

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SCRAs No.216 to 222 of 2018

(Director, Intelligence & Investigation v. M/s. Power Industries Pakistan & another)

Date	Order with signature of Judge
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1. For orders on office objection a/w reply at 'A'
2. For orders on CMA No.1733/2018
3. For hearing of main case
4. For hearing of CMA No.1734/2018

19.9.2024

Mr. Syed Mahmood Alam Rizvi, Advocate for Applicant in all SCRAs
Mr. Umair Azam in attendance for Respondents pursuant to order of
disposal dated 16.12.2019 in CP No.D-4821 of 2017 & other
connected matters

Muhammad Junaid Ghaffar, J: Through these Reference Applications the Applicant Department has impugned judgment dated 30.3.2017 passed in Customs Appeal No.K-1384/2017 and other connected matters by the Customs Appellate Tribunal, Bench-I, at Karachi proposing various questions of law. However, subsequently, on 10.2.2019 the Applicant has proposed the following questions:-

“1. Whether the findings of learned adjudication Authority and Customs Appellate Tribunal, Bench-I, Karachi are suffering from gross mis-reading of the SRO 468(i)/2017 dated 09.6.2007 read with CGO 05 of 2017 dated 04.7.2017 and SRO 581(l)/2013 dated 13.6.2013, wherein the Applicant’s officers have been specifically empowered to exercise the authority under Sections 17, 26, 91, 139, 161, 168, 197, 198 & 199 of the Customs Act, 1969 categorically deal with the smuggled / non-duty paid goods and those goods lying in a Customs Area or cleared there from?

2. Whether the learned Appellate Tribunal’s aforesaid finding is not contrary to the provisions of Sections 2(s) & 32(1) of the Customs Act, 1969?

3. Whether the findings of both the lower forums Respondents/Importers discharged its burden of proof as required under Section 156(2)(8) and 187 of the Customs Act, 1969 is not erroneous and perverse in so far as no documentary evidence whatsoever to such effect was ever placed on the record by the

Respondent/Importer? Whether such finding was warranted and tenable under the law?"

2. Heard learned Counsel for Applicant and perused the record. It appears that the Applicant had made a seizure of the goods in question on the allegation that the imported material is *Kerosene Oil* and not *White Spirit*, hence not freely importable by the Respondents pursuant Serial No.2 Appendix-B (Part II) of Import Policy Order, 2016. Show cause notice was issued, and an order was passed against the present Respondents who being aggrieved approached the Customs Appellate Tribunal and through impugned judgment the Appeals have been allowed. Relevant finding of the Tribunal starts from para 5 and reads as under: -

"05. The essential factor leading to the present controversy is that the imported goods were stated to be white spirit, which is classified under heading 2710.1240 the first schedule of Customs Act, 1969. As per this classification, the said goods are chargeable to Customs duty @ 3% ad val. and Sales Tax @ 17% of the duty paid value. There is no restriction on import of goods falling under this classification. It is the case of appellant department that the impugned imported goods are Kerosene oil which falls PCT under heading 2710.1911. Though the goods under this heading attract the same rate of customs duty and Sales tax, yet they come within the mischief of S. No.2, Appendix-B (Part-II) of Import Policy Order, 2016, whereby Kerosene falling under PCT 2710.1911 is importable only by approved Oil Marketing Companies. The Chief underlying cause of dispute is the appropriate classification of goods. The heading claimed by the importers entitles them to import goods free of any restrictions. On the other hand the import of goods under alleged classification is restricted and the present importers cannot legally import the goods.

06. The classification of goods in the first schedule of Customs Act, 1969 is governed under General Rules for interpretation of the Harmonized System (GIR). For the purpose of present discussion GIR (1) and GIR (6) are the most relevant. The same are reproduced hereunder:-

GIR (1):

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

GIR (6):

For legal purposes, the classification of goods in the sub-headings of a heading except Chapter 99 shall be determined according / to the terms of those sub-headings and any related sub-heading Notes and, mutatis mutandis, to the above Rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter/Notes also apply, unless the context otherwise requires.

07. The classification of goods under heading 27.10 at one dash, two dash, three dash and four dash level subheading are as follows;

27.10

(2710.1200) -- light oils and preparations

2710.1210 --- Motor spirit

2710.1220 --- Aviation spirit

2710.1230 --- Spirit type Jet fuel

2710.1240 --- White spirit

2710.1250 --- Solvent oil (non-composite)

2710.1290 --- other

(2710.1900) – other

(2710.1910) --- Kerosene, including Kerosene type Jet fuel

2710.1911 ---- Kerosene

2710.1912 ---- JP-1

2710.1913 ---- JP-4

2710.1919 ---- other

08. In accordance with GIR (1) and (6), the goods are to be classified in accordance with text of the headings, subheadings, in the light of relevant notes and headings or subheading at the same level are to be compared. The chemicals namely white spirit and kerosene are distinct commercial products, however as their classification has been created at national level, the text does not

provide full picture, therefore, following GIR (6), comparison is drawn at higher level i.e. at two dash level, relevant to these subheadings. Classification at 2710.1200 and 2710.1900, clearly distinguishes both the products Sub-heading note 4 note (4) to chapter 27 provides as follows;

“For the purposes of subheading 2710.1200 “light oil and preparations: are those of which 90% or more by Volume (including losses) distill at 210°C according to the ISO 3405 method (equipment to ASTM D 86 method).

09. It is equally important that vide note 2 of the same chapter, any goods to remain within main heading 27.10, weight of non-aromatic contents must exceed that of aromatic constituents. The analysis of aromatic, non aromatic contents and application of ISO 3405 or ASTM D86 methods together will determine the correct classification of the disputed goods.

10. Having gone through the parameters of classification we now proceed to the chronology of the case. Prior to seizure of the goods, samples of detained goods were drawn from the tanker as well as storage bounds and sent for lab test from Hydrocarbon Development Institute of Pakistan, Islamabad (HDIP). The samples were received by the lab on 09.6.2017 and the lab vide their report on the same day gave remarks that “to the extent of tests carried out in this lab, the sample conforms to the PSI specification of Kerosene Oil”. The report only bears signature of officer Incharge without disclosing his name. In the meanwhile, the importers approached the Hon’ble Sindh High Court vide Suit No.1541/2017 and 841/2017. As per directions of the Court, samples were drawn under the supervision of Nazir, and in the presence of the concerned parties and sent for analysis to the following laboratories;

- i. HEJ
- ii. HDIP
- iii. PCSIR
- iv. SGS, Karachi
- v. Intertek, Pakistan

11. A synopsis of the test reports so conducted is as under;

1. HEJ Lab Report.
“The representatives samples was tested against ASTM-D235-02 (Mineral Spirit or White Spirit)/PSQCA standard PS-703/1988 standard of Mineral Turpentine or While Spirit), ASTM D3699-12B (Kerosene)/PSQCA standard PS, 442-2010, the test results showed that the given sample is complies with ASTM-D235/PS-703 1988 standards”.
2. HDIP Islamabad Lab Report.
“to the extent of test carried out in this lab, the sample falls under the category of Kerosene Oil,

however in order to ascertain its description as White Spirit (Mineral Turpentine) as per PSI Specification; Aromatics Test is required to be performed, facility for which is not available at HDIP.”

3. PCSIR Lab Report.
“The above results demonstrated that the sample corresponds to White Spirit also known as Mineral Turpentine.”
4. Societe General De-Surreillance (SGS) Pakistan Pvt. Ltd. Lab Report.
“Based on above analysis and to the extent of distillation (FBP), low, Sulphur content odor (aromatic) and detail hydrocarbon chain found to be C8-C12 it confirms that nature of sample is similar to White Spirit Oil.”
5. Intertek Pakistan Pvt. Ltd. Lab Report.
“We have received two sealed samples, total quantity 4 liters, from the representative of the Honourable High Court of Sindh Mr. Nazir, for the analysis at our laboratory.

In this regards we would like to politely regret that the facilities to conduct this type of analysis is not available at our lab.

12. It is apparent that three of the above laboratories, namely M/s. HEJ, M/s. PCSIR and M/s. SGS were categorical in stating that the goods were white spirit. One laboratory i.e. M/s. Intertek Pakistan was candid enough to admit that they do not have the requisite facility to conduct this type of analysis. One out of the five laboratories, M/s. HDIP gave their analysis result as Kerosene oil, however they added caveat that in order to ascertain description as white spirit (Mineral Turpentine) as per PSI SPECIFICATION; Aromatic Test is required to be performed, facility for which is not available at HDIP. As discussed at para (09) supra, in the absence of Aromatic Test, product can not be even classified in main heading 27.10, subheadings classification will thus be remotely possible.

13. The above mentioned reports by far support the claims of the importers and do not in any way contradict the importers stance to say the least. Faced with dilemma of failure, the present Appellants department found refuge in letter No.6(15)/2017 dated 07.07.2017, from Ministry of Petroleum and Natural Resources; the said letter read as under, para 3 and 4 are relevant:-

Sub: Laboratory testing of Kerosene Oil HS Code 2710.1911 imported in the garb of white spirit (2710.1240) issued regarding;

This is with reference to your letter number C.No.1(21)DGCI/Enf/HQ/2017 dated 06.07.2017 on the captioned subject.

2. This Directorate appreciates efforts of your Directorate in investigating and identifying the unlawful practice in the Petroleum sector as requested at para five of your letter, the matter has been examined.

3. Primarily testing of imported fuel is the responsibility of OGRA and the same is done through HDIP. Rarely the results of HDIP have been challenged and have been found satisfactory. The same leads us to believe that HDIP laboratory testing is accurate and as per International norms.

4. As far as the subject case is concerned, even though we trust results of HDIP but if further confidence is needed PSO can also be engaged to have the sample tested in their laboratory.

5. Kindly feel free to contact this Directorate in case any further assistance may be required.

Sd/-
(Abdul Jabbar Memon)
Director General Oil"

3. From perusal of the above finding it reflects that the Tribunal has come to a finding of fact by holding that the imported material is White Spirit and not Kerosene Oil. Such finding of fact has been arrived at based on laboratory tests carried out by the Nazir of this Court pursuant to certain orders passed in Suits No.1541/2017 and 841/2017 before the Original Side of this Court. Though two of the said reports are unclear, however, the other reports clearly confirm that the goods are not Kerosene Oil but White Spirit. This finding cannot be interfered by us in our Reference Jurisdiction as per settled law, the highest authority for factual determination in tax matters is the Tribunal¹, whereas no other ground

¹ Commissioner Inland Revenue v RYK Mills Lahore; (SC citation- 2023 SCP 226); Also see Commissioner Inland Revenue v. Sargodha Spinning Mills, (2022 SCMR 1082); Commissioner Inland Revenue v. MCB Bank Limited, (2021 PTD 1367); Wateen Telecom Limited v Commissioner Inland

even otherwise has been made out except that the reports are not final. In that case the Applicant ought to have agitated the matter before the learned Single Judge or by way of an Appeal against the orders of retesting of the goods.

4. In so far as the other finding of the Tribunal, as recorded in para 16, regarding jurisdiction of the Applicant to seize goods within the Port Area is concerned, it appears that the same has been arrived at based on the judgment of this Court in the case of **Saadat Khan v. Federation of Pakistan, reported by PTCL 2015 CL83**. However, the said judgment has been subsequently modified by the Hon'ble Supreme Court vide order dated 31.1.2019 in Civil Appeal No.20/2018. Therefore, the said finding of the Tribunal cannot be sustained and must be set aside. It is so ordered and the question to that effect is answered accordingly.

5. Insofar as the question as to correct classification of the goods is concerned, it is based on laboratory reports and appears to be a question of fact which we cannot investigate; hence, the same is answered against the Applicant and in favor of the Respondent. All these Reference Applications are accordingly dismissed in *limine* with pending applications. Let copy of this order be sent to the Tribunal as required under Section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE

Shakeel. PS.