

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No.1273 of 2021

M/s Abdul Ghaffar Traders

Versus

Federation of Pakistan through Chairman, FBR and others

Date of Decision: 26.04.2021

Petitioner by: Mr. Ghulam Qasim Bhatti, Advocate.

Respondents by: Mr. Muhammad Amin Feroz, Advocate

BABAR SATTAR, J.-The petitioner is aggrieved by recovery notices issued by respondent No.7 under Section 202 of the Customs Act, 1969 ("**Act**"), dated 27.02.2021 and 10.03.2021.

2. The learned counsel for the petitioner stated that the recovery notices have been issued pursuant to an Order-in-Original No. 202/2014 dated 01.10.2014 ("**Order-in-Original**") that was never served on the petitioner and that the petitioner was never aware of. He submitted that the WBOC ID of the petitioner was canceled due to nonuse and for restoration of which, it filed Writ Petition No.645/2021 before this Court, which was converted into a representation and sent to respondent No.7 for decision. During those proceedings a copy of Order-in-Original was provided to the petitioner on 11.03.2021 in lieu of which the impugned recovery notices have been issued. The petitioner then challenged the said order before respondent No.3, who

dismissed the appeal on grounds of limitation. The petitioner then filed an appeal before the learned Customs Appellate Tribunal/respondent No.2 on 31.03.2021 along with an application for injunctive relief. But that respondent No.2 is presently not functional and therefore, the appeal and the stay application have not been taken up. The learned counsel for the petitioner stated that the Order-in-Original reflects the address of premises of the petitioner which has not changed over the years. However, no copy of the said order was ever received. He further stated that the Order-in-Original is an ex-parte order, which has been passed against twenty-four respondents and none of those twenty-four respondents were in appearance before the relevant Deputy Collector when the said order was passed and consequently no adjudication has ever taken place in relation to the subject-matter that forms part of the Order-in-Original. The learned counsel further stated that no recovery proceedings were affected by the respondents for almost seven years even though the Order-in-Original was passed in the year 2014. And it was only after the petitioner made efforts to have its WEBOC ID restored that the recovery proceedings were initiated. He submitted that it is settled law that no coercive recovery is to be affected till such time that at least one forum outside the hierarchy of the tax authorities adjudicates the matter. And given that the petitioner's appeal and the stay application are pending adjudication before respondent No.2, the respondents may be restrained from affecting coercive recovery. The learned counsel relied on Messrs Kaka Traders, Karachi v. Additional

Director, Karachi and another (2011 PTD (Trib) 1146), Messrs Bashir Jamil and Brothers (Pvt.) Ltd. v. Secretary, Revenue Division, Islamabad (2014 PTD 1182), Ghulam Hussain Ramzan Ali v. Collector of Customs (Preventive) Karachi (2015 PTD 107) and Messrs AFU International, Karachi v. The Deputy Collector, Karachi and another (2020 PTD (Trib.) 1517).

3. Learned counsel for respondents No. 1, 4, 6, 7 and 8 relied on a report filed on behalf of the said respondents and argued that the appeal filed before the Collector (Appeals) against Order-in-Original passed by the Deputy Collector Customs on 01.10.2014 was dismissed as it had been filed after an inordinate delay of more than six years. Along with the report he referred hearing notices dated 01.07.2014, 15.07.2014, and show cause notice dated 10.06.2014 ("**SCN**") and submitted that it was only after issuance of a show cause notice and repeat hearing notices that the Order-in-Original was passed.

4. In rebuttal, the learned counsel for the petitioner submitted that the Order-in-Original lists dates of hearing within the order and the SCN dated 10.06.2014 purportedly issued to the petitioner lists the hearing date as 19.06.2014. Likewise hearing notice dated 15.07.2014 lists the date of hearing as 22.07.2014. However, neither the hearing date listed on the SCN nor the hearing date listed on the hearing notice dated 15.07.2014 are mentioned as hearing dates in the Order-in-Original, suggesting that the show cause notice and the hearing notices might be bogus. He further submitted

that while the show cause notice was issued on 10.06.2014 for hearing on 19.06.2014, while the first hearing date mentioned in the Order-in-Original is 07.05.2014 and that there are at least four other dates prior to 19.06.2014 when pursuant to show cause notice the petitioner was to appear before the Deputy Collector Customs. This shows that record of proceedings presented before this Court may have been fabricated. He further submitted that under section 193 of the Act time for purposes of limitation is to be counted from the date of communication of the order and as the Order-in-Original was never communicated, the appeal before the Collector appeals cannot be deemed to be beyond the time provided for its filing. He also submitted that section 215 of the Act mandates that notices are to be served by registered post or courierservice or any other mode of transmission subject to acknowledgment receipt and that the respondent have failed to produce record of any registered post or acknowledgment receipt confirming that the show cause notice or hearing notices or the Order-in-Original was ever delivered to the petitioner.

5. The respondents have failed to establish that the show cause notice, hearing notices and the Order-in-Original was ever communicated to the petitioner. And further the Order-in-Original adjudicated the cases of twenty-four parties none of whom were present before the learned Deputy Collector Customs who passed the Order-in-Original. This appears to be an incredible coincidence that none of the parties against whom the learned Deputy Collector was proceeding elected to

appear before him forcing him to pass an ex-parte order. Article 10A of the Constitution guarantees the fundamental rights of the parties to fair trial and due process and an ex-parte order creating a final liability in view of the facts of this case is akin to imposing a penalty on a person without hearing him. Due to failure of the respondents to establish that process was ever served on the petitioner thereby affording it an opportunity to present its case, the petitioner has made out a *prima facie* case that the Order-in-Original pursuant to which the impugned notices were issued on 27.02.2021 and 10.03.2012 (after a period of more than six years from the passage of the Order-in-Original) was passed without affording the petitioner opportunity of being heard. It has been confirmed by the respondents that the petitioner has filed an appeal against the order passed by the Collector (Appeals) as well as the Order-in-Original before the learned Customs Appellate Tribunal which is presently not functional.

6. The Hon'ble Supreme Court in the case of Mehram Ali & others Vs. Federation of Pakistan & others (PLD 1998 SC 1445) held that access to justice is a fundamental right. In the instant case, the adjudication of the appeal has not been delayed for any fault of the petitioner. In the case reported as ZN Export Vs. Collector Sale Tax (2003 PTD 1363) it was held that an assessee is entitled to adjudication in respect of his disputed liability by at least one independent forum outside the hierarchy of the respondent department. This view was reaffirmed in Sun-Rise Bottling Company (Pvt.) Ltd. through Chief Executive Vs Federation of Pakistan (2006 PTD 535) as

well as Karachi Shipyard & Engineering Works Ltd., Karachi v. Additional Collector, Customs, Excise And Sales Tax(Adjudication-III), Government of Pakistan, Karachi and 2 others (2006 PTD 2207) and has been followed consistently.

7. The petition is therefore allowed and the respondents are restrained from affecting recovery of the demand generated through the impugned notices dated 27.02.2021 and 10.03.2021. Till the passage of a speaking order in relation to the appeal pending before respondent No.2 or the stay application, whichever is earlier.

(BABAR SATTAR)
JUDGE

Saeed