

## IN THE HIGH COURT OF SINDH, KARACHI

*Before: Muhammad Junaid Ghaffar &  
Mohammad Abdur Rahman, JJ*

### Special Customs Reference Application No.324 of 2015

Port Qasim Authority

Vs.

The Director General Intelligence  
& Investigation-FBR & others

Applicant : Mr. Shaiq Usmani, Advocate

Respondent : Ms. Masooda Siraj, Advocate

Date of Hearing : 30 August 2024

Date of Judgement : 16 October 2024

### J U D G E M E N T

**MOHAMMAD ABDUR RAHMAN, J:** This Special Customs Reference Application, maintained under Section 196 of the Customs Act, 1969, impugns a judgement dated 18 May 2015 passed in Customs Appeal No.K-3134 of 2013 by the Customs Appellate Tribunal Bench-III, Karachi and which had upheld an Order in Original bearing No. 227 of 2013-14 dated 31 October 2013 passed by the Collector of Customs Adjudication-I, Karachi.

#### **A. The Question**

2. This Special Customs Reference Application was admitted on 11 June 2015 on the basis of the following question that had been pleaded by the Port Qasim Authority (hereinafter referred to as "PQA"):

" ... *Question No.3: Whether on the facts and circumstances of the case, the learned Tribunal was justified by not giving benefits of exemption of duties under Notification No. SRO.567(I)/2006 dated 05.06.2006 and sales tax SRO No.551(I)/2008 dated 11.06.2008 and income tax under clause 21 of the Second Schedule to the Income Tax Ordinance, 2001 to the applicant?"*

**B. The Facts**

3. The facts leading up to the presentation of this Application relate to the purchase, on 12 November 2012, by the PQA from China Shipbuilding Trading Company Ltd. for a sum of US \$ 36,500,000 (United States Dollar Thirty Six Million Five Hundred Thousand) and import into Pakistan of a "Trailing Suction Hopper Dredger" named "DONGHAI JUN 7001" (hereinafter referred to as the "Dredger").

4. The Dredger arrived in Pakistan on 5 January 2013 and whereafter on 8 January 2013, the Applicant wrote to the Additional Collector Customs Licensing informing them of the Dredger's arrival and seeking permission to file a manual Goods Declaration.

5. A Goods Declaration bearing No. KPQO-HC-4906 dated 9 February 2013 was filed under PCT Heading 8905.1000 claiming the benefit of an exemption given under SRO 551(1)/2008 dated 11 June 2008 from the payment of Sales Tax and another exemption under EXMITORD/2001 dated 12 August 2005 from the payment of Income Tax.

6. The exemption claimed by PQA were considered by the customs authorities and it was decided that as each of the exemptions claimed by PQA contained a condition requiring the Dredger to be "flying the Pakistan Flag" **prior to its arrival in Pakistan** and as the Dredger had admittedly not been registered with the Marine Mercantile Department to claim such a right, the Dredger was not "holding National Flag," and therefore was not entitled to the benefit of the exemptions as claimed by it.

7. A letter dated 14 February 2013 was initially sent to the Chairman PQA requesting that the payment of duties/taxes may be made and which when not responded resulted in a seizure notice under Section 168 of the Customs Act, 1969 to be issued. As this also was not replied to by PQA, a Show Cause Notice dated 9 April 2013 was issued by the Deputy Collector of Customs, MCC Muhammad Bin Qasim, concluding that the exemption could not be claimed by PQA and therefore demanded a sum of Rs. 925,742,663 (Rupees Nine Hundred and Twenty Five Million Seven Hundred and Forty Two Thousand Six Hundred and Sixty Three) as unpaid duties and taxes.

8. PQA responded to the Show Cause Notice on 8 May 2013 contending that:

- (i) the provisions of the Mechanically Propelled Vessels Act, 1917 and not the provisions of the Merchant Shipping Ordinance, 2001 (hereinafter referred to as the "MSO, 2001") regulated the registration of the Dredger as it was only plying inland waters and could not therefore be considered a "sea going vessel" therefore excluding the regulation of the MSO, 2001;
- (ii) the process for registration would take a "reasonable" time and which application had been made by PQA on 10 April 2013;
- (iii) PQA were entitled to claim an exemption from the payment of Sales Tax under SRO No. 551(I)/2008 dated 11 June 2008 as the item that had been imported was a "dredger" and which was specifically exempted from the payment of Sales Tax being indicated at serial number of 5 of that Statutory Regulatory Order;
- (iv) while the Customs Authorities did not have the requisite jurisdiction to adjudicate on issues pertaining to income tax nevertheless the Dredger was exempted from the payment of income tax under clause 21 of Part II of the Second Schedule read with Section 53 of the Income Tax Ordinance, 2001;
- (v) no customs duty was payable on dredgers under the Pakistan Merchant Marine Policy, 2001; and
- (vi) no duty was leviable under tariff heading 8905.100 on the import of dredgers.

9. Comments were filed by the Customs Department to the Reply to the Show Cause Notice dated 08 May 2013 and which stated that:

- (i) as the Goods Declaration had been assessed for duties and Sales Tax in terms of Section 80 of the Customs Act, 1969 on 9 February 2013, an appeal as against the assessment was to be preferred under Section 193 of the Customs Act,

1969 within a period of 30 days from the date of the assessment order and which had not been preferred within the time stipulated resulting in all objections raised being superfluous;

- (ii) as the Dredger was not registered with the Mercantile Marine Department and did not fly the Pakistan Flag, the import of the Dredger did not qualify for an exemption from the payment of Sales Tax under SRO No. 551(I)/2008 dated 11 June 2008; and
- (iii) while an exemption from income tax was claimable by PQA under the provisions of clause 21 of Part II of the Second Schedule read with section 53 of the Income Tax Ordinance, 2001, it had no bearing on the liability of PQA to pay Customs Duty on the import of the Dredger.

10. On 1 October 2013, an additional reply to the Show Cause Notice dated 9 April 2013 was submitted by PQA contending that:

- (i) any assessment made by under Section 80 of the Customs Act, 1969, without affording PQA a hearing and without issuing an order in original, was illegal;
- (ii) as no assessment had been made under Section 80 of the Customs Act, 1969 the notice for seizure made under Section 168 of the Customs Act, 1969 was illegal;
- (iii) the proceedings of the Show Cause Notice dated 9 April 2013 were to be concluded within 120 days or within a period of 6 months if the period was extended by the Collector after giving reasons in writing under Sub-Section (3) of Section 179 of the Customs Act, 1969 for the delay;
- (iv) Sub-Section (2) of Section 83 of the Customs Act, 1969 and the consequences stipulated therein were not attracted when an order in original had not been passed;
- (v) a notice that had been issued under Section 26 of the Customs Act, 1969 to carry out an investigation into this matter was in fact illegal as it was a roving inquiry;

- (vi) that PQA had since the import of the Dredger applied for and had been registered under the MSO, 2001 and hence was exhibited to claim on each of the exceptions;
- (vii) that the imposition of such duties and taxes has violated the Pakistan Merchant Marine Policy, 2001 which specifically exempted the imposition of such duties and taxes;
- (viii) Sections 14, 79, 80 and Sub-Section (2) of Section 83 of the Customs Act, 1969 had been mis-interpreted by the Customs authorities while issuing the Show Cause Notice;
- (ix) Under Sub-Section (i) of Section 3 of the Import and Export Control Act, 1950, the import of ships into Pakistan had not been restricted, instead the Pakistan Merchant Marine Policy, 2001 encouraged the import of ships into Pakistan advocating their exemption from taxes and duties for the purchase of ships into Pakistan;
- (x) that the import of a dredger was exempted from the payment of Sales Tax under SRO No. 551(I)/2008 dated 11 June 2008 and from the payment of income tax under clause 21 of Part II of the Second Schedule read with section 53 of the Income Tax Ordinance, 2001;
- (xi) clause (6), (7), (43) of Sub-Section (1) of Section 156 of the Customs Act, 1969 were not applicable to the import of the Dredger;
- (xii) that the manner in which the assessment was carried out without issuing an order in original amounted an act of maladministration with the meaning given to that expression under Sub-Section (3) of Section 2 of the Federal Tax Ombudsman Ordinance, 2000;

11. The Customs Authorities thereafter filed further comments to the second reply to the show cause notices and contended that:

- (i) No "order" was passed on the rear side of the goods declaration and which had been assessed for taxes and duties in accordance with Section 80 of the Customs Act, 1969;

- (ii) that PQA was raising objections in an attempt to distract from the liabilities on the show cause notice issued by the customs authorities and from the notice of seizure under Section 168 of the Customs Act, 1969;
- (iii) the exemptions claimed by PQA were not available to it as at the time when the Dredger was imported into Pakistan it had not been registered under Section 16 of the MSO, 2001 and therefore was not able to claim the right to “fly the Pakistan flag” to attract the exemption;
- (iv) the Goods Declaration, that had been manually submitted by PQA, had been assessed for duties in accordance with Section 80 of the Customs Act, 1969 and which, having not been paid by PQA, was further subject to a penalty at the rate of KIBOR plus 3% under Sub-Section (2) of Section 83 of the Customs Act, 1969;
- (v) the notices issued under Section 26 of the Customs Act, 1969 had been correctly issued to the PQA; and
- (vi) that there was no question of any “maladministration” having occurred in the manner in which the assessment was made within the meaning give to that expression under the provision of the Federal Tax Ombudsman Ordinance, 2000.

12. An Order in Original bearing No. 227/2013-24 dated 31 October 2013 was passed by the Collector of Customs Adjudication-I holding that the exemptions claimed by PQA under S.R.O.567(1)/2006 dated 5 June 2006 from Customs Duty, SRO No. 551(I)/2008 dated 11 June 2008 from Sales Tax and under Clause (21) of the Second Party of the Second Schedule read with section 53 of the Income Tax Ordinance 2001 from Income Tax were each not applicable as PQA was not registered the MSO, 2001 at the time of the Dredgers import into Pakistan.

13. PQA thereafter maintained Customs Appeal No. 3134-K of 2013 before the Customs Appellate Tribunal Bench – III and which by its order dated 18 May 2015 dismissed the appeal upholding the Order in Original bearing No. 227/2013-24 dated 31 October 2013 passed by the Collector of Customs Adjudication-I holding that the exemptions claimed by PQA under SRO No. 551(I)/2008 dated 11 June 2008 from Sales Tax and

under Clause (21) of the Second Part of the Second Schedule read with section 53 of the ITO, 2001 from Income Tax as it was not registered under the MSO, 2001 at the time of the Dredgers import into Pakistan and against which order PQA has maintained this reference.

**C. Contentions on behalf of PQA**

14. Mr. Shaiq Usmani entered appearance on behalf of the Applicant and contended that PQA is a statutory body established under the provisions of the Port Qasim Authority Act, 1973 to manage Port Qasim. It was submitted that as Port Qasim is an unnatural Port and consequentially it was heavily prone to silting and which caused the depth of the channel leading to the port to be reduced unless regularly dredged. As a consequence, Port Qasim could not function without a Dredger and on account of which PQA had been spending large quantities of monies to engage the service of foreign companies to perform this function. To reduce such cost a decision was made to invest in the purchase of the Dredger and which, prior to its purchase, necessitated a mandatory inspection of the vessel to take place in Pakistan. He further contended that it was only after this inspection that an application for registration could be maintained under the MSO, 2001 and which when granted would then be considered as a vessel flying the "Pakistani flag".

15. Pursuant to such a decision, he contended that PQA purchased the Dredger and which arrived in Pakistan on 5 January 2013 and subsequently thereafter the Applicant wrote to the Customs Authority on 8 January 2013 informing them of the Dredgers purchase and arrival at Port Qasim. He contended that thereafter a Goods Declaration dated 9 February 2013 was submitted and which, he contended claimed exemption from the payment of Custom duties under S.R.O.567(1)/2006 dated 5 June 2006, Sale Tax under SRO No. 551(I)/2008 dated 11 June 2008 and from income tax under Clause 21 of the Second Part of the Second Schedule read with section 53 of the Income Tax Ordinance 2001 and each of which exemptions had been brought about to implement the Pakistan Merchant Marine Policy, 2001 in which in principle such a decision had been made by the Federal Government. Relying on each of the exemptions as mentioned hereinabove, he contended that instead of giving effect to such exemptions, the Customs Authorities had rather myopically looked at the "letter rather than the intent of the law" and had denied PQA the benefit of the exemptions on the ground that the Dredger was not registered under the MSO, 2001 and hence did not "fly the Pakistani Flag" as mandated in each of the exemptions.

16. Mr. Usmani referred us to Section 14 and to Section 18 of the MSO, 2001 and clarified that it was an obligation on all “ships” owned by citizens of Pakistan and companies, as defined in Sub-Section (8) of Section 2 of the MSO, 2001 (and which includes statutory bodies constituted under a statute of Pakistan,) to be registered and have the Ships tonnage ascertained in the prescribed manner under the provisions of the MSO, 2001 and which thereafter would be classified as a “Pakistani Ship” as defined in Sub-Section (27) of Section 2 of the MSO, 2001.

17. Regarding the procedure for registration, Mr. Usmani referred us to the provisions of the Merchant Shipping (Registration of Ships) Rules, 2002 (hereinafter referred to as the “MSR, 2002”) and which through clauses (1) to (11) of Rule 5 of the MSR, 2002 prescribes the formalities required for registration of a vessel and where after under clause (12) of Rule 5 of the MRR, 2002, a “permanent Pakistani registry” would be issued by the Registrar of Ships for the Pakistani vessels. He contended that it was literally impossible for the PQA to complete this process prior to the ship entering into Pakistan. He clarified that the Dredger is still being used by PQA and now has been registered and is hence flying the Pakistani flag. He clarified that if a purposive approach is taken to the application of these exemptions, then clearly the intention of the Federal Government was not to be surmised on the technicality of the process having been complied with but rather to grant exemption to any company that would be “entitled” to such a registration.

18. Regarding the exemptions claimed it was contended that the requirement for claiming exemption as stated at item No. 40 of SRO.567(1)/2006 dated 5 June 2006 and Item No. 5 of SRO No. 551(I)/2008 dated 11 June 2008 were as follows:

- (i) the vessel must be a Pakistan entity;
- (ii) the vessel must be a purchased by this entity;
- (iii) the vessel should be flying Pakistan flag; and
- (iv) the vessel should be used for the purpose for which it was procured

Applying each of the requirements separately he contended that:

- (a) PQA was a company as defined in clause (a) of Sub-Section (8) of Section 2 of the MSO, 2001 and hence a Pakistani entity;

- (b) Being a Company as defined in clause (a) of Sub-Section (8) of Section 2 of the MSO, 2001, PQA was entitled to have the Dredger registered in Pakistan under Section 14 of the MSO 2001 and to have its tonnage ascertained in the prescribed manner under Section 18 of the MSO, 2001.
- (c) Any ship which is registered under the MSO, 2001 was a "Pakistani ship" as per Sub-Section (27) of Section 2 of the MSO, 2001.
- (d) The Dredger having been purchased by PQA and the **purchase** having been communicated by PQA to the Customs Authorities **and there being no doubt of the entitlement of PQA to have the Dredger registered under the MSO, 2001** the requirement of registration and hence the right to "fly the Pakistani Flag" **was merely symbolic** and all that was required is that at the time when the Dredger was imported into Pakistan it should, under the provisions of the MSO, 2001 **be entitled to fly the flag**.
- (e) as the Dredger was eligible to "fly the Pakistan Flag" on account of its ownership by PQA, the formality of the application for registration had been duly complied with and the fact of the Final Registration being granted on 13 January 2014 should not deprive PQA from availing the benefit of the exemptions of Customs Duty, Sales Tax and Income Tax; and
- (f) the Dredger was being used for the purpose for which it was imported.

On the basis of the above he submitted that as each of the prescriptions of S.R.O.567(1)/2006 dated 5 June 2006, Sale Tax under SRO No. 551(I)/2008 dated 11 June 2008 had been complied with, PQA were entitled to the benefit of each of the exemptions.

19. In conclusion, Mr. Usmani, referring to Article 21 of United Nations Convention on the Law of the Sea, 1982 contended that flying a flag of a nation is merely an indication of the nationality of the vessel and therefore nothing "turned on it" rather, what was important, was that the vessel should be registered in Pakistan and which on the basis of the entitlement

of PQA under the provisions of Section 14 of the MSO, 2001 should be considered as a foregone conclusion. He did not rely on any case law in support of his contentions.

**D. Contentions on behalf of the Respondent No. 3**

20. Ms. Masooda Siraj has entered appearance on behalf of Respondent No.3 and contended that as per the literal interpretation of the exemptions, as the Dredger was not registered under the provisions of the MSO, 2001 at the time it was imported into Pakistan, PQA was not entitled to the benefit of the exemptions as claimed by it. Ms. Siraj did not rely on any case law in support of her contentions.

21. We have heard Mr. Shaiq Usman and Ms. Masooda Siraj and have perused the record.

**E. The Policy, Statute and Statutory Regulatory Orders on the basis of which the Exemption is claimed.**

22. The Pakistan Merchant Marine Policy, 2001 advocated incentives for the import of certain vessels into Pakistan. Amongst the incentives identified was an exemption from the payment of duties and taxes and which was clarified therein in the following terms:

“ ... 4. *Incentives*

*The thrust of this policy is towards encouraging the maritime sector, both private and public, to grow. To achieve the objectives and targets of this policy certain specific incentives have been provided. The main incentives including duty exemptions, concessional tax measures. Fixed taxes, various assurances, simplified rules and deregulation, are:-*

- (i) *Ships and all floating crafts including tugs, dredgers, survey vessels and other specialized crafts purchased or bareboat chartered by a Pakistani entity **and flying the Pakistan flag** shall be exempt upto 2030 from payment of all import duties and surcharges. The above exemptions shall not apply to vessels acquired for demolition purposes. The exemption will, however, be subject to the condition that the ships/crafts so acquired will be used for the purpose for which they were procured and in case such ships/crafts are used for demolition purposes within a period of 05 years of their acquisition, full import duties and other charges applicable to ships purchased for demolition purposes shall be chargeable. ...”*

As can be seen under the Pakistan Merchant Marine Policy, 2001, an exemption from all import dues and surcharges was to be offered, inter alia on a Dredger purchased by a Pakistani entity and **which ship was “flying the Pakistan Flag”**. Premised on Pakistan Merchant Marine Policy, 2001 exemptions were introduced from the payment of customs duties and Sales Tax through Statutory Regulatory Order and from Income Tax through statute each of which are reproduced hereunder:

**(i) Customs Duty - S.R.O.567(1)/2006 dated 5 June 2006**

Pursuant to section 19 of the Customs Act, 1969 SRO No.567(1)/2006 dated 5 June 2006 was issued in respect of exemption from Custom duties in the following terms:

“ ... Islamabad, the 5th June, 2006

NOTIFICATION (CUSTOMS)

S.R.O.567(1)/2006. In exercise of powers conferred by section 19 of the Customs Act, 1969 (IV of 1969) and in supersession of its Notification No.S.R.O.567(1)/2005 dated the 6th June,2005, the Federal Government is pleased to exempt the imported goods specified in column (3) of the Tables below, falling under the HS Codes specified in column (2) of those Tables, from so much of the customs-duty specified in the First Schedule to the said Act, as is in excess of the rates specified in column (4) thereof, subject to the following conditions, besides the editions specified in those Tables, namely:-

The designated/authorized person of the following Ministries, or as the case may be, companies shall furnish all relevant information, as set out in this Notification, on line to the Customs Computerized System "[omitted] accessed through the unique users identifier obtained under section 155d of the Customs Act, 1969, along with the password thereof, namely:-

(a) (Drug Regulatory Agency of Pakistan), in case of imported goods specified under headings A, B and C of Table III;]

(b) Ministry of Industries, Production and Special Initiatives, in case of imported goods specified against serial numbers 7 of Table 1;

(c) Pakistan Steel Mill "(or their contractors), in case of imported goods specified against serial number 5 of Table1;

(d) (M/s Lottee Pakistan PTA Ltd.), in case of imported goods specified against serial number 8 of Table 1; Pakistan Horticulture Board, in case of imported goods specified against serial number

(e) Pakistan Horticulture Board in case of imported goods specified against serial no.24 of Table 1;

(f) commercial airlines registered in Pakistan, in case of imported goods specified against serial no. 34 of Table 1.

(g) manufacturers of 2 and 3 wheelers, in case of imported goods specified against serial number 35 of Table 1; [Omitted]

(h) construction companies, in case of imported goods specified against serial number 37 of Table 1; [and]

(i) Ministry of Livestock and Dairy Development, in case of goods specified against serial number 4A of Table 1.1

3. The importer shall file the Goods Declaration online, through PACCS, in the Collectorates in which the "[Customs Computerized System) is operational, and through a normal hard copy in the Collectorates/Custom-stations in which the "[Customs Computerized System) is not operational as yet. He shall also submit an undertaking that customs duty being short paid as a result of partial exemption availed by him at the time of import y be recoverable in case of any misuse detected at any subsequent stage.

In already computerized Collectorates and Custom-stations where the "[Customs Computerized System] is not yet operational, the Project Director or any other authorized officer shall feed the requisite information about clearance/release of goods under this notification in the "[Customs Computerized System] on daily basis, and the data obtained from the Custom-stations which have not yet been computerized, on weekly basis.

Explanation For the purposes of this clause, where PACCS is not yet operational or where Custom-stations have not yet been computerized, the certificate in the Annexure shall be provided along with the Goods Declaration in person.

TABLE I

| S.NO | HS Code  | Description   | Rate of duty | Condition of Imports   |
|------|--|---|--------------|--|
| (1)  | (2)  | (3)   | (4)          | (5)  |
| 1    | ...  |   |              |  |
|      | 8901.1000<br>8901.2000<br>8901.3000<br>8901.0000<br>8902.0000<br>8904.0000<br>8905.1000<br>8905.2000<br>8905.9000<br>8906.1000<br>8906.9000<br>8907.9000 | <i>Ships and other floating crafts including tugs, survey vessels and other specialized crafts purchased or bare-boat chartered by a Pakistani entity and <u>flying Pakistani flag.</u></i> | 0%           | <i>Exemption shall be available up to the year 2020. Subject to the condition that the ships and crafts are used for the purpose for which they were procured, and in case such ships and crafts are used for demolition purposes, full customs duties and other charges applicable to ships and crafts purchased for demolition purposes shall be chargeable.</i> |

**(ii) Sales Tax - SRO No. 551(I)/2008 dated 11 June 2008**

Pursuant to clause (a) of Sub-section (2) of Section 13 of the Sales Tax Act, 1990, SRO No. 551(I)/2008 dated 11 June 2008 was issued creating an exemption from the payment of sales tax in terms as reproduced hereinunder:

“ ...

| S No. | Description of Goods   | Conditions and Restrictions   |
|-------|--|---|
| (1)   | (2)  | (3)   |
| ...   |  |   |
| 5.    | <i>Ships of gross tonnage of less than 15 LDT and all floating crafts including tugs, dredgers, survey vessels and other specialized crafts <u>purchased or bare-boat chartered by a Pakistan entity and flying the Pakistan flag</u> except the ships or crafts which are acquired for demolition purposes or are designed or adapted for use for recreation or pleasure purposes</i> | <i>Import and Supply thereof upto the year 2020 subject to the condition that the said ship or crafts are used only for the purpose that they were procured and in case such ships or crafts are used for demolition purposes with a period of five years of their acquisition, sales tax application to such ships purchased for demolition purposes shall be chargeable</i> |

**(iii) Income Tax Clause 21 of the Second Part of the Second Schedule of the Income Tax Ordinance, 2001**

In respect of Income Tax an exemption was available in clause 21 of the Second part of the Second Schedule read with section 53 of the Income Tax Ordinance, 2001 as clarified hereinunder:

“ ...

(21) *In the case of any resident person engaged in the business of shipping, a presumptive income tax shall be charged in the following manner, namely:-*

(a) *ships and all floating crafts including tugs, dredgers, survey vessels and other specialized craft purchased or bareboat chartered and flying Pakistan flag shall pay tonnage tax of an amount equivalent to one US\$ per gross registered tonnage per annum; and*

(b) *Ships, vessel and all floating crafts including tugs, dredgers, survey vessels and other specialized craft not registered in Pakistan and hired under any charter other than bare-boat charter shall pay tonnage tax of an amount equivalent to fifteen US cents per tonne of gross registered tonnage per chartered voyage provided that such tax shall not exceed one US\$ per tonne of gross registered tonnage per annum;*

*Provided that the reduction under this clause shall not be available after the 30th June, 2020.*

23. As is apparent each of the exemptions require such a vessel's to be “flying the Pakistani flag” and which right is conferred on a vessel as an incident of it being registered under the provisions of the MSO, 2001 with the Registrar of Shipping, Mercantile Marine Department. The prescriptions to qualify for registration of a Pakistani Ship are clarified in Section 13 of the MSO, 2001 and which are as hereinunder:

- “ ... 13. Qualification for registration of Pakistan ships.
- (1) For the purposes of this Ordinance, a ship may be registered as a Pakistani ship if it is owned by persons of the following description, namely,-
- (a) citizens of Pakistan by birth or by migration;
- (b) persons having acquired citizenship of Pakistan by registration under the Pakistan Citizenship Act, 1951 (II of 1951);
- (c) companies having their principal place of business in Pakistan and which conduct operation and management of the ship from Pakistan; or
- (d) any individual or company permitted by Federal Government.
- (2) A ship on bareboat or demise charter for a period of not less than six months may be registered as a Pakistani ship in the name of a persons provided that such a person falls under any of the description given in clauses (a) to (d) of sub-section (1) and subject to condition as may be prescribed.
- (3) A bareboat charter registry may be kept suspended for a period of charter, where Pakistani ships are bareboat chartered out to a person other than Pakistani Nationals on conditions as prescribed.
- (4) Citizens of Pakistan by birth or by migration or Companies have their principal place of business in Pakistan which are conducting operation and management of ships from Pakistan or any other individual Company permitted by Federal Government, may obtain Second Registry of ships or other crafts registered abroad in their names provided that this Registry shall be for such period as the Government may prescribe.”

As PQA comes within the definition of the expression “company” as defined in clause (a) of Sub-Section (8) of Section 2 of the MSO, 2001 there can be no dispute as to its right to have a vessel owned by it to be registered under the MSO, 2001.

24. In respect of the registration of a vessel, Sub-Section (1) of Section 14 of the MSO, 2001 obligates any ship owned by a “company” to be registered by prescribing that:

- “ ... 14. Obligation to register ships.
- (1) Ships owned by citizens of Pakistan and companies shall be registered under this Ordinance. “

A ship once registered would thereafter be classified as a “Pakistani Ship” within the meaning of that expression as made in Sub-Section (27) of Section 2 of the MSO, 2001 which reads as hereinunder:

- “ ... “Pakistani ship” means a ship registered as such under this Ordinance.”

Where a ship is purchased outside of Pakistan, Section 29 of the MSO, 2001 prescribes that:

“ ... 29. *Provisional certificate for ships becoming Pakistani owned abroad.*

*If at a port outside Pakistan, and not being a port of registry established under this Ordinance, a ship becomes the property of persons qualified to own a Pakistani ship, the Pakistan consular officer there may grant to her master, on his application, a provisional certificate, stating,---*

*(a) the name of the ship;*

*(b) the time and place of her purchase and the names of her purchasers;*

*(c) the name of her master; and*

*(d) the particulars respecting her tonnage, build and description which he is able to obtain.*

*and shall forward a copy of the certificate at the first convenient opportunity to the Registrar of Shipping, Mercantile marine Department, Karachi, who upon receipt will issue a certificate of registry.”*

As such where a ship is purchased outside of Pakistan, there is no impediment for the ship to be registered as a “Pakistani Ship” as a “Provisional Certificate” can be issued under Section 29 of the MSO, 2001 by the Pakistan Consular Officer to the Master of the Vessel and which when forwarded to the Registrar of Shipping Mercantile Marine Department, Karachi would obligate that authority to issue a Provisional Registration Certificate thereby permitting the vessel to “Fly the Pakistan Flag”.

25. The procedure for registration of a ship is elaborated in Rule 5 of the MSR, 2002 and which prescribes that:

“ ... 5 *Registration procedure-*

*(a) The registration of Pakistani Ships shall be done by Principal Officer (Registrar of Ships), Mercantile Marine Department, Karachi, on prescribed application form by the persons qualified to own ships under M.S.O. 2001 as given in Annex-A, Declaration shall be signed before the Registrar of Ships by the Applicant.*

*(b) Every name to be used for a Pakistani vessel shall be approved by the Directorate, of Signals, Naval Headquarters, Islamabad. This shall be applicable even if there is no change in the name of vessel from its previous registry. More than one name may be submitted for approval in the order of preference. After approval of name an advertisement at least in the one daily newspaper shall be published for public notice.*

*(c) The call sign or signal letters shall be issued by the registrar of ships at the time of issuance of Certificate of Registry and the owner of a ship shall also obtain Mobile Station License to operate the ship board radio station while vessels equipped with, GMDSS are required to obtain the Maritime Mobile Serving identity (MMSI) number from the Pakistan Telecommunication Authority Provided that the ships will be exempt from such formalities if there is no requirement for the vessel to be fitted with any radio station.*

*(d) The following requirements shall be fulfilled as to ownership of a Pakistani ship or vessel-*

(i) in case of individual, proof of proprietorship, partnership or association of persons, national identity cards, national tax number and place of business shall be supplied,

(ii) in case of body corporate, a certified copy of memorandum and articles of association, certificate of incorporation, certificate of commencement of business, list of directors with their nationality and address, and place of business in Pakistan shall be supplied,

(e) The following shall be required as an evidence of ownership of a vessel-

(i) an original copy of the ownership deed or documents, and

(ii) builders certificate shall be required for a new vessel and any other vessel, a certified transcript of its former registry or similar other document showing the previous ownership and the bill of sale duly executed shall be required. If there shall be intervening changes of ownership, all the intermediate bill of sale shall also be produced showing the continuity of title;

(iii) provided that a builder's certificate or bill' of sale which is executed outside Pakistan shall be notarized and endorsed by the Pakistan Consulate of that country.

(f) A copy of the full term Tonnage Certificate issued by Mercantile Marine Department, Karachi, or one of the authorized classification societies in accordance with the provisions of the Merchant Shipping (Tonnage) Rules, 2002, shall be produced, if required.

(g) A copy of the full term classification certificate issued by one of the authorized classification societies may be accepted as evidence of seaworthiness.

(h) When applicable, copies of the vessels valid statutory certificate such as passenger ship safety, cargo ship safety construction, cargo ship safety equipment, cargo ship safety radio, International load line, international oil pollution prevention, noxious liquid substances document of compliance, safety management certificate shall be produced:

Provided that the certificates shall be valid for at least for three month's period,

(i) Evidence of cancellation of the former registry shall be required in all cases where the vessel, at any point in time, has been registered in, another country. Such evidence may be in the form of Deletion Certificate or any other form as the case may be, issued by the last flag Government.

(j) A certified copy of the carving and marking note issued by registrar of ships and certified by a surveyor from the Mercantile Marine Department or one of the authorized classification society's shall also be required, where applicable.

(k) Attested photocopies of the following documents shall also be required for purposed of record and reference-

- (a) general arrangement plan
- (b) accommodation plan
- (c) tonnage certificate
- (d) previous ships registry; and

(e) All the other statutory certificates required under SOLAS, MARPOL and other IMO Conventions applicable to the concern type of ship.

(l). After completing all formalities and production of required documents mentioned und (1) to (11), permanent Pakistani registry shall be sued by the registrar of ships.

(m) A certificate of registry shall be issued to a ship on becoming Pakistani abroad in the following cases

- (i) When at foreign port where a ship becomes the property of a person qualified to own a Pakistani ship a permanent Pakistani ship, a permanent Pakistani ship registry and carving or marking note shall be prepared by the registrar and forwarded to the Pakistan consular officer at the port of delivery, who after certification of carving or marking of the vessel shall deliver the registry to the owner; and
- (ii) in case of any deficiency in production of all required document under clause 5, subject to the alternative acceptable to the registrar, a provisional certificate of registry shall be issued."

26. It would therefore seem that ships located outside of Pakistan can be registered by a "permanent Pakistani Ship registry" preparing a "carving or marking note" and which would thereafter be forwarded by the registry to a Pakistan Consular officer at the port outside of Pakistan where the Ship was berthed and who would after certifying the carving or marking would deliver the registry to the owner abroad. Alternatively, in the event that there was any deficiency in the documentation as prescribed in Rule 5 of the MSR, 2002 a provisional certificate could also be issued.

#### **F. The Answer**

27. After considering the procedure that has been identified in Rule 5 of the MSR, 2002, It would seem the PQA were negligently oblivious of the requirement of registering the Dredger in Pakistan prior to its import into Pakistan so as to claim the exemptions contained in SRO No. SRO.567(I)/2006 dated 5 June 2006, SRO No.551(I)/2008 dated 11 June 2008 and clause 21 of the Second Schedule read with section 53 of the Income Tax Ordinance, 2001 of "flying the Pakistan Flag" as we see no reason as to why PQA would not have applied for and been granted either a permanent registration or a provisional registration prior to the Dredger being brought into Pakistan, either of which would have, to our mind, entitled them to claim the exemptions as contained therein.

28. In the decision reported as **Messrs Army Welfare Sugar Mills Ltd and others vs. Federation of Pakistan and others**<sup>1</sup> the Supreme Court

<sup>1</sup> 1992 SCMR 1652; Similar opinions have been given by the Supreme Court of Pakistan in the decision reported as **Central Board Of Revenue, Islamabad and Another vs. WAPDA and another** PLD 2014 SC 766; **Collector Of Custom FBR and another vs. Messrs Fitter Pakistan**

of Pakistan opining on this principle of interpretation relating to the interpretation of clauses granting exemptions in respect of fiscal statutes has held that:

“ ... 42. We are not inclined to agree with Ch. Ijaz Ahmad that the above quoted para. (d) of the Central Board of Revenue's instructions and the above para. 82(iii) of the Finance Minister's Budget. Speech can be equated with a legislative instrument sufficient to take away a vested right, if any. However, it is true that the grant of exemption from payment of excise duty under section 12-A of the Act is a discretionary matter for the Government and that there are two basic principles of construing a provision of a statute involving exemption from payment of a tax, namely, the first rule is that the burden of proof is on the person who claims exemption. The second rule is that a provision relating to grant of tax exemption is to be construed strictly against the person asserting and in favour of taxing officer.”

A corollary of the same principle of interpretation was made by the Supreme Court of Pakistan in the decision reported as **Oxford University Press vs Commissioner Of Income Tax, Companies Zone-I, Karachi and Others**<sup>2</sup> wherein it was opined that:

“ ... 9. The principles relating to the proper interpretation and application of exemption clauses in fiscal legislation are well established and require only a brief recapitulation. As correctly submitted by learned counsel for the appellant, as presently relevant these are as follows. Firstly, the onus lies on the taxpayer to show that his case comes within the exemption. Secondly, if two reasonable interpretations are possible the one against the taxpayer will be adopted. But, thirdly, if the taxpayer's case comes fairly within the scope of the exemption then he cannot be denied the benefit of the same on the basis of any supposed intention to the contrary of the legislature or authority granting it. It is in light of these principles that Clause 86 must be interpreted and applied”

If one is to examine the exemptions that had been advocated for in the Pakistan Merchant Marine Policy, 2001 and which subsequently were incorporated into law through S.R.O.567(1)/2006 dated 5 June 2006, SRO No. 551(I)/2008 dated 11 June 2008 and in Clause 21 of the Second Part of the Second Schedule read with Section 53 of the Income Tax

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(Pvt.) Ltd. 2020 SCMR 1157; and by this Court in the decisions reported as **Orient Straw Board & Paper Mills Limited, Karachi vs. Commissioner of Income Tax, Hyderabad** 1992 PTD 1369; **Messrs Dada Steel Mills (Pvt.) Ltd., Karachi vs. Central Board of Revenue through Chairman, Islamabad** 2007 PTD 369;

<sup>2</sup> 2019 SCMR 235, See also the decisions of the Supreme Court of Pakistan reported as; **Liaquat National Hospital vs. Province Of Sindh and Others** 2019 SCMR 865; **Pakistan Match Industries (Pvt.) Ltd. and Others vs. Assistant Collector, Sales Tax And Central Excise Mardan And Others** 2019 SCMR 906 and decisions of this Court reported as **Pakistan Cricket Board through Manager, National Stadium Karachi and others vs. Director- General Excise and Taxation and others** 2011 CLC 1894; **A.P Moller through Agent vs. Taxation Officer of Income Tax and another** 2011 PTD 1460; **Commissioner Inland Revenue, Zone-II, Karachi vs. Messrs Kassim Textile Mills (Pvt.) Limited, Karachi** 2013 PTD 1420; **Liaquat National Hospital vs. Province Of Sindh And Others** PLD 2015 Sindh 123; **Messrs Getz Pharma (Pvt.) Limited through Authorized Person and Others Vs. Federation of Pakistan through Secretary and Others** 2019 PTD 2209;

Ordinance, 2001 each clearly prescribes that to avail the benefit of each of the exemptions contained therein in respect of customs duties, sales tax and income tax it was necessary for the Dredger to be “flying the Pakistan Flag” i.e. be registered under Section 14 or Section 29 of the MSO, 2001 read with Rule 5 of the MSR, 2002. Now, it is an undisputed fact that the Dredger had, neither on 5 January 2012, being the date of the import of the Dredger into Pakistan nor on 9 February 2012, being the date when the Goods Declaration was filed by PQA, been registered. Such a requirement being a condition precedent for availing such an exemption, even on the broadest literal interpretation of each the provisions, we cannot see how such an exemption could be claimed by PQA thereunder. We are also not inclined to agree with the contention of Mr. Shaiq Usmani, that it was not possible to register the vessel prior it being brought into Pakistan as clearly, at the very least, a provisional registration could have been obtained by PQA prior to the import of the Dredger into Pakistan so as to permit it to fly the Pakistan flag prior to it entering Pakistan. Similarly, the additional objection that the Dredger was required to be inspected in Pakistan can also not be accepted as clearly such an action could well have taken place at the port at which the Dredger was berthed and whereafter a Provisional Registration Certificate could have been procured by PQA.

29. It seems that being aware of such a position, PQA has attempted to impress on the Court to take a more purposive approach to the interpretation of these provisions and has asked the Court to permit PQA to claim each of the exemptions contending that as obtaining the registration of the Dredger was a formality a purposive approach to the interpretation of these provisions should be adopted and each of the exemptions should be granted to PQA on the basis of their entitlement to registration. While such an argument would clearly be contrary to the decisions of the Supreme Court of Pakistan as reproduced hereinabove, we can only add that while interpreting Statutory Regulatory Orders, the Supreme Court of Pakistan has in the decision reported as **Collector of Customs, Model Customs Collectorate, Peshawar vs. Waseefullah and others**<sup>3</sup> also held that:

“ ... 9. The abbreviation "S.R.O." stands for "Statutory Regulatory Orders" which in fact refers to genres of government regulations disseminated through delegated powers under the statutory regime. Insofar as it relates to taxing statutes, the concessions or exemptions may be granted through statutory regulatory orders; it may also impose tax in the form of additional duties and regulatory duties including exemptions and may lay down the procedural niceties to implement the laws and amendments in an existing S.R.O. It is clear that the S.R.O. only

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<sup>3</sup> 2023 SCMR 503

*classifies HEVs with PCT headings without drawing any distinction with regard to fully or semi hybrid, or used or new vehicles, or any specification of large batteries. Anything which tried to be inferred extraneously or beyond the scope or tenor of the S.R.O. was not permissible under any rule of interpretation. According to well-settled canons and rules of interpretation laid down by the superior Courts time and again, the indispensable and imperative sense of the duty of the Court in interpreting a law is to find out and discover the intention of the legislature, and then endeavor to interpret the statute in order to promote or advance the object and purpose of the enactment. The S.R.O. requires purposive interpretation or construction which complements its effect to the purpose by following conscientious and exact meaning. S.R.Os are issued fundamentally in the aid of substantive principles of law set out in the parent legislation and to give effect to administrative directions and instructions for the implementation of the law. If the words used are capable of one construction only, then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. If the words of the section are plain and unambiguous, then there is no question of interpretation or construction. The duty of the Court then is to implement those provisions with no hesitation. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the Courts would prefer to adopt the latter construction."*

To our mind even if a purposive approach is taken to the interpretation of each of the exemptions, premised on the Pakistan Merchant Marine Policy, 2001, even then there is only one interpretation that can be cast and which is that the benefit of each of the exemptions could only be availed where the Dredger had been registered with the Registrar of Shipping Mercantile Marine Department and hence we have no hesitation in answering the question in the affirmative in favour of the Revenue and as against the Applicant. As a consequence, thereof, this Reference Application is dismissed.

30. Let a 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

Karachi dated 16 October 2024