Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 4232 OF 2016

Euro Tiles & Granite, etc.

Vs

Federation of Pakistan, etc.

PETITIONER BY:	Mr. Salman Farooq and Mr. Umer Altaf, Advocates.
RESPONDENTS BY:	Mr. Ahmed Sheraz, Advocate for NTC.
	Mr. Farrukh Shahzad Dall, AAG.
DATE OF HEARING:	12.08.2022.

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BABAR SATTAR, J.- The petitioners have impugned order dated 22.04.2016 passed by National Tariff Commission **("NTC")** rejecting the request for refund of provisional anti-dumping duty imposed by NTC on the basis of preliminary determination in the case of anti-dumping investigation on imports of Wall/Floor Tiles into Pakistan dated 03.04.2014 **("Preliminary Determination")**.

2. Learned counsel for the petitioners contended that the Preliminary Determination was challenged before the learned Lahore High Court through ***M.I. Sanitary Store, etc. vs. The Federation of Pakistan*** **(W.P No. 12255/2014)**, which by order dated 19.05.2014 set aside the Preliminary Determination for being *coram non judice.* The question of resumption of proceedings into the investigation in which the Preliminary Determination was made was taken up by NTC on

27.07.2015. But the representative of domestic industry on whose application the investigation leading to the issuance of the Preliminary Determination was initiated, withdrew his application. After withdrawal of the application by the domestic industry in exercise of power under Section 40 of the Anti Dumping Duties Ordinance, 2000 **("Ordinance")**, NTC terminated the investigation without imposition of any anti-dumping duty or other measures provided under the Ordinance by order dated 10.08.2015. After termination of the said investigation, the petitioners sought a refund of the cash deposit received by NTC from the petitioners as provisional anti-dumping duty, which request was rejected through the impugned order. Learned counsel for the petitioner contended that pursuant to Section 55(4) of the Anti-Dumping Duties Act, 2015 **("Act")**, once NTC makes a negative final determination any cash deposit made during the period of application of provisional measures is to be refunded by NTC within forty days of such determination. He contended that the scheme of the Act provided that under Section 43 the provisional anti-dumping duty could be imposed as a provisional measure to prevent injury to be caused to the domestic industry. But Section 44 clarified that such provisional measures took the form of security by way of cash deposit and such security deposit acquired the form of anti-dumping duty only once such duty was imposed by NTC after it made a final determination of dumping causing injury. He submitted that in the instant case, the domestic industry had withdrawn its application under Section 40 of the Act. And NTC

in its wisdom deemed the case not to be fit for continuation of the investigation pursuant to its *suo moto* power under the proviso of Section 40 and terminated the investigation without imposition of any duty. Given that there was no final determination of dumping and injury to the domestic industry, the petitioners' case clearly fell within the scope of Section 55(4) of the Act. He contended that to deny the refund NTC was conflating the matter by relying on a judgment of the august Supreme Court in the case of ***Fecto Belarus Tractor Ltd. vs. Government of Pakistan*** **(2005 PTD 2286)**, wherein the subject-matter was refund of customs duty and sales tax and not anti-dumping duty. And such precedent had no co-relation to the *lis* before this Court. He further submitted that NTC was also relying on a judgment of this Court in ***M/s Home Life vs. National Tariff Commission, Islamabad.*** **(W.P 2000 of 2010)**, wherein this Court had expressed its opinion in relation to Section 52 of the Act and not Section 55(4), and such precedent was also not relevant to the controversy before this Court.

3. Learned counsel for NTC submitted that the august Supreme Court in ***Fecto Belarus Tractor*** had held that an importer cannot recover customs duty and sales tax from the State once it had passed on the burden of the same to end consumers, while enumerating the doctrine of unjust enrichment that prohibited a person from availing the benefit of a windfall. And in such case, the tax and duty collected was to be retained by the State, as the end consumers to whom such duty was due to be refunded could not be identified. He

further relied on judgment of this Court in ***M/s Home Life*** wherein, the learned Judge-in-Chambers had held that the grant of allowance and refusal of refund was an exclusive prerogative of NTC and that a Court could not enter into an exercise of calculating anti-dumping duty. And further that where liability had been passed on to consumers the importer would not be entitled to recover anti-dumping duty. That the Intra Court Appeal, against said judgment was dismissed and CPLA against the same was pending before the august Supreme Court.

4. The question before this Court is whether NTC is entitled to seek documentary evidence from an importer, who has made cash deposit due to application of provisional measures by NTC through a Preliminary Determination, as to whether such provisional anti-dumping duty has been passed on to buyers/consumers, in order to decide the question of entitlement of such importers in a claim for refund under Section 55(4) of the Act.

5. The facts as enumerated above are undisputed. NTC imposed provisional anti-dumping duty as a provisional measure pursuant to the Preliminary Determination. The petitioners made cash deposits pursuant to Section 44 of the Act to discharge their obligation under the Preliminary Determination. The Preliminary Determination was declared illegal by the learned Lahore High Court for being *coram non judice.* The question of continuation of investigation was then heard by NTC during which the domestic industry, on whose

application the investigation had been initiated, withdrew its application under Section 40 of the Ordinance (which is *pari materia* to Section 40 of the Act). NTC by order dated 10.08.2015 terminated the anti-dumping investigation re import of Wall/Floor Tiles without imposition of anti-dumping duty.

6. It is not contested by NTC that there was no final determination issued by NTC declaring that the petitioners were liable for dumping or had inflicted any "injury" on "Domestic Industry" within the meaning of Sections 2(i) and 2(d), respectively, of the Act. The only question then is whether issuance of a refund under Section 55(4) of the Act within a period of forty-five days is a mandatory requirement under the Act or whether such refund is contingent on NTC first satisfying itself that the provisionally determined anti-dumping duty has not been passed on by the importer to end consumers.

7. Section 55(4) of the Ordinance states the following:

> *"Where the Commission makes a negative final determination, any cash deposit made, during the period of application of provisional measures shall be refunded by the Commission within forty-five days of such determination."*

It would be useful to contrast the language of Section 55(4) with provisions of Section 52, also related to refund of amounts paid in excess of the dumping margin. It states the following:

> ***52. Refund of anti-dumping duties paid in excess of dumping margin.***—*(1) An importer shall be granted a refund of the actual amount of anti-dumping duties collected if the Commission determines that dumping margin, on the basis of which such antidumping duties were paid, has been eliminated or reduced to a level which is below the level of the anti- dumping duty in force.*
>
> *(2) An importer may submit an application for refund of anti-dumping duties collected within any twelve months period to the Commission not later than sixty days from the end of such period.*
>
> *(3) An application under sub-section (2) shall contain such information as may be prescribed.*
>
> *(4) The Commission shall provide an importer making an application under sub-section (2) with an explanation of the reasons for the decision concerning a request for refund.*
>
> *(5) A refund of anti-dumping duties under this section shall normally take place within twelve months, and in no case later than eighteen months, after the date on which an application for refund compliant with the requirements of sub-section (3) is received by the Commission.*

8. Section 55 addresses the situation where at the end of the adjudicatory process NTC reaches a conclusion while making its final determination that there was no injury or threat of injury (which Section 55(4) describes as negative final determination). NTC is then under an obligation to issue a refund of "any cash deposit made during the period of application of provisional measures… within the period of forty-five days of such determination". The scheme of Section 55 reflects that the issuance of a refund is not the product of any adjudicatory process but is a mandatory requirement with a fixed timeline i.e. to issue a refund in the amount of any

cash deposit received as provisional anti-dumping duty within a period of forty-five days of issuance of a negative final determination.

9. In the instant case, the adjudicatory process in relation to the investigation in which a Preliminary Determination was made, pursuant to which cash deposits were received from the petitioners as provisional measures, came to an end by order dated 10.08.2015, after withdrawal of application by the domestic industry and a decision by NTC to terminate the proceedings without imposition of anti-dumping duty pursuant to its power under proviso of Section 40. NTC, in the event it deemed it fit to do so, could continue the investigation even after the withdrawal of application by the domestic industry. NTC, however, in exercise of its power decided not to do so and the decision to terminate proceedings in relation to the investigation that resulted in the Preliminary Determination was for all practical purposes a negative final determination clearly stating that investigation was being terminated without imposition of any anti-dumping duty.

10. The scheme and mechanism for refund under Sections 52 and 55 of the Act, respectively, can also not be confused. Under Section 55(4) the refund of cash deposit taken as a provisional measure after the issuance of a negative final determination is mandatory and automatic. Section 52(2), on the other hand, provides for an adjudicatory process which kicks off with the importer filing an application for refund. Section 52(3) endows the Federal Government with the

authority to prescribe through rules the information that must be furnished by an importer along with its refund application. Sub-section 52(4) then requires NTC to give reasons for the decision in relation to the refund. Obviously in view of Section 52(1) there is need for application of mind and to make calculations while determining whether or not a refund is due to an importer. But the scheme of Section 52 cannot be imported and read into the scheme of refund under Section 55.

11. The principles of statutory interpretation in this regard are well settled. A Court must give meaning and effect to the words used by the legislature in a statue in order to garner legislative intent (see for example ***Federation of Pakistan vs. Durrani Ceramics*** **(2014 PTD 2016),** ***Jamat-I-Islami vs. Federation of Pakistan*** **(PLD 2000 SC 111) and** ***Standard Printing Press vs. Sind Employee's Social Security Institution*** **(1988 SCMR 91)**. A Court cannot read into the statue in view of the established doctrine of *casus omissus* (see for example ***Gul Taiz Khan Marwat vs. Registrar, Peshawar High Court*** **(PLD 2021 SC 391**). A Court is also not to give meaning to the language of a provision in such manner that it renders the provision redundant.

12. In view of the unambiguous language used in Section 55(4) neither the scheme of Section 52 of the Act can be read into Section 55(4) nor can any provision of the Customs Act, 1969, be read into Section 55(4) of the Act.

13. NTC argued before the Court that the impugned order has been passed in view of the law laid down by the august Supreme Court in ***Fecto Belarus Tractor.*** The argument is misconceived. In ***Fecto Belarus Tractor*** the Court had interpreted the provisions of the Customs Act, 1969, and the Sales Tax Act, 1990, and by applying the principle against unjust enrichment it had been held that in the event that in a case of refund the refund could not be issued to the person who bore the burden of the duty or tax collected by the State, the excessive amount collected would remain with the State and would not be transferred to a private person who had not discharged such burden of tax but had transferred it further down the chain. The doctrine of unjust enrichment had been applied in the context of a tax or duty collected by the State. The imposition of anti-dumping duty under the Act is not akin to collection of tax. The Act, according to its preamble, was promulgated "to provide a framework for investigation and determination of dumping and injury in respect of goods imported into Pakistan…" The object of imposing of anti-dumping duty is to prevent the infliction of injury on Domestic Industry by import of goods at a price that constitutes dumping.

14. This Court need not determine conclusively whether or not the doctrine of unjust enrichment is applicable to anti-dumping duties given the fundamental differences between the duty imposed to protect domestic industry versus a duty or tax collected to meet the needs of the State and for the general welfare of the citizens. Suffice it to say that the ratio

in ***Fecto Belarus Tractor*** is not applicable in the instant case. In ***Fecto Belarus Tractor*** the august Supreme Court interpreted provisions of the Customs Act, 1969, and the Sales Tax Act, 1990, and provisions of such statutes cannot be read into the Act. It was held by the august Supreme Court in ***Ghulam Mustafa Jatoi vs. Additional Distrct & Sessions Judge*** **(1994 SCMR 1299)** that provision of one statute need not be imported or read into another statue where the text of the provision to be interpreted is not ambiguous while endorsing the judgment of the learned Karachi High Court in ***Mahbub Ahmad vs. First Additional District Judge*** **(PLD 1976 Karachi 978)** wherein it was held that *"unless the provision is pari materia, it is not correct to construe a provision with reference to another provision in a different Act, for it is the language of the provision which is the determining factor."* It is a settled principle of interpretation that looking at provisions of statues that are *pari materia* is an interpretation tool to decipher the legislative intent behind provisions of a statute where the language of such provisions is ambiguous or amenable to multiple interpretations. Section 55(4) is not ambiguous and consequently while deciphering the intent of the legislature in promulgating such provision there is no need to seek guidance from provisions of other statutes.

15. In view of the law laid down by the august Supreme Court in ***Fecto Belarus Tractor*** the legislature amended the Customs Act, 1969 and Section 33(4) now states that, *"no refund shall be allowed under this section, if the sanctioning authority is satisfied that the incidence of customs duty and*

other levies has been passed on to the buyer or consumer." The legislature was cognizant of the ratio in ***Fecto Belarus Tractor*** and incorporated the same in the form of Section 33(4) of the Customs Act, 1969. There was nothing preventing the legislature from incorporating such provision within Section 55 of the Act (or for that the matter even within Section 52). But the legislature has not done so and it is not for NTC or for this Court to read Section 33(4) of the Customs Act, 1969, into the provisions of the Act that deals with the subject of refund. The Act is not a tax statute. In relation to tax statutes it was held in ***Cape Brandy Syndicate v. Inland Revenue Commissioner*** **(1921) 1 K.B. 64)** that "… in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is not equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used". This principle of interpretation of fiscal statutes has been endorsed by the august Supreme Court (see for example ***Collector of Customs vs. Muhammad Mahfooz*** **(PLD 1991 SC 630)**, ***Star Textile Mills Ltd. vs. Govt. of Sindh*** **(2002 SCMR 356)** and ***Province of the Punjab vs. Muhammad Aslam*** **(2004 SCMR 1649)**.

16. The second argument of NTC with regard to law laid down by this Court in ***M/s Home Life*** is also misconceived. The question before this Court in ***M/s Home Life*** related to the entitlement of importers to be refunded anti-dumping duties collected pursuant to a final determination that was set aside and the matter was remanded back to NTC. The

judgment is distinguishable as it related to interpretation of Section 52 of the Act and not Section 55, which forms the subject matter of the instant petition. Even in the context of Section 52, the Court had held that the matter whether or not anti-dumping duty was due from the importers was pending adjudication before NTC, which had not turned down the claim of the importers, and consequently the importers were at liberty to raise their claim regarding the refund before NTC. The comments about the question of grant of refund falling within the exclusive prerogative of NTC or that the importers were not entitled to such refund in the event that liability had been passed on to consumers were obiter comments that did not form the ratio of the decision. The principles of statutory interpretations as applicable here, including that Section 33(4) of the Customs Act, 1969, cannot read into provisions of the Act has been stated above. As the interpretation of Section 52 of the Act and the entitlement to refund under it does not form the subject-matter of the present petition, this Court need not to delve upon it. Suffice it to say that the judgment of this Court in ***M/s Home Life*** is distinguishable and is not a precedent on the basis of which NTC can conclude that it is authorized to impose additional conditions to be satisfied by importers while processing a refund under Section 55(4) of the Act.

17. For the aforementioned reasons, this Court finds that in the event that NTC terminates an investigation without imposition of any measures under the Act pursuant to Section 40 of the Act or issues a negative final determination the

effect is that NTC has determined that the matter before it does not involve any injury or threat of injury to the domestic industry and any security deposit received by NTC as a provisional measures pursuant to the provisions of Sections 43, 44 and 51 becomes refundable automatically pursuant to Section 55(4). And is to be refunded within a period of forty-five days of the termination of the investigation without imposition of any measures or the issuance of a negative final determination as the case may be. The petition is accordingly **allowed**. The impugned order is **set aside** for being in breach of Section 55(4) of the Act. NTC is directed to refund the cash deposit received as provisional anti-dumping duty within a period of forty-five days.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 29.08.2022.

JUDGE

Shakeel Afzal

Approved for reporting.