

Stereo.HCJDA 38.
JUDGMENT SHEET.
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Custom Reference No.28736 of 2024

The Director Customs House, Vs. M/s Duty Free Shop
Lahore etc. Limited Sialkot, etc.

JUDGMENT

Date of hearing:	24.09.2025
Applicant-department by:	Rana Muhammad Mehtab, Advocate for the applicant-department
Respondent-taxpayer by:	Mr. Umar Ilyas Khan, Advocate.

MALIK JAVID IQBAL WAINS, J. This judgment shall decide the instant Custom Reference Application along with connected Reference Applications bearing Nos.28738 of 2024, 28739 of 2024, 28741 of 2024, 29457 of 2024, 29458 of 2024, 29459 of 2024, and 29460 of 2024, filed by applicant-department and respondent-taxpayer, as all these matters involve common question of law, though arising from the separate judgments.

2. The instant Reference Application, being the lead case, filed under Section 196 of the Customs Act, 1969 (hereinafter “**the Act**”), by the Director Custom House, Lahore (“**applicant-department**”) against M/s Duty Free Shop Limited, Sialkot (“**respondent-taxpayer**”) seeking opinion of this Court on the following question of law, purported to have arisen from the judgment dated 28.11.2023 (hereinafter “**impugned judgment**”) passed by the learned Customs Appellate Tribunal, Bench-I, Lahore (hereinafter “**the Appellate Tribunal**”): -

“Whether the learned Tribunal could pass the impugned judgment having difference of opinion between the learned Members without resorting to mandatory procedure provided under sub section (5) of Section 194-C of the Customs Act, 1969?”

3. Conversely, in connected Reference Application, second lead case, bearing No.29457 of 2024, the respondent-taxpayer has approached this Court seeking a declaration to the effect that the opinion rendered by the

learned Member (Judicial-I) be treated as the majority view of the learned Appellate Tribunal, in light of the orders dated 15.01.2024 and 23.01.2024 passed by the learned Referee Member.

4. Briefly stated, the facts of the lead case are that during audit of respondent-taxpayer, the discrepancies/irregularities and evasion of duty and taxes for the period from July 2006 to June 2007 were detected in record maintenance, Sales and Stock Registers, Mismatching of Sales Record, Suppression of Sales Value, Assessable Value being lower than the import value and sales value, removal of goods in commercial quantity, sales against fake invoices and non-deposit of foreign exchange. Resultantly, show cause notice was issued by the applicant-department to respondent-taxpayer. After adjudicating the matter, Collector of Customs (Adjudication), Lahore vide Orders in Original Nos.34, 35, 36 & 37 of 2014, dated 23.06.2014 upheld the charges contained in the show cause notice and directed respondent-taxpayer to pay the evaded amount of duty and taxes and also imposed penalty upon the respondent.

5. Feeling aggrieved, the respondent-taxpayer filed an appeal before the Appellate Tribunal, which after hearing arguments from both parties, reserved judgment on 11.09.2023, and was subsequently announced on 28.11.2023. The impugned judgment was rendered by the Member (Technical), wherein the appeal filed by respondent-taxpayer was dismissed. However, the second Member i.e. Member (Judicial), instead of concurring with the aforesaid judgment, recorded a dissenting note and allowed appeal of respondent-taxpayer.

6. In view of the difference of opinion, the Chairman of the Appellate Tribunal referred the matter to another Member (Technical) of the Lahore Bench, acting as the Referee Member. The Referee Member concurred with the view expressed by the Member (Judicial), through two separate orders dated 15.01.2024 and 23.01.2024, thereby resulting in the appeal being allowed.

7. Learned counsel for the applicant-department contends that the requirements of Section 194-C(5) of the Act, have not been complied with.

It is argued that where the members of the Appellate Tribunal are divided in their opinion, the law enjoins upon them to formulate the precise points of divergence and refer the matter to the Chairman for nomination of a third Member to resolve the difference. In the present case, however, the points of difference were not duly formulated and as such the prescribed procedure was not followed. Learned counsel maintains that the impugned judgment suffers from legal infirmity and is not sustainable in law. Reliance has been placed on the judgments rendered by this Court in Messrs VINTAK PIPE INDUSTRIES through Proprietor Versus CUSTOMS APPELLATE TRIBUNAL and 3 others (2018 P T D 1823) and DEPUTY COLLECTOR SALES TAX versus COLLECTOR, EXCISE AND SALES TAX and others (2002 P T D 2570).

8. Learned counsel for the respondent-taxpayer has supported the impugned order passed by the Referee Member, contending that the Chairman of the Appellate Tribunal, after ensuring due compliance with the mandatory requirements of Section 194C(5) of the Act, lawfully referred the matter to the Referee Member for resolution. It is further submitted that the Referee Member concurred with the opinion expressed by the Judicial Member through two separate orders dated 15.01.2024 and 23.01.2024. Hence, no illegality can be attributed to the rendering of the impugned decision. The learned counsel has, therefore, prayed that the impugned judgment be declared as the majority opinion of the Tribunal, as constituted by the Judicial Member and the Referee Member.

9. We have heard the learned counsel for the parties and have carefully examined the record.

10. The moot point requiring determination by this Court is whether the difference of opinion between the Member (Technical) and the Member (Judicial) of the Appellate Tribunal was resolved in strict conformity with the mandatory procedure prescribed under Section 194-C(5) of the Act; whether the points of difference were properly formulated by the then Members; whether the subsequent referral to the Referee Member was duly made in accordance with law; and whether the two separate orders

dated 15.01.2024 and 23.01.2024 passed by the Referee Member were in compliance with the statutory requirements of the majority opinion of the Tribunal.

11. Perusal of the impugned judgment passed by Member (Technical) of the Appellate Tribunal, it is observed that a detailed judgment dated 28.11.2023, comprising 24 pages was delivered, whereby the appeals filed by the respondent-taxpayer were dismissed, and the Orders-in-Original passed by the Adjudicating Authority/Collector (Appeals) were upheld. Notably, the Member (Judicial) authored a separate dissenting note spanning 40 pages, wherein he accepted the appeals and declared the impugned orders passed by the authorities below to be void ab initio and ultra vires.

12. The Referee Member, after providing an opportunity of hearing to both parties on 15.01.2024, concurred with the opinion expressed by the Member (Judicial). However, subsequently, on 23.01.2024, another order was passed by the Referee Member, whereby the appeals filed by the respondents were allowed, resulting in the setting aside of the Orders-in-Original passed by the Adjudicating Authority. It is significant to note that both orders issued by the learned Referee Member comprise only a single page each and are entirely devoid of any reasoning or discussion addressing the points of difference between the two original Members. Furthermore, the subsequent order dated 23.01.2024 contains no explanation as to why a second order was passed, nor does it furnish any reasons for departing from the earlier concurrence.

13. Now, the pivotal question emerging for determination in the present reference is whether, upon the occurrence of a difference of opinion between the learned Members of the Appellate Tribunal, the points of difference were duly formulated in accordance with the mandatory requirements of Section 194-C(5) of the Act, and whether the Referee Member proceeded to address and decide the matter in conformity with the procedure prescribed therein. For better understanding, the relevant provision is reproduced below:

Section 194-C – Procedure of Appellate Tribunal

“(5) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ and the case shall be referred by the Chairman for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case including those who first heard it.”

Provided that, where the members of a Special Bench are equally divided, the points on which they differ shall be decided by the Chairman.

(Underlined for supplying emphasis)

14. Upon perusal of the record and a plain reading of Section 194-C(5) of the Act, it is evident that the statutory provision contemplates a specific procedure to be followed in the event of a difference of opinion between the Members of a Bench. The legislative intent is unambiguous, the Members shall first formulate the precise point or points of difference, which shall then be referred by the Chairman of the Appellate Tribunal to one or more other Members for resolution. The final decision must reflect the opinion of the majority of the Members who have heard the case, including those who originally constituted the Bench. This framework ensures adjudication in accordance with law and upholds the principle of collective decision-making.

15. In the present matter, however, the Appellate Tribunal has failed to adhere to the mandatory procedural requirements set forth under the above provision. The Members of the original Bench did not record or frame the specific point or points on which they differed, as required under Section 194-C(5) of the Act. In absence of duly formulated points of difference, the matter was nonetheless referred by the Chairman to a Referee Member, contrary to the statutory mandate, the Referee Member proceeded to dispose of the matter without identifying or addressing any specific point or points of divergence and without assigning independent or reasoned justification for concurring with either Member of the original Bench.

16. These lapses amount to a clear violation of the mandatory procedure prescribed by law. Section 194-C(5) of the Act expressly provides that in the event of disagreement among Members, they shall articulate the point or points on which they differ. Only such point or points shall be referred by the Chairman for hearing by one or more other Members of the Appellate Tribunal. The matter is then to be decided in accordance with the opinion of the majority of Members who have heard the case, including those who originally heard it. In view of the foregoing, the procedure adopted by the Appellate Tribunal is legally unsustainable and is vitiated by non-compliance with statutory requirements.

17. Further, the record discloses three distinct and mutually inconsistent opinions: (i) the original judgment authored by the Member (Technical), (ii) the dissenting note of the Member (Judicial), and (iii) the brief, unreasoned orders of the Referee Member. These cannot collectively constitute a “majority opinion” as contemplated under Section 194-C(5) of the Act, as the majority must emerge from a procedurally valid formulation of points of difference and their resolution, which is absent here. Such a course of action undermines the statutory structure, defeats the legislative intent behind collective adjudication, and constitutes a material irregularity going to the root of the proceedings.

18. Accordingly, the impugned judgment is vitiated by procedural illegality and cannot be sustained in law. Reliance is placed on the judgment rendered by this court reported as Messrs VINTAK PIPE INDUSTRIES through Proprietor Versus CUSTOMS APPELLATE TRIBUNAL and 3 others (2018 P T D 1823), which reiterates and fortifies the principle earlier enunciated in judgment passed by this Court in DEPUTY COLLECTOR SALES TAX versus COLLECTOR, EXCISE AND SALES TAX and others (2002 PTD 2570). Relevant portion of said judgment is reproduced hereinafter: -

“4(3) In the light of provisions of subsection (5) of section 194-C of the Customs Act, 1969 a reference to learned Chairman for referring the matter to a third Member could not have been made by the learned Member without recording the point or points on which they differed. These

points are required to be formulated in order to identify the exact nature and extent of difference of opinion between the Members. The formulation of these points is in the nature of issues framed in civil suits bringing out the material proposition of law or fact on which the learned Members had differed.

On formulation of all these points which has to be by agreement of the Members and signed by them the matter is submitted to the learned Chairman "for hearing on such point or points by one or more of the other Members of the Tribunal". Once this has been done and the third Member has heard the parties and expressed his opinion the point or points are to be decided in accordance with the opinion of the majority. The final result or decision in accordance with the opinion of the majority is to be recorded and signed by all the Members who had heard the case.

19. In the present case, both Members of the Appellate Tribunal, whose opinions were at variance, have since been retired. In the absence of any specifically formulated points of difference between them and considering the detailed and independent reasoning set out in their respective opinions, it is not feasible at this stage for the Appellate Tribunal to identify or frame such points from their extensive and divergent findings. Most importantly, the governing statute does not prescribe any procedural mechanism to address such a situation. Consequently, this Court is left with no alternative but to set aside the impugned judgment/orders passed by the learned Members of the Tribunal.

20. For the reasons recorded above, the impugned judgment passed by the learned Member (Technical) of the Tribunal, including the orders rendered by the dissenting Member and the Referee Member are hereby set aside. The matter is remanded to the Chairman of the Appellate Tribunal, where the appeals filed by the respondent-taxpayer shall be deemed to be pending before the Tribunal, who shall proceed to fix them for a fresh hearing and decide the same in accordance with law. In the event that a difference of opinion again arises between the Members hearing the matter, the Chairman shall ensure strict compliance with the mandatory requirements of Section 194-C(5) of the Act.

21. The instant Reference Application along with connected reference applications stand **disposed of** in the above terms, and proposed question

is answered accordingly. The Office is directed to send a copy of this judgment to the Customs Appellate Tribunal, Lahore, in compliance with Section 196(10) of the Act.

(ABID AZIZ SHEIKH)
JUDGE

(MALIK JAVID IQBAL WAINS)
JUDGE

Approved For Reporting

JUDGE

JUDGE

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