

JUDGMENT SHEET
ISLAMABAD HIGH COURT
ISLAMABAD

CUSTOM REFERENCE No.06/2019

**DIRECTORATE OF INTELLIGENCE AND INVESTIGATION
CUSTOMS, RAWALPINDI.**

Versus

AMJAD ALI, ETC.

CUSTOM REFERENCE No.07/2019

**THE DIRECTORATE GENERAL, INTELLIGENCE AND
INVESTIGATION-FBR.**

VERSUS

ZEVEERGUL AND OTHERS, ETC.

Applicants by: Mr. M.D, Shahzad and Ch. Talib Hussain,
Advocates. (In both Cases)

Respondent by: Mr. Muhammad Adnan Moton, Advocate.
(In Custom Reference No. 06/2019)
Ms. Naziran Malik, Advocate.
(In Custom Reference No. 07/2019)

Date of Hearing: 12.10.2020

LUBNA SALEEM PERVEZ J. Through this consolidated judgment we intend to dispose of above mentioned reference applications filed against the consolidated judgment of the Customs Appellate Tribunal dated 06.05.2019. The applicant formulated 10 questions, however, as per order dated 29.07.2020, learned counsel for the applicant proposed following questions for determination by this Court considering them to be questions of law arising out of the impugned order dated 06.05.2019, passed by the Customs Appellate Tribunal, Islamabad.

- i. *Whether the act of bringing into Pakistan the goods in question, without payment of duty/taxes, does or does not, fall within the category of smuggling, as defined u/s 2(s) of the Customs Act?*
- ii. *Whether the act of bringing into Pakistan the goods in question, through route other than a route declared u/s 9 or 10 of the Customs Act, from any place other than a custom station does or does not fall within the category of smuggling, as defined u/s 2(s) (iii) of the Customs Act and (the goods) are or are not liable to be confiscated?*
- iii. *Whether the seized foreign goods/smuggled goods, can or cannot be released unconditionally under the law?*

- iv. *Whether notified goods at Serial No. 15 (Food Grains and Food items, all sorts) of SRO. 566(I)/2005 dated 06.06.2005, can or cannot be, released unconditionally?*

2. Facts of the case, in brief, are that the applicant on informer's information intercepted a Hino Trailer Truck bearing Registration No. Z-7193, carrying 25 cartons of Rani Float Juice, 10 cartons of Achahichi Coconut Chocolate, 12 cartons of Shoniz-Nado Milk Chocolate, 16 cartons of Shoniz Coconut Eclairs Toffee and 10 cartons of foreign origin small Cardamom and 2 suzuki pickups loaded in 40 ft container No. CRSU-9103958, near Dhamma Stop, Fateh Jang Road, Tehsil & District Attock, driven by Muhammad Gul (the driver). The Driver on demand of the Applicant, could not produce the relevant import documents and receipts regarding payment of taxes and duties in respect of the goods. Therefore, the goods were taken into custody along with trailer truck. The seizure report dated 21.02.2019 was submitted to the Collector of Customs (Adjudication), who after issuance of show cause notice dated 08.03.2019, passed Order-In-Original (ONO) No.20 of 2019 dated 19.03.2019, whereby he ordered outright confiscation of the seized goods u/s 156(1) read with clauses 89 & 90 of the Customs Act, 1969, by affirming the unlawful entrance of goods in the country through non-notified route. The Hino Trailer Truck was also confiscated for transportation of smuggled goods. However, the truck was released against redemption fine of 20% of the Customs appraised value on the ground that it being commercial vehicle was only carrying the seized goods in routine and no previous activities has been reported against it. The applicant assailed the ONO before Customs Appellate Tribunal, whereby learned Member/Chairman, vide order dated 06.05.2019, released the goods mentioned at Sr. No. 1 to 5 in the seizure report to the applicants unconditionally by modifying the ONO passed by the Collector. It was against this order, the respondent filed present reference application u/s 196 before this Court.

3. Learned counsel for the applicant department submitted that the learned Member/Chairman failed to appreciate the facts and applicable law; that goods were intercepted on Fateh Jang Road and the driver failed to produce the legal documents in respect of import of foreign origin goods except a bility No. 505 dated 26.01.2009 issued by Sitara Usman Goods forwarding agency Quetta and a scanned colored copy of GD No. 617 dated 14.04.2017 which, on verification, was found to be fake; that the goods were smuggled goods within the meaning of

section 2(s) of the Customs Act, 1969 as the goods were brought in the country through non-notified route u/s 9 & 10, without payment of duty and taxes; that the smuggled foreign origin goods cannot be released unconditionally under the law as SRO 499(I)/2009 dated 13.06.2009 specifically bars the release of smuggled goods against redemption fine; that the learned Member/Chairman has erred in not appreciating the fact that the respondents before the intelligence officer has admitted of having no evidence regarding legal import documents or lawful possession of seized foreign origin goods and they also offered to pay duty/taxes leviable on such goods, he submitted that their consent to pay duties and taxes is their admission of offence, therefore, the impugned order dated 06.05.2019, passed by Customs Appellate Tribunal is liable to be set aside.

4. Learned counsel for the respondents while supporting the impugned judgment passed by the Customs Appellate Tribunal submitted that the ONO dated 19.03.2019 passed by the Collector adjudication is without jurisdiction as u/s 179 of the Act, 1969, the Collector has the power to adjudicate cases where the amount of duty and taxes involved exceeds three million rupees as power of adjudication up to three million rupees has been assigned to the Additional Collector. He submitted that the total revenue involved in present cases is below three million rupees, therefore, the appropriate jurisdiction lies with Additional Commissioner under section 179(1)(ii) of Customs Act, 1969 (hereinafter referred to as the "Act, 1969"). He relied on the judgment of Hon'ble Sindh High Court, Karachi passed in case titled as *Collector Customs vs. M/s Kapron Overseas Supplies Co. (Pvt.) Ltd, Karachi*" (PTCL 2010 CL. 1067) wherein it has held that jurisdiction by an authority is a mandatory requirement and non-fulfillment would entail the entire proceedings to be *coram-non-judice* and the judgment in case titled as "*Collector of Customs, Lahore vs. South East Trading*" (PTCL 2014 CL.135) wherein it has been held that *any transgression to the responsibility assigned within the parameter section 179(1) would render the entire exercise of authority to be ab initio, void and illegal*. On merits he submitted that the goods were freely available in the open market from where the respondents purchased the said goods; that the applicant was unable to prove before learned Tribunal that the goods have been brought into Pakistan through non-notified routes u/s 9 & 10 of the Customs Act, 1969.

5. Arguments heard, record perused.

6. Though, the respondent has not filed cross reference against the impugned order, passed by Appellate Tribunal, to consider the question of jurisdiction of Collector, who has passed ONO in the present case, however, we consider it pertinent to decide the issue of jurisdiction. Learned counsel for the respondents is of opinion the learned Collector adjudication illegally exercised jurisdiction u/s 179(i) of the Act, 1969 in the case as the revenue involved in the cases is below three million and only the Additional Collector has been vested with power to adjudicate cases up to three million. We are not inclined to agree with the argument of the learned counsel as bare perusal of section 179(i) clearly shows that it grants power to Collector to adjudicate all cases, without any limit of involvement of custom duties and taxes. The provision of Section 179 does not provide any upper or lower limit of duty & taxes under clause (i), for the Collector to adjudicate the cases. The capping of the maximum limit of three million for adjudication by Additional Collector does not set the minimum limit for adjudication of cases exceeding three million by the Collector. Since, the words “no limit” are mentioned against Collector under section 179(i), therefore, in our opinion the Collector has been vested with powers and jurisdiction to adjudicate all the cases irrespective of the amount of duties and taxes involved. The pecuniary limit for adjudication, vide Section 179(i) as interpreted by learned counsel for petitioner is legally incorrect in view of the fact that legislature in its wisdom has not provided any monetary limit for adjudication of cases by Collector and if it was intended to restrict the minimum limit then such limit would have been provided in the same way as in Clause (ii) & (iii) of Section 179 of the Act, 1969. The learned counsel for respondents has misinterpreted the provisions of Section 179(i) of the Act, 1969, against the settled rules of interpretation of fiscal statutes by superior courts, whereby, it has been held that *Court, in case of taxing statute has to look to clear words and it is to be interpreted by applying plain literal meaning to the words used in the statute, there is no question of any intendment, presumption or equity about tax and nothing can be read or implied in taxing statute.* Reference can be made in this regard to the case laws reported as ***Ocean Pakistan Ltd. through Chief Executive Officer, Islamabad versus Additional Commissioner Inland Revenue, (Audit-I), Islamabad and others (2018 PTD 996), M/s Saad Ullah Khan and Brothers (SKB) versus Appellate Tribunal of Inland Revenue and others (2019 PTD 776) and Commissioner of Agricultural Income-***

Tax versus B. W. M. Abdur Rahman (1973 SCMR 445). The cases relied upon by the learned counsel for the Respondents in this regard are distinguishable and in all the cases the ONOs have been issued either by the Deputy Collector or Additional Collector, who under Section 179(ii) & (iii) of the Act, 1969 has cases having restricted amount of duties and taxes for adjudication. The contention of the learned counsel for Respondents is, therefore, rejected.

7. As regards the questions in this reference application, the applicant in the present case has alleged that the goods have been brought into Pakistan through a route other than notified u/s 9 & 10 of the Act, 1969, without payment of taxes and duties, therefore, it is an act of smuggling as defined u/s 2(s) of the Act. Perusal of the ONO revealed that the learned Collector have affirmed all the charges and allegations made by the applicant in seizure report as referred to him without applying his independent mind, ignoring the fact that being an adjudicating authority, he is exercising quasi judicial powers and before arriving at a just conclusion, an independent process of investigation from the respondents/accused in the seizure report was required to be adopted which is provided in the Act 1969, but he affirmed the action for the same reason that the respondents were willing to pay duties and taxes, which for him is a sufficient ground to establish that the goods have been smuggled in Pakistan through non-notified route. The Collector did not give any findings regarding contention of the respondents who claimed that they are not importers but have purchased the goods from the local market and were transported to Quetta for onward sale to users. No such queries regarding the business status of respondents and receipts regarding purchase of goods from local market were called by the applicant or by the Collector Adjudication during proceedings. The perusal of the order shows that the seizure report as well as the ONO has been passed with predetermined mind that the goods are non-duty paid and smuggled one. There is nothing on the record to show that the route used by respondents was a route other than notified, vide Section 9 or 10 of the Act, 1969 and that Fateh Jang, Road has been mentioned as a non-notified or unauthorized route as no trail of transportation of the goods from the point the goods alleged to have been brought into Pakistan through non-notified route to avoid custom duties and taxes have been recorded in the seizure report as well as in ONO. Applicant is unable to substantiate with any supporting document to prove the act of smuggling within the meaning of

Section 2(s) of transporting goods unlawfully into Pakistan in violation of the Act, 1969.

8. Admittedly, the import of subject goods is not restricted or prohibited under the Act, 1969 and are freely available in the local market within Pakistan and in view of judgment of Hon'ble Supreme Court of Pakistan in case titled as ***"Sikandar A Karim vs. The State" (1995 SCMR 387)***, presumption of lawful importation of such goods is attached to it. Relevant observation is reproduced as under:-

"If the items alleged to be smuggled by the prosecution were available freely in the open market and imports of such goods were not banned in the country, a presumption may arise that these goods were lawfully brought in the country unless contrary is shown."

9. In another judgment of the Hon'ble Supreme Court passed in case titled as ***The Assistant Collector, Central Exercise and Land vs. Qazi Zia Uddin" (PLD 1962 SC 440)***, wherein it has been held that *"If a person purchases goods in an ordinary market then in the absence of any suspicious circumstances or some definite facts leading to that inference the customs officer is not entitled to a reasonable belief that the Government has been defrauded of the duty payable on the goods. The ordinary method of the import of goods from outside into Pakistan is that they come through the Customs barrier and the duty payable is in fact paid. The presumption, therefore, with respect to any goods, which may be sold in the open market in the absence of an indication to the contrary would be that duty has been paid on them."*

10. It has been also alleged by the applicant that the respondents have failed to produce the import documents in respect of the seized goods. In this regard we are of the view that since, the respondents are not the importers but are local traders, who have purchased the subject imported goods which are freely available in the local market, therefore, it was not possible for them to produce any import documents to the applicant. The insistence to produce such import documents is nothing but undue pressure of the departmental authorities/applicant on the respondents, which act is arbitrary and unjustified. Since, the applicant failed to discharge its onus to prove through evidence, the trail of transportation of the subject goods from entering into Pakistan through un-notified routes, under sections 9 & 10 of the Act, 1969, without payment of

custom duties and taxes, the subject goods, therefore, cannot be categorized as smuggled goods within the meaning of section 2(s) of the Act, 1969.

11. It has been observed that the questions proposed by the respondents are not formulated in a proper manner and cannot be answered in affirmative or negative, therefore, in view of the discussion made hereinabove, the questions proposed in the present reference and reproduced in para 1 above are decided/answered in favor of Respondents.

(MIANGUL HASSAN AURANGZEB) (LUBNA SALEEM PERVEZ)
JUDGE JUDGE

Announced in the open Court on 17th Nov 2020.

JUDGE

JUDGE