

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Special Customs Reference Application ("SCRA") No. 715 of 2023

Date _____ Order with signature of Judge _____

*Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Zulfiqar Ahmad Khan,*

Applicant: **The Director, Intelligence & Investigation (Customs), Regional Office, Karachi, Through Mr. Khalid Mehmood Rajpar, Advocate.**

Respondent: **Rehmatullah and others Through Mr. Sardar Muhammad Ishaque and Mr. Amjad Hayat, Advocates.**

Date of hearing: **11.12.2023.**

Date of Judgment: **11.12.2023.**

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant (department) has impugned Order dated 05.10.2022 passed by the Customs Appellate Tribunal Bench-III, Karachi, in Customs Appeal No.K-1664 of 2022 proposing the following questions of law;

- i. Whether the Appellate Tribunal while concluding impugned judgment has not erred in law to allow release of notified goods (tyres) under Section 181 of the Customs Act, 1969, which were confiscated outright by Adjudicating Authority in terms of clauses (8) and (89) of subsection (1) read with subsection (2) of Section 156 of the Customs Act, 1969, further read with SRO 566(1)/2005 dated 06.06.2005 and clause (a) of preamble of SRO 499(1)/2009 dated 13.06.2009?
- ii. Whether the impugned judgment passed by the Appellate Tribunal based on misreading of evidence is sustainable under the law?
- iii. Whether in consideration of the facts and circumstances of the case the non-duty paid/smuggled tyres are not liable to outright confiscation in terms of clauses (8) and (89) of subsection (1) read with subsection (2) of Section 156 of the Customs Act, 1969, read with SRO 566(1)/2005 dated 06.06.2005 and clause (a) of preamble of SRO 499(1)/2009 dated 13.06.2009 for violation of Section 2(s) and 16 of the Act *ibid*?

2. Heard learned counsel for the parties and perused the record. It appears that pursuant to a show cause notice dated 28.04.2022, an Order in Original dated 26.05.2022 was passed, whereby, Tyres Made in China were out rightly confiscated.

Respondent No.1 & 2 being aggrieved preferred appeal before the Tribunal which has been disposed of with certain modification through the impugned order. The relevant finding of the Tribunal reads as under:-

“6. I have perused the case record and heard both parties. In short, the instant appeal has been filed by the appellant against outright confiscation of China Origin Tyres by the learned Adjudication Officer vide Order-In-Original No. 1092 to 1106/2021-22 dated 26.05.2022. The impugned tyres were seized by the staff of Directorate General, Intelligence & Investigation- Customs, Karachi on the ground that these were smuggled into the country hence non-duty paid. Full account of the case is given in the preceding part of the instant order and the same is not being reproduced here in the operative part for the sake of brevity.

7. It is noteworthy that the appellant has expressed willingness to pay leviable duty and taxes on the seized tyres and prayed for release of the same.

8. I have considered facts of the case. The willingness on the part of the appellant claimant / owner of the seize tyres to pay leviable duty and taxes is a plain admission on his part that the same were smuggled into the country without payment of leviable duty and taxes and therefore liable to confiscation under clause (9) and (90) of section 156(I) of Customs Act, 1969. However, keeping in view the redeeming circumstances of the case including the fact that the impugned tyres are very old and worn-out and the appellant is ready to pay leviable duty and taxes on the seized goods, the same are ordered to be released to the lawful owner under section 181 of Customs Act, 1969 on payment of redemption fine @ 20% of the value of the tyres (to be ascertained by the department mindful of the fact that the tyres are old and worn-out after re-assessment of value from the valuation department). The impugned Order-in-Original is modified to the above extent only. The instant appeal is disposed of in above terms.”

3. The above order of the Tribunal reflects that though a finding of fact has been recorded that the goods in question are smuggled goods; however, at the same time they have been ordered to be released against payment of fine @20%. It is also an admitted position that the Respondent is not aggrieved any further and has not impugned the above order of the Tribunal. It may be of relevance to observed that in terms of SRO 499(I)/2009 dated 13.06.2009 issued in exercise of the powers conferred by section 181 of the Customs Act, 1969 (IV of 1969), it has been directed that no option shall be given to pay fine in lieu of confiscation in respect of (a) smuggled goods falling under clause (s) of section 2 of the Customs Act, 1969 (IV of 1969). Once it is not denied that the goods in question are smuggled goods, then they were liable to be confiscated out rightly. It could not, even be released against payment of any redemption fine. In fact, after recording the above finding no further case for indulgence was made out; rather, the

appeal of the Respondent ought to have been dismissed instead of modification of the Order in Original.

4. 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's under section 181 *ibid*) and the powers of FBR to prescribe conditions in respect of outright confiscation and redemption fine came for scrutiny before the Hon'ble Supreme Court in the case of **Collector of Customs, Peshawar**¹, 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*. In an unreported case of *Haji Tooti*², a challenge to the provisions of Section 181; its provisos, and the erstwhile SRO 574(I)/2005 being *ultra vires* to Section 223 of the Customs Act, 1969, has been dismissed, and it has been held that FBR is competent to exercise its powers under Section 181 of the Act, and can issue notification to fix minimum redemption fine direct outright confiscation of goods. Reliance may also be placed on the cases of *Muhammad Tasleem*³, *Collector of Customs*⁴ & *Maqbool Ahmed*⁵.

5. In view of the above, question No.3 is answered in the affirmative in favour of the applicant and against Respondent No.1 & 2 and as a consequence thereof, question No.1 & 2 need not to be answered. This Special Customs Reference Application is allowed and the impugned order of the Customs Appellate Tribunal stands set-aside. 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

Ayaz p.s

¹ Collector of Customs v Wali Khan (2017 SCMR 585)

² Haji Tooti v Federal Board of Revenue (Civil Appeal No.24-Q of 2014 vide order dated 26.5.2021)

³ Collector of Customs v. Muhammad Tasleem (2002 MLD 296);

⁴ Collector Customs v. Salman Khan (2015 PTD 1733)

⁵ Maqbool Ahmed v. Customs Appellate Tribunal (2009 SCMR) 226