

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CUSTOM REFERENCE NO.16 OF 2015

Muhammad Zubair.
VS
Collector Appellate Tribunal Islamabad, etc

Applicant by : **Mr. Tofeeq ul Irfan Raja, Advocate.**

Respondents by : **Ch. Mohammad Nawaz, Advocate.**
 Ghulam Jafar, I.O.

Date of hearing : **27.08.2020**

LUBNA SALEEM PERVEZ, J. Through this judgment we intend to dispose of the titled reference applications filed u/s 196 of the Customs Act, 1969, by the applicant Muhammad Zubair, wherein, the following questions of law said to arise out of the impugned judgment dated 01.12.2014, passed by the Custom Appellate Tribunal in Appeal No. 31/CU/IB/2014, have been proposed:

- I. Whether only the appellant has the valid import entitlement of the confiscated gold weighing 23664 grams under the import and Export of Gold, Gold Jewelry and Gemstones Order, 2001, issued in exercise of the powers conferred by Sub Section (1) of Section 3 of the Imports and Exports (Control) Act, 1950, (XXXIX of 1950).*
- II. Whether as per general procedure, in para No. 3 and export procedure in para No. 4 and entrustment scheme in para No. 5 of the Import and Export of Gold, Gold Jewelry and Gemstones Order, 2001, the foreign buyer, the exporter and the authorized, representative, is allowed to send and bring gold into Pakistan personally as accompanied or unaccompanied baggage.*
- III. Whether, there was no restriction of import of gold at any notified customs station, in the import export of Gold and Gold Jewelry and Gemstones Order 2001, and such restriction was later on provided in the repealing notification SRO No. 760(1)/2013 dated 02.09.2013, procedure in respect of precious metals etc. by virtue of para 11 “imported earlier and import authorization issued by TDAP upto 31st of July, 2013 under notification No.SRO266(1)/2001 dated 7.5.2001, shall remain the same as provided under the said notification”.*
- IV. Whether the adjudicating authority committed violation of section 179(3) of the Customs Act 1969 in passing order-in-original No. 68 of 2014, dated 11.04.2014, by not deciding the case within the*

statutory period of 120 days of the issuance of the show cause notice on 23.09.2013.

2. Brief facts are that on 18.06.2013, a passenger namely Syed Waqas Ali Shah, holding Pakistani Passport No. RF 147821, arrived from Dubai through Shaheen Air, flight No. NL 224, at Islamabad International Airport, who while crossing Green Channel exit, was arrested and disclosed to the Customs Staff of carrying 23,664 grams of gold in his baggage. He produced two receipts dated 17.06.2013 for purchase of gold issued by M/s. Motiwala Jewelers, one in his name and other in the name of M/s. Global Enterprises and a copy of letter in the name of Dubai Police Airport Security Department. He further informed that the gold was handed over to him by one Dilawar Khan for onward handing over to a person at Islamabad Airport, but he could not provide documents of import and importer to prove the legality of the import of 23,664 grams of gold, thus detained by Customs Officials but allowed release on personal bond to bring the import documents of the subject gold. On 19.06.2013, he produced GD No. PAFU.HC.1174 dated 18.06.2013, which revealed that it was filed and returned at MCC Peshawar. The gold weighting 23,664 grams was, therefore, seized and Syed Waqas Ali Shah was arrested in connection with case registered, vide FIR No. 24/2013, dated 19.06.2013 against him for violation of sections 2(s) & 16 read with 3(1) of Imports & Export Control Act, 1950, punishable u/s 156(1) (8), 157, 158 of Customs Act, 1969 and section 3(3) of Imports & Export Control Act, 1950.

3. Investigation culminated in seizure report No. C.No.V-Cus/I&P/24/2013/225, dated 12.09.2013, wherein 9 persons including Official of TDAP, clearing agent and Muhammad Zubair (the Applicant in present Customs Reference Application) were alleged to be involved in commission of offence of smuggling by manipulating the provisions of SRO 266(I)/2001 dated 07.05.2001.

4. Based on the above report dated 12.09.2013, in case FIR No. 24/2013, show causes notices were issued to the accused persons and after prolonged adjudication proceedings, the Collector (Adjudication) passed Order-in-Original No. 68 of 2014, dated 11.04.2014, *(hereinafter referred*

to as *ONO*), whereby, he dismissed the contentions of the appellant as well as the main accused i.e. Syed Waqas Ali Shah, claiming the ownership of the confiscated gold. The *ONO* was challenged by the applicant in appeal before Customs Appellate Tribunal, Islamabad, which was also dismissed vide judgment dated 01.12.2014, hence present reference application.

5. Learned counsel for the applicant submitted that Muhammad Zubair is the proprietor of M/s Global Enterprises who is in the business of import of gold and re-export the jewelry manufactured from it to its foreign importer in terms of Entrustment Scheme, vide clause 5 of Import and Export of Gold, Gold Jewelry and Gemstones Order, 2001, promulgated vide SRO 266(I)/2001, dated 07.05.2001; that under the said scheme, he lawfully imported gold weighing 23,664/- grams from M/s Motiwala Jewelers LLC Dubai (the foreign buyer), for which valid GD was filed on 18.06.2013, at MCC Peshawar; that all the requirements prescribed under the Entrustment Scheme have been fulfilled as he possesses all the documents in relation to the import of gold i.e. agreement, contracts between M/s Motiwala Jewelers and the applicant, valid certificate issued by TDAP, Passbook containing particulars of import and re-export of jewelry since, 2012 and an application dated 30.05.2013 for export approval/import authorization as prescribed and advance information of arrival of contracted gold through authorized person/carrier (Syed Waqas Ali Shah); that the carrier of the gold was due to arrive in Peshawar where the GD was filed but inadvertently he landed at Islamabad Airport where he was arrested on the charge of smuggling; that since, he is the lawful importer/owner of the confiscated gold on the strength of the import documents, therefore, the gold should be returned to him; that the import of gold does not constitute smuggling u/s 2(s) of the Customs Act, 1969; that proper procedure for transmitting the gold to Peshawar where the GD has been filed was not followed by the Customs Authorities; that the carrier has been convicted by Special Court of Customs, vide order dated 31.01.2020, on his confession of illegal transportation of gold in Pakistan. Learned counsel submitted that the questions proposed are questions of law and liable to be answered in favour of the applicant.

6. Learned counsel for the respondent department while contesting the application submitted that the carrier intentionally landed at Islamabad Airport from where he attempted to exit from the green channel with the trolley bag containing the gold bars weighing 23,664/- grams where he was apprehended by customs authorities on suspicion; that no document could be produced by him to prove the legality of carrying huge quantity of gold with him; that the accused persons tried to legalize the smuggling of gold under the garb of import through documents and GD filed in MCC Peshawar; that the accused persons have violated the provisions of sections 2(s) and 16 of Customs Act, 1969, punishable under section 156 (1)(8), 157 & 158 of Customs Act, 1969. He supported the orders passed by the forums below.

7. Arguments heard. Record perused.

8. Perusal of the impugned orders as well as the documents appended with the present reference application revealed that the applicant / Muhammad Zubair as well as Syed Waqas Ali Shah are claiming the ownership of the confiscated gold weighing 23,664/- grams. The stance of the Applicant Muhammad Zubair is that he has lawfully imported the subject gold under the Entrustment Scheme for re-export the same after manufacturing jewelry and in support, he relied on the GD No. PAFU.HC.1174 dated 18.06.2013 produced in this regard. On the other hand, Syed Waqas Ali Shah, though admitted before the customs authorities and during investigation that he is only a carrier of the gold but also claimed its ownership on the basis of receipt issued by M/s Motiwala Jewelers LLC.

9. Admittedly, Syed Waqas Ali Shah, the carrier of the gold landed at Islamabad Airport which according to the learned counsel for the applicant is inadvertent arrival as he was to land at Peshawar Airport where the GD was filed. The contention of the learned counsel has no force as the finding of fact recorded in the ONO and Tribunal's order dated 01.12.2014, that the landing destination of the carrier was Islamabad Airport as he purchased the return ticket from Islamabad. This finding of fact has not

been controverted by the learned counsel for the applicant. During the course of arguments learned counsel for the applicant submitted that the carrier has been convicted by the learned Special Judge Customs Court, on his confession of illegal transportation of gold in Pakistan thus, admittedly the gold has been smuggled into Pakistan as defined in section 2(s) of Customs Act, 1969, which is also reproduced below:-

2. Definitions.- *In this Act, unless there is anything repugnant in the subject or context:-*

(s)“smuggle” means to bring into or take out of Pakistan, in breach of any prohibition or restriction for the time being in force, or evading payment of customs-duties or taxes leviable thereon,-

(i) gold bullion, silver bullion, platinum, palladium, radium, precious stones, antiques, currency, narcotics and narcotic and psychotropic substances; or

(ii) manufactures of gold or silver or platinum or palladium or radium or precious stones, and any other goods notified by the Federal Government in the official Gazette, which, in each case, exceed one hundred and fifty thousand rupees in value; or

(iii) any goods by any route other than a route declared under section 9 or 10 or from any place other than a customs-station. and includes an attempt, abetment or connivance of so bringing in or taking out of such goods; and all cognate words and expressions shall be construed accordingly;

10. Stance taken by the applicant that proper import document and GD have been filed by him at MCC Peshawar as the carrier was intended to land in Peshawar along with the goods/gold through flight NL785, Shaheen Airlines and therefore, he is the lawful owner/consignee has no force in view of the fact that the said GD was returned to him as the consignment as per GD did not reach to its actual destination i.e. MCC Peshawar rather landed at Islamabad and confiscated by the authorities and eventually held to be smuggled gold duly admitted by the carrier.

11. Moreover, the orders passed by Collector (Adjudication), vide ONO as well as judgment of the Appellate Tribunal are based on finding of facts. The findings of facts recorded in the orders/judgment have not been controverted or challenged by the applicant hence, admitted. Thus in view of the admitted facts, Question No. I proposed by the applicant has been considered and it is found on the perusal of orders that legality / illegality / genuineness / validity of the import documents and GD were neither

questioned nor agitated before the forums below and, therefore, there is no finding in this regard incorporated in the impugned order. As observed in the preceding paragraphs, the gold claimed by the applicant has admittedly been brought into Pakistan illegally by the carrier, hence, the gold for which the applicant claimed entitlement on the basis of import documents has now attained the status of smuggled goods, therefore, has been confiscated under the prevailing laws in favour of Government. In view of this fact the question No.I is misconceived and is answered in **negative in favor of Respondent Department.**

12. It is pertinent to mention here that the adjudication proceedings were initiated in case FIR No. 24/2013, dated 19.06.2013, registered against accused / carrier Syed Waqas Ali Shah, and subsequently on the said FIR seizer report dated 12.09.2013, was prepared after conducting detailed investigation and the applicant was also alleged as co-accused for playing active role in the smuggling of gold. Therefore, the applicant in the present case was to defend himself from the charges of connivance in the smuggling of gold. However, he during the course of adjudication proceedings by the Collector has become the claimant of the smuggled gold by producing import documents and GD filed at MCC Peshawar. Therefore, it is apparent from the perusal of the order of the learned Collector (Adjudication) as well as the judgment of the Appellate Tribunal that no observation in respect of validity of import documents has been made. The Appellate Tribunal, vide order dated 01.12.2014, (impugned herein) has rightly observed that no new claim regarding ownership of gold can be agitated or entertained in the proceedings initiated in case FIR No. 24/2013. As a result thereof both the forums below have affirmed the case of the prosecution that the carrier Syed Waqas Ali Shah has illegally transported the gold, and has violated the provisions of Customs Act, 1969, read with Import and Export Act, 1950, and SRO 499(I)/20109, dated 13.06.2009.

13. So far as question No. II is concerned, the learned counsel seeks interpretation regarding general procedure, vide para 3 and para 4 of enlistment scheme in para 5 of Import and Export of Gold, Gold Jewelry

and Gemstone Order, 2001, and to that extent we are of the view that the question proposed is of academic nature as it would not affect the decision of the controversy under consideration. The answer to such type of questions requiring general interpretation of any provision of law without relating it to the facts and circumstances of the case has been declined by the Courts. It has now been well settled that only substantial question of law arising out of the order of the Tribunal should be referred to the Court. The Hon'ble Supreme Court in the judgment re: *Commissioner Income Tax vs. Hassan Associate Pvt. Ltd. (1994 SCMR 1321)* has held that *in references questions of academic nature are not to be considered particularly if any reference is sought merely for the purpose of deciding it on academic plane without having any bearing on the rights of the parties.* Hon'ble Lahore High Court in judgment passed in case titled as *Commissioner Inland Revenue, Zone-III Large Taxpayers Unit, Lahore versus MessrsTetrapak Pakistan Limited (2020 PTD 917)*, while relying on various judgments of Hon'ble Supreme Court has reiterated that only substantial question can be examined which may arise out of the order of the Tribunal, whereas, question which requires no interpretation of any provision of law, rules and regulations or its application on undisputed facts of the case do not constitute question of law to be decided by this Court. In another case Hon'ble Lahore High Court, vide judgment in the case titled as *Commissioner of Income Tax, Companies, Lahore v. Crescent Art Fabric Limited, Lahore (2001 PTD 2553)* has declined to answer the question of academic interest. In the case reported as *Muhammad Umer vs. Commissioner Income Tax (2009 PTD 284 HC Kar)* the Hon'ble Court declined to answer the academic question which will not resolve the controversy in the issue. The answer to question No. II is, therefore, **declined**.

14. Answer to question No. III, is also **declined** as first of all it does not arise out of the order of the Tribunal and secondly since, the issue in question regarding import / smuggling of gold pertains to 18.06.2013, therefore, the law prevailing at that time would be applicable. Therefore, the distinction between SRO No. 760(I)/2013, dated 02.09.2013, and SRO

266(I)/2001, dated 07.05.2001, referred by the learned counsel for the applicant is irrelevant.

15. Learned counsel through question No. IV has challenged the maintainability of ONO as has been passed after 120 days of the issuance of show cause notice contrary to the provisions of section 179(3) of the Customs Act, 1969. Bare perusal of the above provision shows that the Collector has been empowered to extend the time limit of 120 days for further 60 days, hence, the maximum limit of finalizing the adjudication proceedings are 180 days and the ONO has been passed within the period prescribed under 179(3) as show cause notice was issued on 23.09.2013 and the order has been passed on 06.03.2014 thus, the answer to question No. IV is in **negative, in favor of Respondent Department**, as no violation of section 179(3) has been committed by the Collector (Adjudication).

16. Copy of this order is also to be sent to Registrar, Customs Appellate Tribunal, Islamabad.

(MIANGUL HASSAN AURANGZEB) (LUBNA SALEEM PERVEZ)
JUDGE JUDGE

Announced in the open Court on _____.

JUDGE

JUDGE

APPROVED FOR REPORTING.

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JUNAID.