

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Custom Reference No.33 of 2017
M/s Lunar Technologies (Pvt.) Limited
Versus
Appellate Tribunal of Customs and others

Date of Hearing: 20.01.2020
Applicant by: Mr. Ayyaz Shaukat and Malik Sardar Khan,
Advocate
Respondents by: Mr. Adnan Haider Randhawa, Advocate for
respondents No.2 to 4
Mr. Riffat Hussain Malik, Advocate for
respondent No.5

MIANGUL HASSAN AURANGZEB, J:- The questions of law arising from the judgment dated 02.05.2017 passed by the Customs Appellate Tribunal, Islamabad were framed by this Court vide order dated 22.06.2017.

2. At the very outset, learned counsel for the petitioner submitted that the sole question of law that he would be pressing in his submissions was question No.2 which is reproduced herein below:-

“Whether, without prejudice, the Impugned Order-in-Original passed by respondent No.3 is barred by time under section 179 of the Customs Act, 1969, wherein the statutory period of adjudication as specified in section 179 of the Customs Act, 1969 is considered as mandatory, which is violation of the mandate held by Honourable Supreme Court in Civil Appeals No.682 of 2008?”

3. Learned counsel for the petitioner drew the attention of the Court to Section 179(3) of the Customs Act, 1969 (“the 1969 Act”) and submitted that since the Order-in-Original dated 16.05.2016 was not passed by the Additional Collector within a period of 120 days from the date of the issuance of the show cause notice dated 30.09.2015, the said Order-in-Original was void and could not operate against the petitioner’s interest; that the said Order-in-Original was passed 229 days after the issuance of the show cause notice dated 30.09.2015; that at no material stage, did the Collector extend the period within which the Order-in-Original could be passed; that the delay in the proceedings before the Additional Collector were not attributable to the petitioner; and that the Department had delayed the filing of the parawise comments in the proceedings before the Additional Collector. Learned

counsel for the petitioner prayed for the reference to be answered in the positive.

4. On the other hand, learned counsel for the respondents submitted that in the Order-in-Original, it is clearly mentioned that the date of the judgment was 15.01.2016; that since the said date (i.e. 15.01.2016) is within the period of 120 days from the issuance of the show cause notice, the said Order-in-Original has not been passed in contravention of the requirements of Section 179(3) of the 1969 Act; that a presumption of truth is to be attached to the contents of the said Order-in-Original; that no date was mentioned on the last page of the said order; that the said order was made available to the petitioner on 16.05.2016; that the limitation period for filing an appeal against the said order would be reckoned from 16.05.2016; that the said Order-in-Original was perhaps lying in the Collectorate of Customs (Adjudication) between 15.01.2016 and 16.05.2016 before it was issued; and that the law laid down by the Hon'ble Supreme Court in the case of Super Asia is not applicable to the case at hand. Learned counsel for the Department prayed for the reference to be answered in the negative.

5. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

6. The record shows that on 30.09.2015, a show cause notice was issued by the Additional Collector (Adjudication) Customs House, Islamabad under Section 180 of the 1969 Act, calling upon the petitioner to show cause as to why the goods seized from the petitioner should not be confiscated and why the evaded amount of duties/taxes amounting to Rs.1,138,163/- should not be recovered from it.

7. The proceedings pursuant to the said show cause notice culminated in Order-in-Original No.10/2016 dated 16.05.2016. Although the said order was signed by the Additional Collector, he did not write the date of the order next to his signature. The first page of the said order shows that the date of the judgment was 15.01.2016.

8. The matter as to the legality of an Order-in-Original having been passed beyond a period of 120 days from the date of the issuance of the show cause notice came to be considered by the Hon'ble Supreme Court in the case of Messrs Mujahid Soap and Chemical Industries (Pvt.)

Ltd. Vs. Customs Appellate Tribunal, Bench-I, Islamabad (2019 SCMR 1735). In the said case, the Hon'ble Supreme Court allowed an appeal against the judgment dated 29.03.2016 passed by this Court on the sole ground that the Order-in-Original had not been passed within a period of 120 days prescribed in Section 179(3) of the 1969 Act. In this regard, paragraphs 5 to 7 of the said report are reproduced herein below:-

“5. We asked the learned counsel for the respondents to explain what in her view was the meaning of “decided” in the present case. She said that the matter was decided when it had been heard and the judgment was reserved for release of the reasons. However, it is conceded that on 24.12.2013 no decision was verbally announced by the adjudicating officer nor was any decision communicated to the parties prior to the issuance of the order-in-original dated 19.02.2014. We fail to understand how a decision can be said to have been taken without announcement or communication thereof to the parties. To our understanding the law is quite accommodating for the taxing authority as an extension is available beyond the originally prescribed period of 120 days for rendition of a decision. Even though no decision is communicated within the said period, such an extension can be sought and granted subsequently but in such an event it is mandatory that the decision comes within 180 days after the date of show cause notice. This view is expressed by the Court in its recent judgment reported as Collector of Sales Tax v. Super Asia Mohammad Din and Sons (2017 SCMR 1427 at paragraph 11).

6. In the present case however, the respondent-Deputy Collector did not even apply for an extension but consumed 157 days to record the reasons for his judgment and to communicate the same to the parties. We cannot accept the proposition that such decision had taken place as and when the hearing was concluded. It is necessary that an adjudicatory decision be recorded and duly communicated to the parties. That has not happened in the present case. Therefore, according to the record of the case, the decision took place on 19.02.2014 and not on 24.12.2013 as contended by the learned counsel for the respondents.

7. As a result, the impugned decision given in the case by the respondent was beyond time as prescribed in section 179(3) of the Act. Therefore, the said decision is invalid. Consequently, the impugned judgment is set aside and this appeal is allowed.”

9. In the case at hand, it was admitted by the learned counsel for the Department that the Order-in-Original passed by the Additional Collector had not been made available to the petitioner prior to 16.05.2016. He also very fairly submitted that the limitation for filing an appeal against the said Order-in-Original would commence from 16.05.2016. There is nothing on the record to show that a short order had been announced by the Additional Collector on 15.01.2016. Since no judgment had been made available or communicated to the petitioner on 15.01.2016, this date could not be considered as the date

on which the Order-in-Original had been passed. Since the said order was not made available until 15.05.2016 which is the date clearly written on the first page of the Order-in-Original, the said order can be safely said to have been passed in contravention of the requirements of Section 179(3) of the 1969 Act.

10. Perusal of the said Order-in-Original shows that the petitioner had filed a reply to the show cause notice on the date of hearing mentioned in the said show cause notice (i.e. 12.10.2015). The said order does not show that the delay in the adjudication for reasons attributable to the petitioner. On the contrary, paragraphs 8 and 9 of the said Order-in-Original shows that the Department had caused a delay in the filing of the parawise comments. The Additional Collector had also directed the Department to expedite the filing of the parawise comments. The hearing of the case could not take place on 16.11.2015 since the representative of the Department neither appeared nor filed parawise comments. All this shows that the delay occasioned in the adjudication before the Additional Collector was for reasons attributable to the Department.

11. Since the Order-in-Original had not been made available to the petitioner until 16.05.2016, and since the said Order-in-Original was passed beyond the period of 120 days from the date of the issuance of the show cause notice dated 30.09.2015, the said order is held to be in contravention of the requirements of Section 179(3) of the 1969 Act as well as the above mentioned judgment in the case of Messrs Mujahid Soap and Chemical Industries (Pvt.) Ltd. Vs. Customs Appellate Tribunal, Bench-I, Islamabad (supra).

12. In view of the above, the instant reference is answered in the positive.

(GHULAM AZAM QAMBRANI)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

(JUDGE)

Qamar Khan*