF CAR BY MR. KRISTOF  
W.DUWAERTS, RESIDENT REPRESENTATIVE, M/S  
HANNS SEIDEL FOUNDATION, ISLAMABAD.

I am directed to refer to M/s Hanns Seidel Foundation, Islamabad's letter dated 09-09-2015 on the subject noted above and to say that the Federal Board of Revenue is pleased to condone the time period i.e. one year and nine months i.e. from 19-12-2013 upto 09-09-2015 in respect of Mr. Kristof W.Duwaerts, Resident Representative of M/s Hanns Seidel Foundation, Islamabad to purchase/import of car.

-Sd/-  
**(Yousaf Haider Orakzai)**  
Secretary (DRD)  
For (G&SE)

12. In the case at hand, G.D was filed on 29.07.2015, therefore, the period condoned of one year and nine months makes the subject car permissible for import and release. Now reiterating the position that the Technical Cooperation Agreement of 1972, which through its Article VI, applicable to the present import of the car permits a visiting specialist for import of a car and such concessions are envisaged under Chapter-III, Rule 39 (a) and (d) of the Customs Rules, 2001, which are reproduced as under:-

- (a) Import free of customs duty and sales tax of articles for the personal use of the privileged person or members of his family forming part of his personal and household effects including one car per family on his first arrival in

Pakistan. The time limit for import will be six months, extendable by the Collector of Customs for a maximum period of [eighteen] months from the date of the arrival of the person concerned;

- (d) in addition to the above, a privileged person shall be allowed to import on payment of duty and taxes foodstuff and consumable stores including liquor and tobacco up to a C&F value of two hundred U.S.\$ per month.”

13. For the reasons numerated above, we reach to the conclusion that application of Annexure-C of the Import Policy Order, 2013 does not apply to a privileged personnel working under grant-in-aid agreements particularly when a relaxation has been sought by the importer from the Federal Government under paragraph 20 of Import Policy Order, 2013 for the import of an older car for latter’s personal use. Resultantly the question No.2 is also answered in **Negative** i.e. against the department and in favour of the importer.

14. The reference application stands allowed in the above terms. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Customs Appellate Tribunal, to meet the prescriptions of section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE

Karachi,  
26<sup>th</sup> October 2022

Aadil Arab/B-K Soomro