

IN THE HIGH COURT OF SINDH, KARACHI
Special Customs Reference Application ("SCRA") Nos. 1060 & 1061 of 2023

Date

Order with signature of Judge

Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Mohammad Abdur Rahman

Applicant in both SCRA's : Director, Directorate General, Intelligence & Investigation (Customs), Karachi
Through Mr. Khalid Mehmood Rajpar, Advocate.

Respondent No.1 in both SCRA's : Nafees-ur-Rehman
Through Mr. Sarmad Hani alongwith Mr.Zarar Qadir Shoro, Advocate.

Date of Hearing : 03.09.2024

Date of Judgment : 03.09.2024

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through both these Reference Applications the Applicant department has impugned judgment dated 21.02.2023 passed in Customs Appeal No.K-395 of 2023 and judgment dated 17.02.2023 passed in Customs Appeal No.K-211 of 2023 by the Customs Appellate Tribunal, Bench-I at Karachi and vide a common order dated 23.05.2023 passed by this Court notice was ordered on the following two questions of law:

- III) *Whether a judgment, the operating part whereof is nothing more than a word-for-word reproduction of respondent No.1's contention but nevertheless as Tribunal's "own decision", could be treated a judicial pronouncement susceptible to withstand anxious judicial scrutiny by this Court? Whether such so-called "decision" is safe to allow remain in field?*
- IV) *Whether in consideration of extension granted by FBR in terms of Section 179(4) of Customs Act, 1969, the Appellate Tribunal has not erred in law to conclude that impugned Order-in- Original given beyond time, as prescribed in Section 179(3) of the ibid Act, was invalid?*

2. Heard learned counsel for the parties and perused the record. Insofar as the proposed questions are concerned, at the very outset Respondent No.1's counsel has placed reliance on a

judgment dated 22.05.2024 passed in Spl. Customs Reference Application No.1640 of 2023 [**Pako Computers, Karachi v. Custom Appellate Tribunal, Karachi & others**] and other connected matters and submits that the question as to the Order-in-Original (“ONO”), being time barred, has already been decided by this Court as well as by the Hon’ble Supreme Court of Pakistan by holding that the time line as provided in Section 179 of the Customs Act, 1969 for passing the ONO is mandatory in nature. On perusal of the said judgment and the proposed question (IV) as above, it appears that his contention is correct as perusal of the said order, reflects that similar controversy has been dealt with by a Division Bench of this Court, including one of us, namely, *Muhammad Junaid Ghaffar, J*, in the following manner: -

“2. Heard learned Counsel for the parties and perused the record. In the instant matter the show cause notice was issued on 29.5.2020 and the last date for passing the Order in Original (“ONO”) in terms of Section 179(3) of the Customs Act, 1969 was 28.08.2020, whereas, the adjudicating authority has stated in the ONO that time was extended by FBR till 30.11.2020. Insofar as the case of the Respondents is concerned, Mr. Ali Tahir, Advocate appearing on behalf of Post Clearance Audit has today placed on record, copy of Letter dated 22.09.2020 issued by FBR; whereby, certain extension was granted exercising powers under Section 179(4) of the Customs Act, 1969. He has contended that since an extension had been granted by FBR as above, the Tribunal was fully justified in holding that the ONO was not time barred. However, perusal of the said letter of FBR dated 22.09.2020 reflects that undisputedly such extension was granted after the mandatory period provided under Section 179(3) of the Act had already expired. To that there appears to be no dispute. Not only this, the request for extension was also made by the Adjudicating Authority on 14.09.2020; when the period for passing the ONO had already expired on 28.08.2020. Therefore, even if FBR had any jurisdiction to extend the time period it was done after the cut-off date; hence, was meaningless and was without lawful authority. It further appears that extension letter does not seem to have been issued in consonance with the powers conferred upon FBR under Section 179(4) *ibid*, whereas, no independent reasons of its own have been assigned by FBR; rather, the reasons stated by the Collector in his extension letter have been found to be justified. This is an incorrect approach as FBR cannot abdicate its authority so conferred under the Act in such SCRA No. 1640 of 2023 & others Page 5 of 6 a manner and ought to have given its own reasoning in line with Section 179(4) of the Act. In *Collector of Customs Lahore v HNR Company (Pvt) Limited*, the Hon’ble

Supreme Court while dealing with a somewhat similar extension of time under Section 179(4) of the Act, without assigning cogent reasons has held that the provision of reasons for granting an extension of time is necessary so as to ensure that discretion has been exercised by the FBR on valid grounds transparently and in a structured manner.”

3. At this juncture the Applicants Counsel has tried to argue that in this case FBR had extended the time for passing of the ONO till 16.01.2023 in terms of Section 179(4) of the Act. However, this argument is misconceived because in this matter show cause notice was issued on 20.07.2022, whereas ONO was passed on 5.12.2022, and the limitation of 30 days as provided in the 1st proviso to Section 179(3) of the Customs Act, 1969, had expired on 19.08.2022. Record further reflects that despite the timeline being mandatory, the matter was heard on numerous dates, the last date being 01.11.2022 and the ONO was finally passed on 5.12.2022 by stating that FBR had extended the time till 16.01.2023. The extension of time, in any, after expiry of the mandatory period is meaningless, whereas even otherwise we have not been shown the extension of FBR so relied upon by the Applicants Counsel. It is imperative that such extension ought to have been placed on record along with this Reference Applications so as to see that whether there were enough justifiable reasons to extend the limitation.

4. As to the issue question that such timeline is mandatory, the Supreme Court has already decided it against the department in various cases under the Sales Tax Act, 1990 as well as The Customs Act, 1969, as both the statutes have analogous provisions insofar as passing of ONO within a certain period is concerned. It has been held that wherever the legislature has provided certain period for passing of an Order; then the said direction is mandatory and not directory and in that case non-compliance of such a mandatory provision would invalidate such act. It has been further held that since adjudication was beyond time as prescribed in Section 179(3) of the Act; therefore, the said

decision is invalid. In Super Asia (Supra) it has been held that wherever, the legislature has provided certain period for passing of an Order; then the said direction is mandatory and not directory and in that case non-compliance of such a mandatory provision would invalidate such act. In Mujahid Soap (Supra) it was held that since adjudication was beyond time as prescribed in Section 179(3) of the Act; therefore, the said decision is invalid. Both these views have been followed and affirmed in the case of A.J. Traders (Supra).

5. Accordingly, the proposed question (IV) as above, is answered in the “**negative**” in favour of the Respondent and against the Applicant and consequently thereof, answer to the remaining Question(s) would be an academic exercise; hence, we deem it appropriate not to answer the same. The Reference Applications are hereby **dismissed**. Office is directed to send copy of this order to Customs Appellate Tribunal, Karachi, in terms of sub-section (5) of Section 196 of Customs Act, 1969. Office shall also place copy of this order in the connected Reference Application.

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Farhan/PS