

Form No: HCJD/C-121.

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

JUDICIAL DEPARTMENT

CUSTOMS APPEAL. No. 20 of 2003

Collector of Customs

Vs

M/s Askari Cement Limited

APPELLANT BY:

Dr. Farhat Zafar & Sheikh Anwar-ul-Haq, Advocates.

RESPONDENT BY:

Mian Tauqeer Aslam, Advocate.

DATE OF HEARING:

21-12-2015.

ATHAR MINALLAH, J.-

Through this consolidated order we shall decide the instant Customs Appeal filed *under Section 196 of the Customs Act 1969* (hereinafter referred to as the "**Act of 1969**") alongwith Customs Appeal No.13 of 2003, as common questions of law have been proposed for our consideration.

2. The facts, in brief, are that the respondents are juridical persons, inter-alia, engaged in the manufacture and sale of cement. In order to establish their respective

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manufacturing units they had imported the manufacturing plant and machinery, which included "refractory bricks". The refractory bricks imported by the respondents were of various specifications i.e. PERILEX-83 and KORONEX-30, 40 & 70. At the time of clearance the 'refractory bricks', imported from Germany, were declared as falling under PCT headings 6902.1090 and 6902.2090, chargeable to customs duty at the rate of 10% ad-valorem. It is pertinent to mention that the declared PCT headings relate to 'refractory bricks', which are capable of resisting temperature at or above 1600 °C. The department sought expert opinion from M/s Fecto Cement Limited, M/s Heavy Mechanical Complex Taxila, as well as the Pakistan Council of Scientific and Industrial Research (hereinafter referred to as "**PCSIR**"). After receiving the reports, the department interpreted the same in a manner which would have classified the imported 'refractory bricks' under PCT heading 6902.1010 attracting customs duty at the rate of 30% instead of 10%. Respective *Show Cause Notices* were served on the respondents and the same were adjudicated after affording an opportunity of hearing. The respective adjudicating orders were assailed by filing appeals before the Customs, Central Excise and Sales Tax Appellate Tribunal, Islamabad Bench (hereinafter referred to as the "**Tribunal**"). The learned Tribunal, after considering the reports and thoroughly dilating upon the factual controversy, allowed the appeals and declared that the 'refractory bricks' had been correctly classified by the respondents under PCT heading 6902.1090 and 6902.2090, which were chargeable to 10%

customs duty. The instant references have been filed by the department proposing the following questions of law:-

- i. Whether a fact which is vehemently contested and not admitted can be declared as an admitted fact and whether the judgment based on such a fact is sustainable.*
- ii. Whether the learned Tribunal erred in law by declining to exercise its jurisdiction by not looking into the report of PCSIR dated 22-05-2002.*
- iii. Whether the three reports considered by the learned Tribunal have not been misread and misinterpreted.*
- iv. Whether the Central Board of Revenue is vested with the exclusive jurisdiction to classify a product for the purposes of PCT heading.*

3. The learned counsel for the department has contended that; the learned Tribunal has taken into consideration the second report of the PCSIR and, therefore, erred in determining the material question of fact; the general rules for interpretation of the First Schedule to the Act of 1969 provides that for the purposes of classification of a heading in

the First Schedule, the Board i.e. the then Central Board of Revenue, was to be the final authority; the learned Tribunal was not justified in determining the classification and should have left the matter to be decided by the Central Board of Revenue.

4. On the other hand, the learned counsel for the respondents has argued that the determination of the PCT heading is a mixed question of law and facts and, therefore, the hierarchy of forums provided under the Act of 1969 are empowered to make a determination; no question of law arises out of the judgments of the learned Tribunal; the learned Tribunal has rendered detailed and well reasoned judgments; the factual aspects have been determined after taking all the relevant matters into consideration.

5. The learned counsels have been heard and the record perused with their able assistance.

6. It is not denied that the dispute relates to the determination of the PCT heading in respect of the 'refractory bricks' imported by the respondents. It is also not denied that determination of a PCT Heading of imported goods is a mixed question of law and facts i.e. whether in the instant case the 'refractory bricks' imported by the respondents would fall under PCT heading 6902.1090 and 6902.2090 attracting customs duty @ 10% or PCT heading 6902.1010 attracting customs duty @ 30%. The department had obtained opinions from three entities i.e. M/s Fecto Cement Limited, M/s Heavy Mechanical Complex Taxila and Pakistan Council of Scientific and Industrial Research

Lahore. The learned Tribunal had not only taken into consideration all the three reports but had elaborately analyzed the findings recorded therein. The learned Tribunal had also taken into consideration the literature/specifications of the manufacturers and opinions of experts which had been placed on record. The learned Tribunal, after examining the record, had concluded that the reports obtained from the three entities had been misread by the learned Collector (Adjudication). The learned Tribunal had also correctly interpreted the description given in the First schedule in the case of the relevant PCT headings. The learned Tribunal had, therefore, made a determination on the factual side after taking into consideration the relevant matters. It was held that the respondents had correctly declared the imported 'refractory bricks' under PCT heading 6902.1090 and 6902.2090. The learned counsel, appearing on behalf of the department, has not been able to show that there was any misreading or non-reading on part of the learned Tribunal in determining the factual controversy or that the findings are perverse. The factual controversy i.e. whether the 'refractory bricks' were of a kind that were capable of resisting temperatures above 1600 °C had been determined by the learned Tribunal and, therefore, the same has attained finality. The report of the PCSIR, dated 23-05-2002, affirms that the respondents have correctly declared the relevant PCT heading. The learned Tribunal has elaborately discussed the findings and the same have not been found to suffer from any infirmity.

7. It is noted that only a question of law arising out of an order passed by the learned Tribunal can be raised through an appeal under section 196 of the Act of 1969. As noted above, the findings of the learned Tribunal on the factual side have not been found to be perverse and, therefore, have attained finality. The questions at serial number (i) and (ii) relate to questions of fact determined and decided by the learned Tribunal and, therefore, the same are not required to be answered while exercising jurisdiction under section 196 of the Act of 1969. However, to the extent of the question at serial number (iii) we answer the same in the negative.

8. The question at serial number (iv) raised in the instant reference i.e. whether the Board is vested with the exclusive jurisdiction to classify a product for the purposes of a PCT heading raises an important question of law for our consideration. The learned counsel for the department has relied on the 'General Rules for Interpretation of the First Schedule' of the Act of 1969. The said Rules are part of the First Schedule of the Act of 1969. In order to answer the question it would be necessary to appreciate the PCT headings in the context of the scheme of the Act of 1969. PCT is an abbreviation for 'Pakistan Customs Tariff'. The First Schedule of the Act of 1969 enumerates the PCT headings. There are various columns in the First Schedule and it, inter-alia, includes two essential elements i.e. the nomenclature or description of

the goods and the corresponding tariff rate. The description relating to each PCT heading determines as to what goods would fall there under. The goods, therefore, are identified as falling under a particular PCT heading based on the description or the nomenclature thereof. It is also noted that the Pakistan Customs Tariff is based on the Harmonized Commodity Description and Coding System, popularly known as Harmonized System. The Coding is indicated in numerals only and are subdivided according to the description of the goods that would fall under the relevant PCT headings of the Harmonized System. As an illustration, the columns relevant to PCT headings in the instant case are reproduced as follows.

H.No.	Sub H.No.	Description of Goods	Customs Duty	<u>S. Tax on</u> Import Supply	
<i>Assessable rates on account of Exemption or Regulatory Duty etc</i>					
Exmpetion: Bricks and cement blocks, falling under Heading No. 6901.0000. (<i>See Sixth Schedule to the Sales Tax Act, 1990</i>).				Free	Free
69.02		Refractory bricks, blocks, tiles and similar refractory ceramic constructional goods, other than those of siliceous fossil meals or similar siliceous earths.			
	—	Containing by weight, singly or together, more than 50% of the elements Mg, Ca or Cr, expressed as MgO, CaO or Cr ₂ O ₃ :			
6902.1010		Capable of resisting temperature upto 1600°C	30% ad val.	15%	15%
6902.1090		Other	10% ad val	15%	15%
	—	Containing by weight more than 50% of alumina (Al ₂ O ₃), of silica (SiO ₂) or of a mixture or compound of these products:			
6902.2010		Capable of resisting temperature upto 1600°C	30% ad val.	15%	15%
6902.2090		Other	10% ad val.	15%	15%

9. The first column mentions the main heading such as 69.02 while the second the sub headings. The description of the goods falling under a particular PCT heading is given in column 3 while the rate of customs duty and sales tax in columns 4 and 5 respectively. The World Customs Organization has published 'Explanatory Notes' which contains official interpretation and serves as a guide for determination of the headings. The determination of classification of the headings, therefore, involves interpretation of the description based on deciding questions of law as well as facts. The august Supreme Court in the judgment of "Federation of Pakistan through Secretary, Revenue Division, F.B.R. and others vs. Messrs Millennium Pharmaceutical Company, Karachi and others" **2011 PTD 690** while considering the question of classification of a PCT heading has observed as follows:-

"Needless to observe the question as to which of the PCT heading was relevant being disputed required inquiry for appropriate determination."

10. Moreover, the question relating to disputes and the determination of PCT headings have been considered and determined by the hierarchy of forums provided under the Act of 1969 rather leaving it to the exclusive domain of the Board and treating the latter's determination as final. Reference in this regard may be made to "Collector of Central Excise and Sales Tax, Multan vs. Messrs Holiday Inn, Multan and others", **2010**

SCMR 241 and "Muree Brewery Company Limited vs. Collector of Customs (Appraisement), Customs House Karachi", **2010 SCMR 164**.

11. In the context of the question under consideration it is relevant to examine the scheme of the Act of 1969. After the goods have been imported, the importer is required to make a declaration under section 79 of the Act of 1969, which includes declaring the PCT heading relating to the imported goods in respect of which clearance is sought. The appropriate officer makes an assessment under section 80 or 81, as the case may be, and thereafter allows the goods to be cleared on payment of the assessed customs duties and taxes. In case the importer is not satisfied with the assessment order, the latter may then avail the remedies as provided in the statute. However, in case the department finds at a later stage i.e. after the goods have been cleared, that the importer had not correctly declared the PCT heading and resultantly the customs duty was not levied or short levied, then it may initiate adjudication proceedings as provided under section 179 of the Act of 1969. The Act of 1969 provides for the remedies to an aggrieved importer against an order passed under section 179. At the relevant time, appeal was provided before the Tribunal under section 194-A of the Act of 1969, against an order passed by the Collector (Adjudication) under section 179 *ibid*. Likewise, remedy against an order passed by the learned Tribunal is provided under section 196 by way of a Reference to a High Court. The scheme of the Act of 1969, therefore, does not envisage a role of the Board in cases

involving a dispute relating to the classification of goods. However, the 'General Rules for Interpretation of the Schedule' are part of the First Schedule and appear to be in conflict with the substantive provisions of the Act of 1969. It is settled law that a schedule of a statute is subservient to the substantive provisions, and in case of conflict the latter shall prevail. Reference in this regard may be made to "Federation of Pakistan through Secretary, Ministry of Finance and others vs. Haji Muhammad Sadiq and others" **PLD 2007 SC 133** and "Excise and Taxation Officer, Karachi and another vs Burmah Shell Storage and Distribution Company of Pakistan Limited and 5 others", **1993 SCMR 338**.

12. The status and role of the Federal Board of Revenue, formerly known as the Central Board of Revenue, in the context of the provisions relating to adjudication and the hierarchy of appellate forums under the Income Tax Ordinance, 1979 was examined by the august Supreme Court in the judgment rendered in "Messrs Central Insurance Co. and others vs. The Central Board of Revenue, Islamabad and others" **1993 SCMR 1232** and the relevant portion is reproduced as follows:-

"It is evident from the above provisions that though the Central Board of Revenue has administrative control over the functionaries discharging their functions under the Ordinance, but it does not figure in the hierarchy of the

forums provided for adjudication of assessee's liability as to the tax. In this view of the matter, any interpretation placed by the Central Board of Revenue, on a statutory provision cannot be treated as a pronouncement by a forum competent to adjudicate upon such a question judicially or quasi-judicially. We may point out that the Central Board of Revenue cannot issue any administrative direction of the nature which may interfere with the judicial or quasi-judicial functions entrusted to the various functionaries under a statute. The instructions and directions of the Central Board of Revenue are binding on the functionaries discharging their functions under the Ordinance in view of section 8 so long as they are confined to the administrative matters. The interpretation of any provision of the Ordinance can be rendered judicially by the hierarchy of the forums provided for under the above provisions of the Ordinance, namely, the Income Tax Officer, Appellate Assistant Commissioner, Appellate Tribunal, the High Court and this Court and not by

the Central Board of Revenue. In this view of the matter, the interpretation placed by the Central Board of Revenue on the relevant provisions of the Ordinance in the Circular, can be treated as administrative interpretation and not judicial interpretation."

13. The scheme of the Act of 1969 and the Income Tax Ordinance, 1979 in the context of the role of the Board in relation to adjudication and the hierarchy of appellate forums is similar. The above principles enunciated by the august Supreme Court are, therefore, relevant in relation to the status of the Board under the Act of 1969. It is further important to note that Section 223 of the Act of 1969 places a clog on the power of the Board to interfere with the discretion of the appropriate officer of the customs in matters which involve the exercise of quasi judicial functions. However, in other matters the officer of the customs and other persons employed in the execution of the Act of 1969 are bound to observe and follow the orders and instructions of the Board. It is, therefore, obvious that in so far as quasi-judicial functions are concerned the opinion, instructions or orders of the Board are not binding. On the administrative side, the Board would indeed be the final authority to determine the classification of an item, however, if it is disputed then it necessarily has to be resolved and decided in the manner and through the forums

provided in the Act of 1969. The importer can even challenge the ruling given by the Board relating to the classification of an item.

14. In view of the above, we hold that the adjudicating officer, as well as the appellate forums created under the Act of 1969, are competent and vested with the power and jurisdiction to resolve any controversy, whether factual or legal, relating to a dispute in the context of a PCT heading, independently. A ruling given by the Board relating to classification may be considered, but cannot be treated as final or binding on the adjudicating authority or the hierarchy of the appellate forums provided under the Act of 1969. We, therefore, answer the question at serial number (iv) in the negative.

15. A copy of this order shall be sent under the seal of this Court by the Registrar to the Appellate Tribunal as required under Section 196 of the Act of 1969.

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 09-03-2016

JUDGE

JUDGE

Approved for reporting