

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. No.1026/2017

PAKISTAN TELECOMMUNICATION COMPANY LTD
VERSUS
DIRECTORATE OF INTELLIGENCE AND INVESTIGATION, ETC.

Petitioner by	:	<u>Malik Qammar Afzal and Mr. Saad Khan Mayar, Advocates</u>
Respondents by	:	<u>Mr. Riffat Hussain Malik, Advocate for respondent no.1. Mr. Zahoor Ahmed Mughal, Supt. I & I, FBR. Mr. Abdul Munir, I.O/I&I, FBR.</u>
Date of Hearing	:	<u>13-09-2017.</u>

ATHAR MINALLAH J: The instant petition has been filed by Pakistan Telecommunication Company Limited (hereinafter referred to as the "***petitioner Company***") assailing the detention and subsequent seizure of imported goods, after they had been given out of customs charge by the concerned officials under the jurisdiction of respondent no.2.

2. The facts, in brief, are that the petitioner Company imported goods from abroad and for the purposes of clearance thereof filed GD No.10384, dated 20-01-2017, (hereinafter referred to as the "***Goods Declaration***"). The concerned customs officials at the Air Freight Unit, Benazir Bhutto International Airport, after examining the goods, completed its assessment. After the completion of the assessment the goods were given out of customs charge. However, the

goods were re-examined by the officials of respondent no.1 and pursuant thereto they were seized and a notice under section 171 of the Customs Act 1969 (hereinafter referred to as the "**Act of 1969**") was issued. The officials of respondent no.1 submitted a seizure report, dated 06.02.2017. Pursuant to the seizure report a show cause notice, dated 22.03.2017, was issued by the Collector Adjudication. The petitioner Company requested the respondent no.1 to release the goods against security. However, this request was not acceded to. The petitioner had mentioned the description of the imported goods in the Goods Declaration as follows:-

"42. ITEM DESCRIPTION OF GOODS

*9SUUPLY OF 600 MSAGS WITH VDSL2+SOLUTION ON
TURKNY BASIS. (POWER SUPPLY AND DISTRIBUTION 64
PORT VDSL2 COMBO LINE CARD WITH V VECTOR)"*

3. Besides the above description, the petitioner Company had declared the PCT heading of the imported goods as H.S code No:8517.6290. The petitioner Company had also sought exemption under SRO 659(I)/2007, dated 30-06-2007, (hereinafter referred to as the "**SRO**"). The assessment of the goods was completed by the concerned officials under section 80 of the Act of 1969. It is not alleged by the respondent no.1 that the imported goods were misdeclared and released with the connivance or collusion of the concerned customs officials who had examined and completed the assessment. The respondent no.1, in fact, is of the opinion that goods imported should have been assessed under H.S Code 8517.7000 instead of H.S Code

8517.6290. The respondent no.1 had, therefore, raised a dispute relating to the classification of the imported goods. It is also not the case of the respondent no.1 that an offence under section 2 (s) is made out. The petitioner Company is aggrieved on account of the excessive use of powers vested in the respondent no.1.

4. The learned counsel appearing on behalf of the petitioner Company has contended that; the imported goods were examined and thereafter assessment was completed by the concerned customs officials in accordance with law and, therefore, the assessment orders could not have been reopened by the respondent no.1; the goods were lawfully imported and presented for assessment at a notified customs station; the respondent no.1 is not vested with jurisdiction to exercise powers under sections 32, 80 or 81 of the Act of 1969; the petitioner Company is a regular importer and there is no apprehension that duty or taxes, even if not levied, could not have been recovered; the petitioner Company was willing, and had also offered to furnish security to the satisfaction of the respondent no.1, so that instead of taking the extreme step of seizing the goods the dispute could have been resolved by a competent authority; the act of seizing the imported goods was illegal and was resorted to merely to harass the petitioner Company for extraneous reasons; the imported goods were urgently required by the petitioner Company and the seizure thereof had exposed the latter to irreparable loss.

5. The learned counsel appearing on behalf of respondent no.1 has argued that; the officials of the Directorate General of

Intelligence and Investigation (hereinafter referred to as "**respondent no.1**") are vested with powers and jurisdiction under SRO 486(I)/2007, dated 09-06-2007, (hereinafter referred to as the "**SRO 486**"); the seizure of the imported goods was legal; the discretion was also exercised by the officials of the respondent no.1 in accordance with law; section 168 empowers the officials of the Directorate General to seize goods which are liable to confiscation; the goods were liable to confiscation and, therefore, they were rightly seized by the concerned officials; the learned counsel has placed reliance on the cases titled "M/S Diplomats Duty Free Pvt. Ltd vs. Federation of Pakistan etc", dated 21-11-2014, passed in W.P.No.4287 of 2013 by a Bench of this Court.

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

7. The goods were seized by officials of the respondent no.1 due to a dispute regarding the interpretation of classification of the imported goods. The description mentioned in the Goods Declaration by the importer Company has been reproduced above. The said description in the opinion of the respondent no.1 brings the imported goods within the meaning of 'parts' and, therefore, they should have been classified under PCT heading 8517.7000 instead of PCT heading 8517.6290. There is no document placed on record to show that there was any deliberate attempt to misdeclare the description of the imported goods. The description of the imported goods mentioned in the Goods Declaration and other documents presented by the petitioner

Company for the purposes of clearance is not disputed. It is not the case of the respondent no.1 that the invoice and other documents presented by the petitioner Company for the purposes of assessment are not genuine. The only dispute raised by the respondent no.1 is with regard to classification i.e. the H.S code. It is settled law that determination of classification of imported goods is a mixed question of law and fact. In the instant case the goods were presented at a notified customs station for assessment. The petitioner Company had submitted the relevant documents. The appropriate customs officials, who are notified as such under the Act of 1969, after physically examining the goods, had completed the assessment. The assessment order was recorded and, thereafter, the imported goods were given out of customs charge. It is not alleged by the respondent no.1 that the duty was not levied or short levied with the connivance or collusion of the appropriate customs officials exercising inherent powers under the Act of 1969. It was in these circumstances that the respondent no.1 took the extreme action of seizing the goods rather than releasing the same against security and then referring the matter to a competent authority for resolving the dispute. The questions which emerge for the consideration of this Court are, firstly, whether the officials of the respondent no.1 are vested with jurisdiction to exercise powers after the goods have been given out of customs charge by the appropriate customs officials and, secondly, if the officials of respondent no.1 were vested with jurisdiction then whether those powers have been exercised in accordance with the law.

8. In order to answer both the above questions it would be beneficial to examine the relevant provisions of the Act of 1969. The Act of 1969 is a comprehensive and self-contained statute. The purpose and object of its enactment is mentioned in the preamble as to consolidate and amend the law relating to the levy and collection of customs duties, fee and service charges and to provide for other allied matters. Section 2 defines various expressions. "Advance Ruling" is defined in clause (ai) as meaning classification determined by the Board or any officer, or a committee authorized by the Board for the assessment of the goods which are intended to be imported or exported. "Appropriate officer" is defined in clause (b) as meaning an officer of customs to whom such functions have been assigned by or under the Act of 1969 or the rules made there under. Likewise, "assessment" is defined in clause (bb) as including provisional assessment, re-assessment and any order or assessment in which the duty assessed is nil. "Customs station" is defined in clause (k) as meaning any customs-port, customs-airport or any land customs-station. The expression "smuggle" is defined in clause (s) while clause (rr) of section 2 defines "seize" as meaning to take into custody, physically or otherwise, goods in respect of which some offence has been committed or is believed to have been committed under this Act or the rules, and all cognate words and expressions shall be construed accordingly. Section 3 relates to the appointment of officers of customs with respect to any area. Section 3A provides that the Directorate General of Intelligence and Investigation i.e. respondent no.1 shall consist of a Director General and as many Directors, Additional Directors, Deputy Directors, Assistant Directors and such other officers

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as the Board may appoint by notification in the official gazette. Section 3E empowers the Board to specify the functions, jurisdiction and powers of the Directorates. Section 4 provides that an officer of customs, appointed under section 3, shall exercise such powers and discharge such duties as are conferred or imposed on him by or under the Act of 1969 or the rules made there under. Subsection (1) of section 32 describes the ingredients of the offence relating to making a false statement or delivering or causing to deliver any declaration, notice or document knowing or having reason to believe that such document or statement is false in any material particular. Subsection (2) and subsection (3) prescribe for the mechanism or procedure regarding initiation of proceedings under section 32. The distinction between the said two subsections is based on the intent of an importer. Sub section (3) contemplates the eventuality when the statement has been made or a document delivered by reason of any inadvertence, error or misconstruction. In such an eventuality the gravity of the offence in terms of section 32 of the Act of 1969 would be far less than if it was a case falling under sub section (2) *ibid*. Section 32 A defines the offence of fiscal fraud and prescribes the procedure relating thereto. Sections 79, 80 and 81 prescribes the procedure and powers in respect of clearance of imported goods. Section 156 provides for the punishment of offences under the Act of 1969. The goods which are liable to confiscation have been described in column (2) of the table given in section 156 (1). Subsection 1 of section 168 empowers an appropriate officer to seize any goods liable to confiscation under the Act of 1969 and also prescribes the procedure in respect of proceedings which are required to be initiated after such seizure. Section 195 vests

revisional powers in the Federal Board of Revenue or the Collector of Customs, as the case may be. They are empowered to call for record for the purposes of satisfaction regarding the legality or propriety of any decision or order passed by a subordinate officer and to pass such order as the respective competent authority may think fit. The proviso to subsection (1) of section 195 vests the power to, inter alia, confiscate goods or order payment of any duty not levied or short-levied.

9. The Federal Board of Revenue, pursuant to powers conferred under section 3E of the Act of 1969, has issued SRO 486 whereby respective officers of respondent no.1 have been vested with jurisdiction and powers specified therein. The power to seize goods which are liable to confiscation is vested in the officers mentioned in column (2) of the table given in SRO 486. The latter notification further provides that the officers are also empowered to invoke other relevant provisions of the Act of 1969 and rules made there under, if so warranted. As noted above, the goods which are liable to confiscation are specified under various clauses in column (3) of the table given under subsection (1) of section 156. The penalties specify such goods which are liable to confiscation. The officers of respondents no.1 are, therefore, indeed vested with jurisdiction and power to seize goods under section 168 for an offence alleged to have been committed under section 32. The legislature has explicitly used the expression 'may' rather than 'shall' in section 168(1) of the Act of 1969. The power under section 168(1) to seize goods which are liable to confiscation is in the nature of discretion vested in an authorized officer. Discretion gives the authorised officer the freedom to decide what should be done

in a particular situation. If there are more than one option then discretion is exercised to make a choice between the alternatives. It is settled law that a public functionary, while exercising discretion, has to act in a just, fair and reasonable manner. Arbitrariness is an antithesis of exercising discretion in accordance with law. Moreover, a plain reading of section 168 (1) and section 2(rr) would show that the satisfaction of the concerned officer to the effect that either some offence has been committed or is believed to have been committed under the Act of 1969 is a precondition for seizing goods. Since seizing goods is an extreme coercive action, which deprives the importer or owner thereof of its possession, therefore, discretion in this regard has to be exercised with care and in a just and fair manner. It is not the case of the respondent no.1 that the imported goods in the instant petition fall within the mischief of the first proviso to section 181 of the Act of 1969 so as to warrant outright confiscation.

10. There is no cavil to the proposition that grave abuse of discretion vested in public functionaries renders an act or proceedings as illegal. In the instant case the goods were seized after they had been given out of customs charge by the concerned officials at a notified customs station. There is no allegation relating to "smuggling" or "fiscal fraud". Moreover, it is also not alleged that the goods were cleared with the collusion of the concerned customs officials who had examined and then completed the assessment thereof. The description of the goods mentioned in the Goods Declaration and the documents delivered for the purposes of clearance under section 79 read with section 80 are not alleged to be tampered, forged or fake. It is also not

denied that the goods were presented for physical examination before the concerned customs officials. The dispute raised by the officials of respondent no.1 is to the extent of the classification of the goods imported by the petitioner Company. In the opinion of the officials of respondent no.1 the goods ought to have been classified under PCT heading 8517.7000 instead of PCT heading 8517.6290. It was essentially a dispute regarding classification of the imported goods which at best could have been resolved by bringing it to the notice of either the officials at the time of clearance or to the concerned supervisory Collector. The petitioner Company is a regular importer and its financial status and known assets could by no stretch of the imagination have given rise to an apprehension that custom duty short-levied or not levied could not have been recovered. Moreover, the petitioner Company itself had offered to furnish security to the satisfaction of the respondent no.1 so as to avoid having its goods unnecessarily seized. In the facts and circumstances of the instant case the act of seizing the goods was obviously neither fair nor just. It is settled law that where express statutory power is conferred on a public functionary, it should not be pushed too far, for such conferment implies a restraint in operating that power, so as to exercise it justly and reasonably. Excessive use of lawful power is itself unlawful. Reliance is placed on "Independent Newspapers Corporation (Pvt) Ltd and another vs. Chairman, Fourth Wage Board and Implementation Tribunal for Newspaper Corporation (Pvt) Ltd, and another", **1993 SCMR 1533.**

11. The question of classification is a mixed question of law and fact. The Federal Board of Revenue is empowered to constitute a committee or nominate an officer for the purposes of resolving disputes relating to classification of imported goods. There is nothing on record to show that the petitioner Company had deliberately made a false statement in the Goods Declaration or had delivered any document knowing or having reason to believe that such document is false in any material particular so as to make out an offence under section 32. As already noted, section 2(rr) contemplates two eventualities i.e. when some offence has been committed or is believed to have been committed under the Act of 1969. In the instant case the description of the imported goods is not disputed. However, the officials of respondent no.1 who had seized the goods were of the opinion that they were parts and, therefore, ought to have been classified under a different heading. There is no document to even remotely suggest that the essential ingredients of the offence under section 32 were fulfilled so as to justify seizing the imported goods instead of accepting security and then referring the matter to a competent authority for resolution. At best it was a case of inadvertence or misconstruction.

12. The purpose and intent of establishing the respondent no.1 and conferring powers to various officials is obviously to safeguard the interests of the exchequer. In the facts and circumstances of the instant case, neither the learned counsel nor the officials of the respondent no.1 could give any plausible explanation for seizing the imported goods, particularly when the petitioner Company had offered to furnish security to the satisfaction of the competent authority till the

dispute was resolved by a competent authority. The officials who had appeared before this Court could also not explain as to why the information relating to the classification of the imported goods was not passed on to the concerned officials at the time of completion of the assessment, so as to ensure that the interest of the exchequer is protected on the one hand and on the other to avoid unnecessary harassment or inconvenience to an established taxpaying entity such as the petitioner Company. The hesitation in informing the concerned Collector of Customs for the purposes of invoking section 195 of the Act of 1969 is also unexplained. The petitioner Company had furnished security of the differential amount of customs duty to the satisfaction of respondent no.1 pursuant to this Court's order and, therefore, the interest of the exchequer was fully protected.

13. In view of the above, this Court is satisfied that the act of seizing the imported goods in the facts and circumstances of the instant case under section 168(1) of the Act of 1969 was a grave abuse of discretion and tantamount to excessive use of powers conferred on the officers of the respondent no.1. The discretion was exercised in an unreasonable, unjust and arbitrary manner. The fundamental rights guaranteed under Articles 18, 23 and 24 of the Constitution were indeed violated. There were several options available under the provisions of the Act of 1969 to protect the interests of the exchequer instead of resorting to the extreme step of seizing the imported goods under section 168(1). The respondent no.1 could have either informed the concerned customs officials before completion of the assessment process or the concerned supervisory Collector of Customs under

section 195 of the Act of 1969 even if an assessment order had been passed by officials subordinate to the latter. The extreme coercive powers exercised by the officials of the respondent no. 1 under section 168 (1) of the Act of 1969, particularly when the petitioner Company had voluntarily offered to furnish security to its satisfaction, pending resolution of the dispute, was definitely not in consonance with the settled principles of exercising discretion. Both the respondents' no.1 and 2 fall under the jurisdiction of the Federal Board of Revenue. The purpose of establishing respondent no.1 is to safeguard and protect the interests of the exchequer rather than causing uncalled for hardship, inconvenience and difficulties for bonafide importers. Excessive use of powers conferred and taking extreme action while other alternatives were available is itself unlawful.

14. For what has been discussed above, the instant petition is allowed and the seizure of the goods imported by the petitioner Company and cleared pursuant to filing the Goods Declaration is declared to be illegal on account of grave abuse of discretion and use of excessive powers. Consequently, the superstructure built on the act of seizing the goods is also declared as without lawful authority. Nevertheless, the respondent no.1 shall place the information relating to the classification dispute before the concerned supervisory Collector of Customs under section 195 of the Act of 1969. The latter, after taking into consideration the information placed by the respondent no.1, shall proceed in accordance with the law and resolve the classification dispute under section 195 of the Act of 1969, after affording a reasonable opportunity to the parties. The security

furnished by the petitioner Company pursuant to order dated 29.03.2017 shall be delivered by the Deputy Registrar (Judicial) to the respondent no.2. The fate of the security will be subject to an order passed by the concerned Collector of Customs under section 195 of the Act of 1969.

(ATHAR MINALLAH)
JUDGE

Announced in open Court on 15.12.2017

JUDGE

Approved for reporting.

*Asif Mughal/