

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
C. P. NO. D-6231 / 2015

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Date	Order with signature of Judge
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- 1) For hearing of Misc. No. 31097/2015.
- 2) For hearing of main case.

19.10.2015.

Mr. Khawaja Shamsul Islam Advocate for the petitioner.  
Mr. Kashif Nazeer Advocate for the respondent.

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Through instant petition the petitioner has sought declaration that the petitioner fully qualifies for exemption from Customs duty under Fifth Schedule to the Customs Act and from Sales Tax under the Sixth Schedule of the Sales Tax Act on the import of Solar LED Street Lights (complete).

Counsel for the petitioner contends that petitioner has imported two consignments vide GD No. KAPE-HC-1690 dated 4.7.2015 and GD No. KAPE-HC-29185 dated 29.8.2015 and submits that the petitioner has fulfilled the requisite conditions for exemption of Customs duty and Sales Tax, whereby, the respondent No. 2 has issued recommendation letters dated 7.7.2015 and 3.8.2015 addressed to the Customs Authorities, for grant of exemption. Counsel further submits that insofar as GD dated 4.7.2015 is concerned, the respondents have issued a Show Cause Notice dated 4.8.2015 on the ground that the petitioner had claimed exemption of duty and Sales Tax for which the petitioner was allegedly not entitled. Counsel submits that during pendency of these proceedings the respondent No. 2 as well as FBR have issued necessary recommendation and concurrence in respect of the said Goods Declaration, therefore, the Show Cause Notice has no legal value and moreover no misdeclaration was made by the petitioner, as it was only a question of claiming of exemption and interpretation of the Fifth Schedule to the Customs Act, 1969. Insofar as GD dated 29.8.2015 is concerned, Counsel submits that the respondent No. 2 has already issued a recommendation letter dated 3.8.2015, whereas, FBR before whom the request for concurrence is pending, is yet to issue a concurrence letter. However, Counsel submits that the petitioner is willing to furnish undertaking and postdated cheques as the petitioner will bring such necessary concurrence / recommendations within a period of two months from the said authorities.

Conversely, Mr. Kashif Nazeer Counsel for respondent submits that insofar as GD dated 4.7.2015 is concerned, the petitioner with the intention of availing exemption against Serial No. 24 of the Fifth Schedule to the Customs Act, had claimed assessment

of the same under HS Code 9405.1090 to avoid necessary certification by respondent No. 2 and its concurrence by FBR, whereas, the goods in question are to be appropriately assessed under HS Code 9405.4090 and therefore, the department has made a contravention case and accordingly issued a Show Cause Notice. Counsel submits that though the necessary certification / concurrence in respect of GD dated 4.7.2015 has been issued in favour of the petitioner, however, the same have been issued subsequent to the issuance of Show Cause Notice, therefore, the petitioner may be directed to approach the concerned adjudication authority and even otherwise such certification is only in respect of exemption of customs duty under the Fifth Schedule to the Customs Act, and not for exemption of Sales Tax under the Sixth Schedule to the Sales Tax Act. Counsel submits that insofar as GD dated 29.8.2015 is concerned; it is only the recommendation of respondent No. 2 which has been issued in favour of the petitioner, whereas, FBR is yet to issue concurrence letter for both exemption of Customs duty as well as Sales Tax.

We have heard learned Counsel at some length and have perused the record. Insofar as GD dated 4.7.2015 is concerned, it appears that the petitioner while filing goods declaration had claimed assessment under HS Code 9405.1090 which is chargeable to 0% duty against serial No. 24 of the Fifth Schedule to the Customs Act, 1969. However, on filing of such goods declaration, the petitioner has been denied such exemption and a Show Cause Notice for claiming such exemption has been issued. Perusal of the Show Cause Notice reflects that insofar as the description of the goods is concerned, there is no material difference in the declaration of description by the petitioner, as against what has been found on examination and it is only to the extent of HS Code that the Show Cause Notice has been issued. It is further reflected that in fact the main heading in both the situations is same i.e. 9405 and it is only the last four digits for which the Show Cause Notice has been issued. It also appears to be an admitted position that vide serial No. 23(16) of the Fifth Schedule to the Customs Act, it has been provided that any other item approved by Alternate Energy Development Board (respondent No. 2) and concurred by FBR, would also be chargeable to 0% duty and it is only the procedure which is required to be fulfilled. In such circumstances, we are of the tentative view that there was no occasion to issue a Show Cause Notice in the instant matter, as a claim of exemption for which the petitioner was otherwise entitled, cannot be termed as misdeclaration within the contemplation of Section 32 of the Customs Act, 1969. Therefore, we are of the view that since the petitioner is in possession of recommendation letter dated 7.7.2015 duly concurred with by FBR vide letter dated 31.8.2015, in respect of GD dated 4.7.2015, the petitioner appears to be entitled for the exemption of Customs duty against Serial No. 23(16) of the Fifth Schedule to the Customs Act. Insofar as the objection with regard to exemption of Sales Tax in respect of this GD is concerned, the para wise comments filed on behalf of respondent reflects

that in an identical situation another importer's goods namely Sher Muhammad Mughari & Company were exempted for Customs duty vide same letter of FBR dated 31.8.2015 who has been allowed provisional release under Section 81 of the Customs Act on furnishing an undertaking to bring the requisite concurrence of FBR within the stipulated period in respect of Sales Tax under the Sixth Schedule. In such circumstances, the petitioner's consignment covered by GD dated 4.7.2015 cannot be withheld and accordingly shall be released by the respondents on petitioner's furnishing an undertaking in respect of submitting Board's concurrence for exemption of Sales Tax on the same terms and condition as have been granted to other Importer, namely Sher Muhammad Mughari & Company as detailed in para 17 of the comments filed by the respondents.

Insofar as GD dated 29.8.2015 is concerned, it appears that the petitioner is in possession of the recommendation letter dated 3.8.2015 issued by respondent No. 2, however, perusal of the record does not reflect that as to whether any concurrence in respect of such letter has been issued by FBR or not, therefore, we adjourn this matter to 22.10.2015 for further assistance with directions to both the Counsel to come prepared and assist the Court in this regard.

To come up on 22.10.2015.

JUDGE

JUDGE

ARSHAD/