

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Special Customs Reference Application ("SCRA") No. 53 of 2022

Date Order with signature of Judge

**Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Adnan-ul-Karim Memon**

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

Respondents: Akhtar Muhammad & another
Through Mr. Sardar
Muhammad Ishaque,
Advocate.

Date of hearing: 19.01.2024.
Date of Judgment: 19.01.2024.

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant (department) has impugned Order dated 29.10.2021 passed by the Customs Appellate Tribunal Bench-II, Karachi, in Customs Appeal No.H-29 of 2020 proposing the following questions of law;

1. Whether in view of the facts and circumstances of the case he impugned vehicle exclusively and wholly used for the transportation of smuggled HSD recovered from specially designed concealed/hidden tanks, is not liable for outright confiscation under clauses (8) and (89) of subsection (1) of Section 156 and Section 157(2) of the Customs Act, 1969, read with clause (b) of preamble of SRO 499(1)/2009 dated 13.06.2009?
2. Whether in view of the facts and circumstances of the case the impugned judgment passed by Appellate Tribunal is not violative of Section 157(2) of the Customs Act, 1969, read with clause (b) of preamble of SRO 499(1)/2009 dated 13.06.2009?
3. Whether the Appellate Tribunal has not erred in law by ignoring that the specially designed tanks fitted in the vehicle for carrying contraband/ notified goods of Section 2(s) of the Customs Act, 1969 proves mens rea and willful act of smuggling on the part of driver/owner of the vehicle?
4. Whether the Appellate Tribunal has not erred in law that the evident purpose of Section 157 of the Customs Act, 1969 is to penalize & discourage clandestine involvement of driver/owner of the conveyance used in assistance & commission of an offence under the act as hold by the Hon'ble Courts (PTCL-2016 CL680)?

5. Whether impugned judgment passed by the Appellate Tribunal is not against the dictum laid down by the Honourable Balochistan High Court in case of Collector, Model Customs Collectorate, Custom House. Gawadar at Gaddani V/s. Abdul Raheem reported as 2021 PTD 1935?

2. Heard learned counsel for the parties and perused the record. It appears that the Vehicle being claimed by the Respondent was seized along with smuggled diesel and a show cause notice was issued on 21.02.2019 alleging that smuggled diesel was found in the hidden tank on the bottom of the Vehicle; hence, an offence was committed under Sections 2(s) & 16 of the Customs Act, 1969, ("Act") punishable under Sections 156(1), (8), (89) & 157(2) of the Act. None contested the show cause notice and an Order in Original was passed, whereby, the diesel as well as the Vehicle in question were confiscated out rightly in terms of the above provisions read with clause (b) of SRO 499(I)/2009 dated 13.6.2009. The Respondent being aggrieved to the extent of confiscation of the Vehicle in question filed an Appeal which was dismissed by the Collector of Customs (Appeals), against which a further Appeal was preferred before the Customs Tribunal which has been allowed through the impugned order. The relevant finding of the Tribunal reads as under:-

“8. After perusal of the record and heard the parties length. The legislature has stipulated Section 157 of the Customs Act, 1969 and the purpose of the said Section is to penalize and discourage clandestine involvement of owners of conveyance used in assistance of commission of an offence under the Act. Section 157 of the Customs Act is being reproduced as under:-

Extent of confiscation.-

1. Confiscation of any goods under this Act includes any package in which they are found, and all other contents thereof.
2. Every conveyance of whatever kind used in the removal of any goods liable to confiscation under this Act shall also be liable to confiscation.

Provided that, where a conveyance liable to confiscation has been seized by an officer of customs, the appropriate officer may, in such circumstances as may be prescribed by rules, order its release, pending the adjudication of the case involving its confiscation if the conveyance furnishes him with a sufficient guarantee from a scheduled bank for the due production of the conveyance at any time and place it is required by the appropriate officer to be produced:

Provided further that where conveyance found carrying smuggled good in false cavities or being used exclusively or wholly offending goods under clause (s) of section 2 of this Act, has been for transportation of seized for the third time, no option to pay fine in lieu of the confiscation shall be given.]

3. Confiscation of any vessel under this Act includes her tackle, apparel and furniture.

10. A beneficial amendment has been introduced vide Financial Act, 2021 (VIII of 2021) only in case of offence committed for the transportation of offending goods under second proviso of this Act. It can be inferred and deduced from perusal of the above mentioned provision that a habitual offender who has committed the offence for the third time, only then 'no option to pay fine in lieu of confiscation shall be given in the instant case there is no such allegation as the vehicle involved in the offence of smuggling for the third time so the Bench is of the considered view that benefit of beneficial legislation may be extended to the Appellant.

11. It was held by a division Bench in the case of Rasool Flour Mills case vs Federation of Pakistan in CPD No. 462 of 2013 Judgment dated 23-11-2018 that issuance of beneficial notification may be given qualifying retrospective effect if the matter was pending before the concerned authorities. The said Judgment was assailed before the Hon'ble Supreme Court titled as Collector of Customs and other vs Rasool Flour Mills (Pvt) Limited and others (Civil petition No. 2 K of 2019); wherein the pronouncement of this High Court was maintained and the august court was pleased to complement that a beneficial notification may be given qualifying retrospective effect even in the matter which was pending before the adjudicating authority. It was held the august court in the of Pakistan Television vs CIR reported as 2019 PTV 484 that stance was the edit of the legislature and the language employed in the statute was determinative of the legislative intent and a tax payer could only be imposed thereupon if the case falls in that category stricto sensu.

12. The Customs Appellate Tribunal concurs and subscribes to the legal view point of Customs Appellate Tribunal in the case of Muhammad Younas Vs Superintendent, Customs Intelligence and Investigation, Faisalabad and others reported as 2018 PTD (Tribunal) 1056 that the object of confiscation under the Custom Act, 1969 is mainly to penalize perpetrators of the offence of smuggling impliedly it is not the purpose of legislator to penalize the owner of vehicle unless any convenience is proved. Fact of the matter is that cargo carrier was apprehended for the first time and therefore is entitled to relief provided in the third proviso of Section 157 of Customs Act as reported as PTCL 2021 BS-468.

13. Keeping in view the circumstances of the case, the competent authority of the Custom Department is directed to release a vehicle Hino(06 wheeler) bearing registration No. TKT-430 after receiving redemption fine @ 20% of the assessed value of the said vehicle after necessary verification of the Appellant and the process of released of the said vehicle may be completed within at the most ten days from the date of order.

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3. Perusal of the above finding reflects that the Tribunal has held that insertion of the 2nd proviso to Section 157(2) of the Act, vide Finance Act, 2021 (effective from 1.07.2021) has to be given a retrospective effect, notwithstanding the fact that admittedly, the alleged offence of smuggling was committed much prior in time (Show cause issued on 21.02.2019; ONO

passed on 30.04.2019 & 1st Order in Appeal also passed on 27.11.2019) and since, the Vehicle otherwise has not been used more than once in the commission of the alleged offence, it ought to be released on payment of redemption fine @20%. However, we have not been able to subscribe to such view taken by the Tribunal as it is not a case of grant of any exemption or otherwise a clarificatory amendment in law, which in certain cases can be given retrospective effect. It is also an admitted position that subsequently vide Finance Act, 2022 (w.e.f. 1.07.2022) this 2nd proviso stands omitted as well. At the relevant time when the offence in question was committed, the issue was to be governed in terms of SRO 499(I)/2009 issued in exercise of the powers conferred by section 181 of the Act, wherein 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 Act; and (b) lawfully registered conveyance including packages and containers found carrying smuggled goods in *false cavities or being used exclusively or wholly for transportation of offending goods under clause (s) of Section 2 of the Act*. Once it is not denied that the Vehicle in question was carrying smuggled Diesel, then it was liable to be confiscated out rightly. It could not, even be released against payment of any redemption fine, whereas, the Tribunal has failed to take this provision of law into consideration and has altogether decided the issue on a wrong premise that the doctrine of retrospective effect will apply to the 2nd proviso to Section 157(2) of the Act.

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 Toot*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 and 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. We have also gone through the order dated 25.01.2023⁶ passed by the Supreme Court and relied upon by the Respondents Counsel, and are of the view that the said order does not apply on the facts available before us as in that case the issue was that whether there was any false cavity to attract the prohibition in clause (b) of SRO 499, and since it was not proved beyond doubt that there was any such cavity, it was held that the said clause would not apply and the Vehicle was rightly released by the Tribunal upon payment of redemption fine. It is not so in the instant case as the Adjudicating Authority has given a definite finding to this issue at Para 16 to 18 of the said order, that not only the Vehicle was being used exclusively for transporting smuggled diesel; but so also there

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

⁶ in the case of Faiz Muhammad v Federation of Pakistan in CP No.4580 of 2021,

was a special cavity for such purposes. On the other hand, the Respondent had never disputed this fact. It would be advantageous to refer to Para F of the Memo of Appeal filed before the forum(s) below which reads as under;

“F. That the Appellant repeats his request already submitted before the adjudicating authority, that he having purchased the truck in question recently against running installments and notwithstanding the fact that he had no knowledge of any foul play or placing of additional tank in the vehicle, he is ready to dismantle the extra fitted tank if any at his costs.”

6. The above argument is self-contradictory; rather is an admission that there was a hidden cavity in the truck in question. In view of such factual position the order of the Supreme Court so relied upon by the Respondents Counsel is not applicable in this case. Accordingly, the proposed question No.1 is answered in favor of the Applicant and against the Respondent, whereas, the remaining question are not required to be answered. As a consequence, thereof, the impugned order is set-aside and the Reference Application stands allowed. 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

Rafiq