JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT

Custom Reference No.43 of 2017

M/S HUMAK ENGINEERING (PVT) LTD.
Vs
THE MODEL COLLECTORATE OF CUSTOMS (MCC), ISLAMABAD, ETC.

Date of hearing:	*18.12.2019*
Applicant By:	*Mr. Farhat Nawaz Lodhi, Advocate.*
Respondents by:	*Ms. Farah Yasmin, Advocate.*

LUBNA SALEEM PERVEZ, J: The present Customs Reference Application has been filed by the Applicant against the order dated 24.05.2017, passed by the Customs Appellate Tribunal, Bench – II, Islamabad, in Appeal No. 119/CU/IB/2016. The following questions of law said to arise out of the impugned order.

1. *Whether the impugned proceedings/judgment are legally sustainable?*
2. *Whether as per facts and in the circumstances of the case, the Learned Tribunal has failed in determination of very important legal aspects, causing serious prejudice?*
3. *Whether the impugned judgment of the Learned Tribunal sustainable since passed without considering / contrary to the relevant law, also bad in law?*
4. *Whether the judgment suffers from non-reading and mis-reading of the evidence/facts on record.*
5. *Whether on the facts and in the circumstances of the case, the learned respondent No. 1 was not under legal obligation to extend the benefit of doubt to the applicants?*
6. *Whether the Learned Tribunal has erred in appreciating the provisions of the Constitution of the Islamic Republic of Pakistan 1973, especially as contained in Article 18, 23, 24 and 25, read with Article 2A and 4 thereof?*
7. *Whether as per the facts and in the circumstances of the case, the impugned judgment is sustainable when the law settled on this legal proposition that 'if a particular thing is required to be done in a particular manner, it must be done in that manner, otherwise it should not be done at all.' (Khyber Tractors (Pvt) Limited Vs. Pakistan* ***(PLD 2005 SC 842)****?*

2. The facts giving rise to the present Customs Reference are that the Applicant is a private limited company, imported consignment of different

goods from China and got them cleared through WeBOC system through various Goods Declarations (GDs) dated 18.07.2013, 31.07.2013, 28.08.2013 and 17.09.2013. The Collectorate of Customs (Adjudication) Islamabad (the Respondent No. 2), issued show cause notice dated 04.08.2015, on the ground that the Applicant got cleared the above consignments without payment of Customs Duty as per rates provided in SRO 497(I)/2009 dated 13.06.2009. Through the said show-cause notice Applicant was confronted with recovery of short payment of Rs. 3,000,088/- and penal action u/s 156(1) & (14) of the Customs Act 1969, was also proposed against Applicant Company. The Applicant filed reply to the said show cause notice, vide letter dated 31.08.2015. The Respondent No. 2 vide Order-in-Original No. 55 of 2016 dated 23-05-2016 (the ONO) rejected the submissions of the Applicant and ordered recovery of short payment of Customs Duty as confronted in show cause notice.

Feeling aggrieved, the Applicant preferred appeal before Customs Appellate Tribunal (the Tribunal), who, vide judgment dated 24.05.2017, dismissed the appeal solely on the ground that the appeal before Tribunal is hit by limitation as filed after 102 days. Hence, the present Customs Reference.

3. Before proceeding to dispose of the present customs reference application, we are of the view that the questions No. 1, 2 & 3 are the questions of law that requires consideration of this Court, whereas, questions No. 4 & 5 are questions of fact and question No. 6 relates to fundamental rights enshrined in the Constitution of Pakistan 1973 thus cannot be agitated in reference/advisory jurisdiction of the High Court as the scope of advisory jurisdiction is limited to the extent of questions of law arising out of the order passed by Appellate Tribunal. Further, Question No. 7 does not require determination by the Court as the legal proposition put forth has already been settled by the Hon'ble Supreme Court of Pakistan.

4. The Learned Counsel for the Applicant argued that proceedings started with the issuance of show cause notice dated 04.08.2015 and under the provisions of section 179(3) of the Customs Act 1969, Respondent No. 2 was under legal obligation to conclude the adjudication proceedings within 120 days of the issuance of show cause notice or within such period extended by the Collector for which reasons were to be recorded in writing but such extended period shall in no case exceed sixty days. Learned Counsel submitted that as per Section 179(3) of the Customs Act, 1969, read with its proviso, which excludes period during which proceeding are adjourned on account of stay of alternative dispute resolution, maximum period for adjudication of the case under said section is 180 days. Learned Counsel further submitted that the impugned ONO has been issued on 23.05.2016 i.e. much after the statutory time limit prescribed for passing the ONO under section 179(3) of the Customs Act 1969, which rendered the ONO invalid. Learned Counsel for the Applicant relied on the judgment of the Hon'ble Supreme Court passed in case titled ***The Collector of Sales Tax Gujranwala, etc. vs. Super Asia Muhammad Din & Sons*** *reported as* ***(PTCL 2017 CL 736)*** and submitted that the Hon'ble Apex Court has now settled the question of passing adjudication orders beyond limitation period prescribed under relevant provisions of law by holding such orders to be invalid.

5. On the other hand, Learned Counsel for the Respondent on the point of issuance of order (ONO) beyond the prescribed limitation period could not rebut the factual and legal contention, however, supported the impugned order passed by the Tribunal and argued that the appeal filed by Applicant before the Tribunal was time barred for 102 days, therefore, same was rightly dismissed on the point of limitation.

6. We have heard the learned Counsel for the parties and have also perused the available record.

7. We have observed that the Tribunal while passing the impugned order has not given any finding on the issue of not passing the impugned ONO by the adjudication officer within the mandatory period given u/s 179 though, specifically raised in the grounds of appeal, but proceeded to dismiss the appeal on the point of limitation. Admittedly, the basic adjudication order i.e. impugned ONO was a time barred order and in terms of judgment cited supra, the Hon'ble Supreme Court while interpreting the identical/pari-materia provision of proviso to section 36(3) of Sales Tax Act 1990, has settled the law by holding as under:

> *"7. From the plain language of the first proviso, it is clear that the officer was bound to pass an order within the stipulated time period of forty-five days, and any extension of time by the Collector could not* ***in any case*** *exceed ninety days. The collector could not extend the time according to his own choice and whim, as a matter of course, routine or right, without any limit or constraint; he could only do so by applying his mind and after recording reasons for such extension in writing. Thus the language of the first proviso was meant to restrict the officer from passing an order under Section 36(3) supra whenever he wanted. It also restricted the Collector from granting unlimited extension. The curtailing of the powers of the officer and the Collector and the negative character of the language employed in the first proviso point towards its mandatory nature. This is further supported by the fact that the first proviso was inserted into Section 36(3) supra through an amendment (note:- the current Section 11 of the Act, on the other hand, was enacted with the proviso from its very inception in 2012). Prior to such insertion, undoubtedly there was no time limit within which the officer was required to pass orders under the said section. The insertion of the first proviso reflects the clear intention of the legislature to curb this earlier latitude conferred on the officer for passing an order under the section supra. When the legislature makes an amendment in an existing law by providing a specific procedure or time frame for performing a certain act, such provision cannot be interpreted in a way which would render it redundant or nugatory. Thus, we hold that the first proviso to Section 36(3) of the Act [and the first proviso to the erstwhile Section 11(4) and the current Section 11(5) of the Act] is/was mandatory in nature.*
>
> *9. .....Thus, having held the first proviso to Section 36(3) supra to be mandatory, the natural corollary of non-compliance with its terms would be that any order passed beyond the stipulated time period would be invalid.".*

Thus, respectfully following the law laid down by the Hon'ble Supreme Court of Pakistan in case law reported as ***PTCL 2017 CL 736,*** reproduced *here-in-above*, we are of the considered view that the impugned order of the Tribunal is not sustainable in the eye of law. The question Nos. 1 & 3 are, therefore, answered in negative, whereas, question No. 2 is answered in affirmative. Resultantly, present Customs Reference is disposed of in favour of the Applicant. Office is directed to send a copy of the decision to the Customs Appellate Tribunal, Islamabad, under the seal of the Court as prescribed under the law.

(AAMER FAROOQ)
JUDGE

(LUBNA SALEEM PERVEZ)
JUDGE

Approved for Reporting.
Blue Slip Added

Adnan/*