IN THE HIGH COURT OF SINDH, KARACHI

Special Customs Reference Applications No. 847 of 2017

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

Applicant:	**Director, Through Additional Director of Customs, Directorate of Post Clearance Audit, Karachi.** **Through Mr. Muhammad Rashid Arfi, Advocate.**
Respondent:	**M/s. Jadeed Feeds Industry (Pvt) Ltd.**
Date of hearing:	**29.01.2025.**
Date of Order:	**29.01.2025.**

O R D E R

Muhammad Junaid Ghaffar, J: Through this Reference Application, the Applicant (department) has impugned Judgment dated 06.06.2017 passed in Customs Appeal Nos. K-432/2016 & others by the Customs Appellate Tribunal Bench-III, Karachi proposing various questions of law; however, the only relevant question is question No.10 as it has already been decided by this Court. It reads as under: -

> 10. Whether in the admitted position that the impugned goods "Silos" which is neither machinery nor equipment hence does not qualify for the exemption of 8th Schedule, the learned Members of Appellate Tribunal, erred in law by allowing the Importer's appeal without giving any findings on the issue of admissibility of 8th Schedule to the imported goods?

2. This question has already been answered against the department and in favour of the importers by this Court vide Order dated 08.03.2021 passed in **SCRA Nos. 288 to 291 of 2018** ***(M/s. Al-Meezan Poultry Feeds v. the Collector of Customs, (Adjudication-I) & another)***. The relevant finding is as under:-

"6. It is also a matter of record that in somewhat similar circumstances the issue of exemption on silos came before this Court in C. P. No. D-462/2013 and the said Petition was allowed vide order dated 23.11.2018 and was then impugned before Hon'ble Supreme Court through Civil Petition No. 02-K/2019 and vide order dated 28.05.2019 the Department's Petition for Leave to Appeal was dismissed. Subsequently, the same issue came before us though in the context of the earlier notifications and before transposition of the said exemption into the Customs Act and the Sales Tax Act; however, in our considered view the controversy is the same that whether silos are entitled for exemption from the Sales Tax or not. The issue in that case was in respect of SRO 727(I)/2011 dated 1.08.2011 and was decided by this bench in Special Customs Reference Application No. 342/2013 vide order dated 01.03.2021. We had also followed the aforesaid Judgment of the learned Division Bench and the Hon'ble Supreme Court in the following terms:-

> "4. Perusal of the aforesaid findings reflects that the issue has cropped up just because of difference of opinion between two wings of FBR i.e. Customs and Sales Tax. It further appears that the issue was taken up by Pakistan Poultry Association with FBR and the Sales Tax Wing of FBR had issued a clarification dated 25.10.2012 (reproduced in Tribunals order as above) in respect SRO 727 which pertains to exemption from Sales Tax and it has been clarified that storage poultry feed Silos are a pre-requisite of Poultry Industry and are used by the Poultry Feed Mills for the production of eggs and meat; hence, the exemption of sales tax is also available to Silos for poultry, whereas, the said clarification was issued with *concurrence of Customs Wing of FBR*. It further appears that Customs Wing of FBR pursuant to some letter of Director General of Intelligence took a different position and vide Letter dated 24.01.2013 stated that since Silos does not fall under PCT heading 84-85 of the Customs Tariff; hence, is not machinery so as to be entitled for exemption under SRO 575. The Tribunal after considering clarification of both the Departments of FBR has been pleased to allow the Appeals on two grounds. The First is that this matter pertains to exemption of Sales Tax and the clarification of the Sales Tax Wing at the behest of whom the SRO in respect of Sales Tax was issued shall prevail. Further, even though subsequently the Customs Wing of FBR took a different view; but at the same time, the earlier view of the Sales Tax Wing was never withdrawn by FBR; hence, the same is still in field would apply to the case of the Respondents as the matter pertains to sales tax. Moreover, in the SRO in question the explanation states that for the purposes of this notification, plant and machinery means such plant and machinery as is used in the manufacture or production of goods, and this is not restricted to any heading of chapter 84 or 85 as contended on behalf of the Applicant, which apparently was the case in terms of SRO 575; whereas, here it is an independent SRO 727 which is under consideration. And lastly the Hon'ble Supreme Court in the case of Fauji Fertilizer[1] has

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[1] 21.....As mentioned herein above the Catalysts being an integral part of the plant and machinery could not be separated for the purpose of levying customs duty and sales tax being inseparable part of the plant and machinery for the reasons that it is a metallic compound and thus is a part and parcel of the reactors of the plant which converts the nitrogen and hydrogen gases by a chemical reaction into ammonia and without Catalysts it cannot be made functional. Thus it can safely be considered as an integral part of the plant and machinery. It may be added here that ammonia is the basis for nearly all commercial nitrogenous fertilizers and about 85% of industrial ammonia is produced in fertilizers plant. As mentioned herein above the Catalysts being an integral part of the fertilizer plant and machinery shall be exempted from the customs duty and sales tax. The S.R.O.959(I)/89 dated 23-9-1989 made the position abundant clear which indicates that `plant and machinery' not manufactured locally and imported for the expansion of the existing units manufacturing fertilizer shall be exempted from whole of the customs duty and sales tax subject to the

been please to allow grant of exemption on catalyst being plant and machinery.

5. Secondly, the Tribunal came to the conclusion that since subsequently, the SRO in question was also amended by putting in a specific exemption of Sales Tax on the import of Silos; hence, notwithstanding, even otherwise, the said notification could be applied retrospectively as per settled law. As a consequence, thereof, lastly, the Tribunal came to the conclusion that this was a matter of interpreting an SRO and the exemption available therein; hence, the matter was never covered under Section 32 of the Customs Act, 1969 so as to initiate proceedings of misdeclaration. After going through the findings of the learned Tribunal we are fully in agreement with such findings and have not been able to persuade ourselves to agree with the arguments of the Applicants Counsel as despite being confronted, he was not able to satisfy as to how the subsequent view of the Customs Wing which had initially concurred with the opinion of the Sales Tax Wing, could be suddenly changed and applied in a case, wherein, the issue pertains to exemption from Sales Tax. Here the matter was never of classification in its strict sense; but of exemption of sales tax to Silos under the SRO issued in terms of the Sales Tax Act, 1990. Therefore, we do not see any reason to interfere with the order of the learned Tribunal.

6. It further appears that the issue of exemption under SRO 575 in respect of storage Silos (though pertaining to another category of Industry) also came before a learned Division Bench of this Court in C.P. No. D-462/2013 and the precise facts involved were similar in nature to the extent of issuance of amending SRO during pendency of the proceedings and its retrospective benefit, and the learned Division Bench vide its Judgment dated 23.11.2018 had allowed the petition with the following conclusion:-

> "Moreover, it is also an admitted position that when SRO ___(I)/2012 dated 23.10.2012 was issued, whereby, the words "including Silos" were added in Column No. 2 after the word "facilities" in the relevant head, the case of Petitioner was pending before the concerned Authorities, therefore, it being a clarificatory and beneficial Notification would otherwise apply to the pending case of Petitioner. Reliance in this regard is placed in the case of *Army Welfare Sugar Mills Limited V. Federation of Pakistan and others (1992 SCMR 1652), Elahi Cotton Mills Limited V. Federation of Pakistan and Others (PLD 1997 SC 582) and M/s. Polyron Limited V. Government of Pakistan and others (PLD 1999 Karachi 238).* In view of hereinabove factual and legal position as emerged in the instant case, we are of the considered view that the case of the Petitioner is covered by the said SROs, hence entitled to exemption."

7. The said judgment was impugned by the Department before the Hon'ble Supreme Court through Civil Petition No. 02-K of 2019 and vide order dated 28.05.2019 the Hon'ble Supreme Court has

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conditions specified under S.R.O.515(I)/89 dated 3-6-1989….(**Collector of Customs v Fauji Fertilizer Ltd. (PLD 2005 SC 577**)

been pleased to dismiss the Department's Petition for Leave to Appeal in the following terms:-

> "4. We have heard the learned Counsel for the Petitioners and perused the record of the case.
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> 5. The Respondent No. 1 has in respect of the subject consignment sought exemption in terms of SRO 2006 which grants complete exemption from customs duties and sales tax on the importation of "Machinery and equipment for development of grain handling and storage facilities", however, as noted above, the exemption was declined as the consignment according to the Petitioners did not fall within the description of the goods mentioned in the SRO 2006. They contended that the amending SRO is not relevant to the subject consignment, as the same came after the assessment of the subject consignment, and further that at the time of release of the consignment the Respondent No. 1 has furnished an undertaking to abide by the decision of the respondent No. 3 in the matter.
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> 6. However, in view of the amendment made by SRO___/(I)/2012 dated 23.1-0.2012, the description of the relevant goods mentioned at S. No. 2 of the SRO 2006, read "Machinery and equipment for development of grain handling and storage facilities including Silos", under which description the subject consignment clearly fit in. It is an admitted position that the amending SRO was issued while the question of exemption with regard to the subject consignment was pending decision before respondent No. 3 and thus the benefit of such amendment, which in view of the language of the main as well as the amending notification, and the facts and circumstances of the case, was / is an explanatory and beneficial notification and therefore, should have been extended to the subject importation. An undertaking to abide by the decision of the respondent No. 3 cannot operate to prevent the consignee from seeking his legal remedy against such decision. We therefore, find the impugned judgment to be just, fair and lawful which calls for no interference. The Petition is accordingly dismissed."

8. Accordingly, in view of the above no case is made out on behalf of the Applicant warranting interference in the impugned order of the Tribunal which appears to be correct in law and facts depicting correct legal position as settled by the Superior Courts. The questions of law proposed are not proper; hence, are re-formulated in the following manner;

(a) Whether in the facts and circumstances of the case the Tribunal was justified in holding that clarification given by Sales Tax Wing of FBR was binding upon Customs Wing of FBR in respect of an exemption pertaining to Sales Tax?

(b) Whether in the facts and circumstances of the case the Tribunal was justified in holding that exemption from sales tax was available on the subject goods in terms of SRO 727?

> 9. Question No.(a) & (b) are answered in the affirmative; against the Applicant and in favor of the Respondents. Let copy of this order be sent to Customs Appellate Tribunal, Karachi, in terms of sub-section (5) of Section 196 of Customs Act, 1969. Office is directed to place copy of this order in all above connected SCRAs."

7. In view of hereinabove facts and circumstances of this case, question (b) is answered in the affirmative; in favor of the Applicants and against the department; Question (c) in negative, in favor of the Applicants and against the department; Question (d) in affirmative, in favor of the Applicants and against the department; Question (e) in affirmative, in favor of the Applicants and against the department; Question (f) in affirmative, in favor of the Applicants and against the department, whereas, Question (g) is not relevant. As a consequence, thereof, these Reference Applications are allowed and the impugned order(s) are hereby set-aside. Let copy of this order be sent to the Tribunal in terms of s.196(5) of the Customs Act, 1969 and shall also be placed in all connected files.

4. In view of hereinabove facts and circumstances of this case, proposed question No. 10 is answered in negative against the Applicant department and in favor of the Importer Respondent. As a consequence, thereof, this Reference Application is ***dismissed***. Let copy of this order be sent to the Tribunal in terms of S.196(5) of the Customs Act, 1969.

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