

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Special Customs Reference Application No.726 of 2022

Date

Order with signature of Judge

09.05.2023

Mr. Haider Waheed, advocate and Mr. Shahzeb Akhtar Khan, advocate for the applicant.

Mr. Khalid Rajpar, advocate for the respondent No.2.

Qazi Ayazuddin Qureshi, Assistant Attorney General.

Briefly stated, the applicant was served with a detention notice in May 2015. A seizure report followed, dated 16.07.2015. Adjudication proceedings were initiated vide a show cause notice dated 16.07.2015, to which a reply dated 26.08.2015 was filed. In pursuance of the adjudication proceedings, initiated vide the aforesaid show cause notice, a verification report dated 12.01.2017 ("Verification Report") was also obtained to assist with the adjudication process. Vide order in original 452/2016-17 dated 20.01.2017, the aforesaid show-cause notice was vacated as the adjudicating officer held that the applicant had discharged its burden of proof, as required under section 187 of the Customs Act 1969. In appeal, the learned Customs Appellate Tribunal, vide judgment dated 08.08.2022 in Customs Appeal K-356/2017 ("Impugned Judgment"), set aside the aforesaid order in original, however, directed the department to recover the taxes etc. on the basis of the Verification Report. It is considered illustrative to reproduce the operative constituent of the Impugned Judgment herein below:

"7. The Appellant department also sought our attention towards the para 9 and 10 of contravention report dated 16.07.2015 which reads as under;

09.	Code of Informer		C/o Mr. Muhammad Asif Marghoob Siddiqui, Director
10.	Name and designation of the detecting processing officers officials.	1. 2. 3. 4. 5. 6. 7.	Mr. Muhammad Asif Marghoob Siddiqui, Director Mr. Nadeem Ahsan, Additional Director

The surprising fact in the case is that the Adjudicating Officer made the case and forwarded the contravention report as Director (Anti-smuggling Customs) I&I FBR, Karachi and adjudicate it as Collector (Adjudication-I). The Order-in-Original is non-speaking and miserably fails to cover the factual and legal points raised by the Appellant Directorate. We are of the view that Adjudicating Officer should have refused to adjudicate the case on the fact that the case was made and contravention report was forwarded under his supervision, and no one could be judge on his own cause.

8. One basis of what has been discussed above, we are of the firm view that order passed by the Collector of Customs (Adjudication-I), Karachi is ultra vires and against the dictates of law enshrined in the cases decided by the superior courts and is not supported by provisions of law under the Customs Act, 1969. The Order in Original is set aside by the Collector of Customs (Adjudication-I), Karachi. The case making agency is directed to recover the taxes from the Respondent on the

basis of verification report dated 12.01.2017 along with default surcharge under the relevant law.

9. The appeal succeed. No order to cost.”
(Underline supplied for emphasis.)

It is the primary submission of the applicant that it has been adjudged culpable devoid of any subsisting adjudication. Whereas, the respondent’s learned counsel insists that adjudication did take place and even now the department would drop its case / present claim if the applicant was to demonstrate certain invoices / documents before the adjudicating officer / authority.

Heard and perused. The learned Tribunal appears to have set aside the order in original, however, has proceeded to impose liability in the manifest absence of any adjudication. Therefore, with respect, to abridge and reformulate¹ the questions of law in order to efficaciously adjudicate the *lis* before us; we do hereby formulate and frame the following question of law to be determined herein:

“Whether, in the facts and circumstances of the case, liability could be apportioned upon the applicant in the manifest absence of any adjudication in such regard?”

Admittedly, the order in original was in favor of the applicant and there was a deliberated finding, *inter alia* post consideration of the evidence and presumably the Verification Report, that the applicant had discharged its burden of proof as required under section 187 of the Customs Act 1969. The learned Tribunal set aside the order in original, however, did not subject the *lis* to any further adjudication, either by itself or by remanding it to the adjudication authority. Instead, it proceeded to impose liability entirely predicated upon the Verification Report.

There can be no cavil to the settled law that adjudication is a precursor to imposition of culpability / liability and in the facts and circumstances before us the omission thereof is glaring and unsustainable. If imposition of culpability / liability would be sanctioned rested solely upon a report, obtained in the very proceedings already set aside, then the entire process of adjudication enshrined in the Customs Act 1969 would be rendered otiose.

Even today, the respondent’s learned counsel graciously submitted that the entire claim of the department would be put at rest if the applicant was to discharge its evidential burden before the adjudicating authority. While we appreciate the forthright assistance rendered by the learned counsel, it is observed that the opportunity to discharge the evidential burden would only arise if the matter was before the adjudicating authority.

In view of the foregoing, herein the question framed for determination by this Court is answered in the negative, hence, in favor of the applicant and against the respondent department. As a consequence thereof, the Impugned Judgment, to the remit that recovery was ordered per the Verification report, is set aside and the matter is remanded back to the adjudicating authority for *de novo* determination expeditiously, preferably within four weeks from the date of receipt hereof. This reference application stands disposed of in the above terms.

¹ *A. P. Moller Maersk & Others vs. Commissioner Inland Revenue & Others* reported as 2020 PTD 1614; *Commissioner (Legal) Inland Revenue vs. E.N.I. Pakistan (M) Limited, Karachi* reported as 2011 PTD 476; *Commissioner Inland Revenue, Zone-II, Karachi vs. Kassim Textile Mills (Private) Limited, Karachi* reported as 2013 PTD 1420.

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, as required per section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE