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IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:
Mr. Justice Umer Ata Bandial, CJ
Mr. Justice Yahya Afridi
Mrs. Justice Ayesha A. Malik

(AFR)

Civil Petition Nos. 1600 to 2807 of 2021

(Against the judgment dated 24.11.2020 passed by the High Court of Sindh, Karachi in Special Customs Reference Application No. 09 of 2015 a/w SCRA No. 10 to 14, 45 to 54, 204 to 295, 1161 to 1216, 1239 to 1338, 1389 to 1488, 1662 to 1710, 2188 to 2287, 2290 to 2389, 2394 to 2493, 2610 to 2609, 2618 to 2717, 2721 to 2791 of 2015 & 559 to 792 of 2017)

National Logistics Cell, Government of Pakistan, HQ NLC, Karachi *(in all cases)*

... Petitioner

Versus

The Collector of Customs, Model Customs Collectorate, Port Muhammad Bin Qasim, Karachi, etc. *(in all cases)*

... Respondents

For the Petitioner: Mr. Muhammad Anas Makhdoom, ASC
Mr. Tariq Aziz, AOR.
(in all cases)

For the Respondents: Raja Muhammad Iqbal, ASC
(in all cases)

Date of hearing: 23.06.2022

JUDGMENT

YAHYA AFRIDI, J.- National Logistics Cell (**"the Petitioner"**) seeks leave to appeal against a single consolidated order dated 24.11.2020, whereby the High Court of Sindh has dismissed the Special Custom Reference Applications filed by the Petitioner under section 196 of the Customs Act, 1969 (**"the Act"**).

Suo Moto Case No.16/2010

2. The genesis of the cases in hand was a news report, which was made the basis for *Suo Motu* proceedings[1] initiated by this Court, under

[1] S.M.C. No. 16 of 2010

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Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 **("the Constitution")** to inquire into the alleged pilferage of commercial and non-commercial cargos meant for transportation to Afghanistan for ISAF and NATO forces under the Afghan Transit Trade Agreement, 1965 **("Agreement")**. This Court tasked the Federal Tax Ombudsman to carry out an inquiry into the matter, and submit a report. In pursuance of the directions of this Court, a report dated 10.01.2011 **("the Report")** was submitted by the Federal Tax Ombudsman, stating therein *inter alia*, that around 7922 containers destined to Afghanistan under the Agreement were unaccounted for, and this report led to the disposal of the *Suo Motu* Case No. 16 of 2010 in terms of order dated 28.03.2012, which reads:

> "Needless to observe that as on the basis of material, so collected by this Court through the FTO (Federal Tax Ombudsman) and other resources, cases are ultimately to be decided by the competent forums either by adjudicating upon the matter by the Customs Department or by the NAB in view of the fact that government officers are also involved in this case; therefore, we dispose of this matter with the observation that let the NAB conduct thorough and fair inquiry in the matter by providing proper opportunity of hearing to all concerned; however, the report of the FTO dated 10.01.2011 shall be read as part of this order. The Chairman NAB, however, is required to submit fortnightly reports about progress in the matter to the Registrar of this Court for our perusal in Chambers and passing appropriate orders, if need be, at a subsequent stage. The matter stands disposed of accordingly."

NAB References

3. In pursuance of the aforementioned order of this Court, NAB References Nos. 6, 7 and 12 of 2012 (in respect of 28802 containers identified by FBR) and Reference Nos. 15 and 16 of 2013 (in respect of 7992 containers identified by the learned F.T.O.) were filed. We have been informed that, all the accused in all the above stated five NAB References have been acquitted.

Adjudication Proceedings under the Act

4. In addition to the five NAB References, 1218 Show Cause Notices were served upon the Petitioner by the Federal Board of Revenue **("FBR")**, wherein it was stated that the Petitioner, as a registered carrier, was

legally under an obligation to ensure safe and secure transportation of the transit cargos to the notified point of exit *via* the transit route, and as the Cross Border Certificates in relation to the consignments were not obtained and produced, this confirmed that the subject cargos were pilfered, and thus, the Petitioner was liable to custom duty, sales tax, income tax and excise duties under sections 2(s), 32(1), 32(2), 32(A), 79, 121, 127, 128, 129, 192 and 209 of the Customs Act, 1969 read with Chapter III of the Customs Rules, 2001, Public Notices (either 16/2000(A) or 5/2003(PQ), section 3(i) of the Imports and Exports (Control) Act, 1950, and various clauses of Section 156 of the Customs Act, 1969 and provisions of the Sales Tax Act, 1990, the Federal Excise Act, 2005 and the Income Tax Ordinance, 2001.

5. The adjudicatory proceedings arising from all the Show Cause Notices served by the Addl. Collector Customs culminated in the Order-In-Original dated 27.06.2013,[2] saddling the Petitioner with the duties and taxes, as stated in the respective Show Cause Notices. Aggrieved thereof, the Petitioner preferred appeals against the Orders-In-Original first before the Collector of Customs (Appeal) and then before the Customs Appellate Tribunal, which were dismissed *vide* a consolidated order dated 12.08.2014, prompting the Petitioner to file the Special Custom Reference Applications before the Sindh High Court, urging the following questions of law:

1) Whether the learned Appellate Tribunal and the Collector of Customs are justified in holding that it is the responsibility of NLC under the Custom Rules extends beyond Custom Exit points at Chaman/Amangarh?

2) Was it the responsibility of NLC to transit goods across Pakistan through designated routes i.e. either via Spin-Boldak (Chaman) or the Torkham borders?

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[2] Order-in-Original No.22/2013 (PQ). The customs official *mutatis mutandis* decided 331 Show Cause Notices issued to the Petitioner and other parties. The leading CPLA No.1600 of 2021 is filed against the said Order-in-Original and the Customs Appellate Tribunal order dated 12.08.2014.

3) Is the production of cross border certificate the responsibility of the appellant (NLC) under Public Notice No. 16/2000?

4) Is the production of cross border certificate under Public Notice No. 05/200, the responsibility of NLC?

5) Whether the issuance of show cause notices without containing material to establish pilferage en route or incriminating material or evidence, fulfill the necessary ingredients of show cause notice?

6) Whether given the long time in using show cause notices and passing orders in original, it is to be treated as past and closed transactions being time barred?

The Special Custom Reference Applications filed by the Petitioner before the High Court were also answered in the negative by holding that, the Petitioner failed in its duty to safely deliver the transit cargos to the exit points, thus the Petitioner was declared liable for the duties and taxes, as stated in the Show Cause Notices. Hence, the present petitions for leave to appeal.

Procedure for transit of Cargo - Agreement and C.G.O. No.4/2007

6. In order to understand the findings recorded in the adjudicatory proceedings against the Petitioner, we have to first examine the provisions of the Customs General Order No. 4/2007 dated 31.03.2007 (**'C.G.O. No. 4/2007'**) and terms of the Agreement to ascertain the obligations of the petitioner under the relevant laws. To do so, we may trace the sequence of the steps required thereunder, for the safe transportation of goods destined for Afghanistan from ports at Karachi *via* the transit route through Pakistan. These steps essentially entail:

Step I

First, in respect of goods arriving at Karachi, the said goods are sealed at and removed from the Karachi port under the supervision of the Pakistan Customs to be transported to the Afghan transit sheds.

Step II

As for the Customs, once the goods destined for Afghanistan are loaded onto railway wagons or vehicles, exclusively for the purposes of transit cargo, the original copy of the Afghan Trust Trade Invoices (**"ATTI"**) is completed and handed over to the owner

of the cargo or his agent, and the duplicate and triplicate copies of the ATTI are dispatched by the Pakistan Customs to the Afghan Customs at Spin Boldak and Torkham.[3]

The customs agent of the owner of the goods, on the other hand, would have to lodge the Afghan Transit Trade Application, and load the container containing the cargo on to the listed Transport Unit. The said Transport Unit would be scanned and moved to the designated Pakistan Container Security System (**"PCCSS"**) Focal Point Entry, where the relevant PCCSS officer after fulfilling the requisite checks issues a single copy of a Transport Note in Form-A to be handed to the driver/supervisor of the Transport Unit to be carried with the Transport Unit to the Focal Point Exit.

Step III

The said Transport Note Form-A, on arrival at destination, will then be handed over to the PCCSS officer at the Focal Point Exit, and after successfully carrying out the requisite inspections of the container, the *'transport note will be returned to the driver of the 1st Transport Unit for record'*.[4] This is the extent of the obligation of the First Transport Unit, i.e., the Petitioner, as thereafter the obligation of the Second Transport Unit commences, who is responsible for moving the container(s) on an Afghan registered vehicle permitted to enter Afghanistan.[5]

Step IV

On arrival of the cargo, the Afghan Customs after examining and verifying the cargo retains the duplicate of the corresponding ATTI thereof received from the Pakistan Customs, and returns the triplicate copy to the Customs House, Karachi with appropriate endorsement certifying the arrival of the goods.[6] This triplicate copy is commonly known as a Cross Border Certificate.

A careful review of the above procedure makes it clear that: Firstly, as far as the Petitioner is concerned, a registered carrier of transit cargo of Afghan Transit goods, the only document which it is to retain evidencing safe transport of transit cargo to the designated Focal Point Exit, is the Transport Note Form-A. This document, containing the particulars of the cargo, is prepared by the Pakistan Customs at the point of loading the cargo onto the transport vehicle of the registered carrier. This document

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[3] Clause 3, Annex to the Agreement.
[4] C.G.O. No.4/2007, Chapter III, Part B, Clause II.
[5] Ibid, Clauses III-VIII
[6] Clause 4 of the Agreement.

is returned to the driver/supervisor of the vehicle of the registered carrier, after the requisite inspections of the container carrying the cargo by the concerned PCCSS officials at Focal Point Exit. Secondly, as far as the Afghan Transit Trade Invoices are concerned, the same are directly sent by the customs officials of the Pakistan Customs, Karachi to Afghan Customs at Spin Boldak and Torkham. The registered carrier, such as the Petitioner, is neither required nor is it provided with a copy of the Afghan Transit Trade Invoice for safe transmission to the Focal Point Exit.

Submissions - Counsel of the parties

7. Learned counsel for the Petitioner candidly admitted that, the Petitioner was the registered carrier transporting transit cargos destined for Afghanistan from Ports at Karachi to the two designated Point Exit-NLC stations at Amangarh, District Nowshera and Spin-Boldak, District Chaman. However, he vehemently disputed the liability of the Petitioner for transporting the cargos across the border into Afghanistan, and also the number of containers for which the Show Cause Notices were issued to the Petitioner. He explained that out of a total of 4946 containers transported during the period under dispute, only 1363 containers were transported by the Petitioner, and that from those 1363 containers, 1104 containers were officially verified by the Customs Authorities as having crossed over in Afghanistan.

8. When the learned counsel for the Petitioner was confronted, why the Transport Notes (Form-A) under the C.G.O. No.4/2007 were not produced before the adjudicating forums under the Act, his response was that it was for the Custom Authorities to provide the requisite record to establish that pilferage or smuggling had taken place in the course of

transit of the cargos transported by the Petitioner. This response of the learned counsel, we have noted, was not legally palatable, as it does not absolve the Petitioner from its duty to produce the Transport Notes (Form-A) which were handed over to the driver/supervisor of the transport unit, and thus should have been in possession of the Petitioner.

9. It was further contended by the learned counsel that, there was unexplained haste in proceeding against the Petitioner, as no due verification from the relevant customs record was conducted by the Custom Authorities before issuing the Show Cause Notices. To substantiate his contention, the learned counsel for the Petitioner drew our attention to the official correspondence of the Customs Authorities, confirming the safe transportation of transit cargos transported by the registered carriers, such as the Petitioner, into Afghanistan under the Agreement. The particulars of the letters referred to by the learned counsel are given hereunder in chronological order:

(i) **Letter dated 04.02.2011** by the Federal Board of Revenue (FBR) to Model Customs Collectorate (MCC), Quetta Collector, wherein a Compact Disk (CD) was enclosed giving details of containers that had allegedly been pilfered, requiring an explanation from the Quetta Customs authorities to show why action should not be taken against them.

(ii) **Letter dated 14.02.2011** by MCC Quetta to the FBR, wherein the former in extensive detail not only refuted the actions of the FTO and its report but stated the following:

(a) that the said CD enclosed contained a list based on the containers and that the record maintained is on the basis of ATTI's, therefore the latter should be provided, along with authentication and veracity of the CD itself;
(b) that relevant "Undertaking Certificates" issued by NLC were enclosed as Annex D;
(c) that no mega scam has ever taken place during the last decade;
(d) that absence of even a single complaint by the Government of Afghanistan regarding pilferage of containers indicates that no containers went missing.

(iii) **Letter dated 30.07.2011** by MCC of Appraisement Custom House, Karachi, to FBR, wherein the former stated the '*automated acknowledgement and desealing record of Peshawar Collectorate reveals that only 2872 containers do not appear in the online data. The balance 11547 containers have either been acknowledged or desealed by the Peshawar Collectorate in the PRAL system or both.*'

(iv) **Letter dated 24.12.2011** by the Ministry of Finance, Afghan Customs Department, wherein it was stated that data contained in the CD was cross-examined and the '*record was reconciled with our data and hence no discrepancy was found. Therefore, it is reiterated that almost all ATTIs mentioned in the CD stand acknowledged.*' The letter further stated the Afghan Customs were endorsing cross border on ATTIs and '*duplicate and triplicate of ATTIs bearing receipt are returned to Pakistan Customs*'.

(v) **Letter dated 16.01.2013** by MCC, Custom House Peshawar, to MCC (Appraisement) Karachi, wherein '*17409 containers were reconciled with relevant Clearance Registers of Customs Station, Torkham, however 455 containers could not reconcile...due to non-availability of photocopies of ATTIs/CBCs*'.

(vi) **Letter dated 01.04.2013** by MCC, Custom House Peshawar, to National Accountability Bureau (NAB), reiterating that reconciliation of 336 containers was pending.

(vii) **Letter dated 04.04.2013** by MCC, Custom House Peshawar, to FBR wherein the former stated that they had requested NAB Sindh to furnish copies of relevant ATTIs/CBCs of the remaining 336 containers.

When confronted to explain, why all the aforementioned seven letters **("the letters")** were not produced before the High Court, or for that matter, before the adjudicatory forums under the Act, the learned counsel for the Petitioner responded: firstly, that these documents were in the possession of the customs authorities, and were purposefully concealed, so that the same were not made available before the lower *fora*; and secondly, that a perusal of the letters reveals that the same were internal correspondence of the respondent-department, and not addressed to the

Petitioner. Explaining his response, the learned counsel submitted that the Petitioner was neither entitled to possess the letters nor had knowledge of the contents thereof, so as to seek its production before the lower *fora* to substantiate its stance that the transit cargo had been safely transported to the exit points at Chaman and Torkham.

10. The learned counsel for the respondent-department in rebuttal contended that, the pilferage of transit cargo in route to the exit points has been clearly established by the material on the record, and has been concurrently held to be the responsibility of the Petitioner for which it has been correctly made liable to pay the taxes, duties and penalties thereof. He further contended that, the concurrent findings of fact by all adjudicatory forums under the Act ought not to be disturbed by this Court, and that too at this belated stage, on the basis of fresh material proposed to be introduced by the Petitioner. He finally concluded his arguments by submitting that, the decision rendered by the customs adjudicatory forums are in accord with the settled principles of law based on material facts.

11. When confronted as to the veracity of the letters proposed to be introduced by the Petitioner, the learned counsel for the respondent-department was unable to outrightly refute the same. However, he sought time to seek instructions. As far as the confirmation of the transit cargos entering into Afghanistan, as reflected in the letters, the learned counsel was unable to explain and refute the contents thereof.

Introduction of Additional Material

12. On considering the valuable submissions of the learned counsel, we note that, in essence, the fundamental legal question before us is, whether this Court, while hearing a petition arising from of a Special

Customs Reference, can for the first time consider additional material relating to factual aspect of the case. Generally, it is for the Appellate Tribunal, being the last fact-finding adjudicator, to finally determine the factual aspects of the controversy, and such findings are not interfered with by the High Court, while exercising its jurisdiction under various tax statutes; as the scope and extent of the power of the High Court hearing matters under the tax statutes in reference jurisdiction, as well as of this Court hearing appeals against decisions of the High Court made in such reference jurisdiction, is limited to deciding the question(s) of law, which may arise from the order passed by the Appellate Tribunal.[7] This rule is, however, not absolute. Where the Appellate Tribunal has based its decision on some perverse or totally incorrect finding of fact, which is contrary to the material available on record or which is based on surmises and conjectures; the decision based on such erroneous finding of fact can be corrected by the High Court.[8] In cases, where the High Court has relied on the findings of the Appellate Tribunal, without a proper appraisal of the material before it, this Court being the appellate court of the High Court, may positively exercise the jurisdiction that is vested in the High Court but having not been exercised by it, in order to correct the perverse or arbitrary findings of fact.

13. We are cognizant that, the said exception to the rule of not interfering with the findings of fact, recorded by the Appellate Tribunal, is by no means to be exercised in order to facilitate a delinquent party, with a chance to fill up the lacunas in his case. Thus, this exception is not meant for allowing the additional material, particularly in

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[7] M/s Mohammad Akbar v. I.T.A.T. 1972 SCMR 409; M/s F.M.Y. Industries V. Deputy Commissioner I. T. 2014 SCMR 907; M/s PTV Corporation Ltd. V. Commissioner Inland Revenue 2017 SCMR 1136; M/s Squibb Pakistan v. Commissioner of I.T. 2017 SCMR 1006.

[8] M/s Shah Nawaz v. Commissioner of I.T. 1969 SCMR 123; Commissioner of I.T. v. M/s Smith, Kline & French 1991 SCMR 2374; Commissioner of I.T. v. M/s Farrokh Chemical 1992 SCMR 523; Ibrahim Ishaq v. Commissioner of I.T. 1993 SCMR 287; M/s Irum Ghee Mills v. I.T. A.T. 2000 SCMR 1871.

circumstances, where in the grounds of appeal, a case for additional evidence has not been set out, or any independent formal application has been moved for the purposes of producing additional evidence.[9]

14. In addition to the above, this Court can invoke the exception and accept the additional material produced before it for the first time, provided that: firstly, it is relevant to resolving the controversy in the case; and that the additional material proposed to be adduced was neither in the possession nor knowledge of the party seeking to produce the same in evidence; and finally, that the party proposing to introduce that additional material in the evidence has been prompt in seeking its production without any delay.

15. Once this Court finds it just and proper to consider the additional material, it would then have to decide; whether it is to pass a finding thereon or refer the matter to a lower forum. In the case of **Secretary to the Govt. of W.P. v. Gulzar Muhammad,**[10] this Court dealing with a similar question, set aside the order of the High Court based on the new material produced before it, and remanded the case, permitting the new evidence to be adduced before the High Court,[11] in the following terms:

> [I]n an appeal it is now well settled that additional evidence should not be admitted in order merely to enable one of the parties to the litigation to fill in gaps in the evidence. This Court, acting as a Court of ultimate jurisdiction, has undoubtedly the power to do complete justice, if necessary, even by admitting additional evidence, for there is no restriction on the powers of this Court to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out. But even so this Court does not, as a rule, undertake an enquiry as a Court of first instance, nor permit additional evidence to be placed in appeal when there was sufficient opportunity for the appellant to place all the relevant material before the High Court itself.
> Having regard, however, to the nature of the material now produced before us we are of the opinion that in order to do complete justice this material should have been before the High Court...therefore, require that this matter should be reconsidered by the High Court in the light of the evidence now sought to be put in.

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[9] Abdul Aleem v. Idara N.I.C.F.C. (2016 SCMR 2067); Muhammad Tariq v. Shamsa Tanveer (PLD 2011 SC 151).

[10] PLD 1969 SC 58.

[11] *Case on the interpretation of Order XLI, Rule 27 of the Civil Procedure Code 1908. See also: Naseer Ahmad v. Asghar Ali (1992 SCMR 2300) wherein the evidence was allowed to be brought on record, and the case was remanded.

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In the present case, neither the High Court nor the Customs Appellate Tribunal has dilated upon the letters, pertaining to the internal correspondence of the customs authorities. The letters indicate that, they were written and addressed to the various Customs Collectorates, and therefore, could not have been in possession of the Petitioner. The matter would have been different, had the same been addressed or copies thereof had been sent to the Petitioner; in such a case, the burden would have been on the Petitioner to show why the letters had not been produced before the lower appropriate *fora* under the law.

16. The learned counsel for the respondent-department, as noted above, did not dispute the letters, but requested that the same be verified, requiring the customs authorities to reconcile their own data to check the authenticity of the letters, and the content stated therein. Therefore, passing a definite finding thereon by this Court at this stage, and that too, without verification of the veracity of the letters would not be legally apt. We, therefore, deem it appropriate that this exercise of verification of the letters and the determination thereon, should not be conducted at this stage before this Court, given that it is a factual controversy going to the root of the issue in determining the liability of the Petitioner, if any, and thus, should be referred to, and be dealt with, by the appropriate legal forum, that is, the Customs Appellate Tribunal.

Apparent withholding of fact by the customs officials

17. As is evident from the letters, the Customs Authorities had, prior to the decision of the Customs Appellate Tribunal, confirmed that the extent of the pilferage of transit cargos alleged in the Show Cause Notices was not entirely based on solid factual basis. Despite having knowledge of this admitted position, the respondent-department failed to bring on

record this crucial fact during the proceedings of appeals of the Petitioner before the Custom Appellate Tribunal.

18. Admittedly, there is no material apparent on the record, which may attribute any personal bias or *mala fide* on the part of the respondent-department or any of its officials against the Petitioner. Yet, the silence and inaction of the officials of the respondent-department to place before the Customs Appellate Tribunal, the correct facts about the alleged pilferage begs serious questions. One apparent reason for their silence was the apprehension of the then customs officials to be seen to be complicit in protecting other customs officials in the alleged pilferage or aiding to conceal the same, and thus, might face the threat of being proceeded against in view of the clear directions rendered by this Court in the *Suo Motu* Case No. 16 of 2010.

19. None can dispute the efficacy of the exercise of the *Suo Motu* jurisdiction vested in this Court under Article 184(3) of the Constitution, in matters of public importance involving enforcement of any of the fundamental rights, which require urgent attention of the Court to ensure that the rule of law in the country prevails. However, the exercise of this jurisdiction by the Court is intended to be the need of the hour to ensure and enforce the rule of law; and not to undermine the lawful authority of the departments, institutions, authorities or offices. Not to mention the prejudice it may cause the parties who would not have any right of appeal against the orders passed by this Court in its *Suo Moto* jurisdiction and the adverse effect it may have on the adjudicatory process that may ensue.

20. We have noted in the present case, that the *Suo Motu* jurisdiction was assumed and exercised to prevent the abuse of authority by the

executive arm of the State, which included the Petitioner and the respondent-department. However, the directions to the NAB authorities to investigate the actions of the custom officials, and that too under the continuous supervision of this Court, not only undermined the authority of NAB to investigate the alleged matter of corruption and corrupt practices, independently without being affected by any extraneous influence, as contemplated under the enabling provisions of the NAB Ordinance, 1999. This Court, while exercising its *Suo Moto* jurisdiction, therefore should not only have to be very cautious on what matters it exercises this jurisdiction, but also to be very mindful of the directions it makes, so that, the lawful authority of the investigating authorities or the adjudicatory forums is not undermined.

Conclusion

21. For the reasons stated hereinabove, and to meet the ends of justice, we find the letters produced before this Court should in the first instance be considered by the Customs Appellate Tribunal, as well as any additional material produced by the Petitioner or the respondent-department to rebut the same, provided that evidence is limited to determining: the actual number of cargos, the Petitioner was obligated to transport; the number of the cargos that reached the respective exit points; and how many of these cargos were reconciled with the record of Pakistan customs, and their counterparts in neighboring Afghanistan.

22. In these circumstances, the petitions are converted into appeals and are allowed in the terms that the impugned judgment of the High Court and the order of the Customs Appellate Tribunal are set aside, and the case is remanded to the Customs Appellate Tribunal, to decide the appeals of the Petitioner afresh, which shall be deemed pending, after

considering the letters or any other additional material produced by the parties.

Islamabad
23.06.2022
Approved for reporting.

Arif