

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL, HCJ

MRS. JUSTICE AYESHA A. MALIK

MR. JUSTICE ATHAR MINALLAH

CMA No.819 of 2019 AND

CIVIL APPEAL NO.1080 OF 2011

(Against the judgment dated 28.04.2011 of the High Court of Sindh, Karachi passed in Special Custom Reference Application No.3 of 2010)

Collector of Customs Port Muhammad Bin Qasim, Karachi

...Appellant(s)

Versus

M/s Mia Corporation (Pvt.) Ltd. Islamabad

...Respondent(s)

For the appellant (s): Raja M. Iqbal, ASC

For the respondent: Mr. Farhat Nawaz Lodhi, ASC

Date of hearing: 02.05.2023

ORDER

ATHAR MINALLAH, J.- The Collector of Customs, Model Customs Collectorate, Port Muhammad Bin Qasim, Karachi ("**appellant**") had assailed judgment dated 28.04.2011 of the High Court and leave was granted vide order dated 08.12.2011.

2. M/s Mia Corporation (Pvt.) Limited ("**respondent**") had imported air conditioners and evaporators from Malaysia. The respondent filed goods declaration dated 28.09.2004 wherein the value was declared as US \$ 77 and US \$ 93 respectively. The appropriate officer of customs was not satisfied with the declared value and, therefore, the consignment was provisionally assessed under section 81 of the Customs Act 1969 ("**Act of 1969**") based on the provisionally assessed value of US \$ 80.85 and US \$ 97.65 respectively. The goods were given out of customs charge after the completion of the formalities. The final determination was not made by the customs authorities within the time prescribed under section 81 of the Act of

1969 and, therefore, the provisional assessment had become final in terms of sub section 4 *ibid*. Subsequently, the Directorate of Valuation received a report from M/s SGS regarding the alleged transactional value of the goods imported by the respondent. The latter was, therefore, served with a show cause notice dated 03.4.2006 issued under section 32 of the Act of 1969. The show cause notice was adjudicated by the Additional Collector *vide* order-in-original no.66 of 2006 dated 25.08.2006. The appeal preferred by the respondent was allowed *vide* order-in-appeal no.467 of 2006 dated 30.09.2006. The appellant department filed an appeal before the Appellate Tribunal Customs, Sales Tax and Excise at Karachi ("**Tribunal**") which was dismissed by a Single Member *vide* judgement dated 09.10.2007. The reference application filed by the appellant was allowed and the matter was remanded by the High Court to the Tribunal. The latter dismissed the appeal *vide* order dated 15.02.2010. The reference application filed by the appellant department under section 196 of the Act of 1969 was dismissed by a Division Bench of the High Court of Sindh *vide* impugned order dated 28.04.2011.

3. The questions proposed by the appellant department were answered in the light of an earlier judgment of the High Court of Sindh.¹ In a nutshell, the controversy is regarding initiation of proceedings under section 32 of the Act of 1969, after the provisional assessment under section 81 *ibid* has attained finality. The High Court has held that proceedings under section 32 are barred when the provisional assessment becomes final under section 81 of the Act of 1969.

¹ M/s Hassan Trading Company v. Central Board of Revenue and others (2004 PTD 1979)
Sus Motors (Pvt.) Ltd. v. Federation of Pakistan (2011 PTD 235)

4. We have heard the learned counsel for the parties at length. The learned counsel for the appellant has argued that the High Court has misconstrued the scheme of the Act of 1969 and did not decide the case on merits to ascertain whether proceedings under section 32 of the Act of 1969 were justified. The High Court has upheld the judgment of the Tribunal on the sole ground that once the provisional assessment made under section 81 attains finality then the proceedings under section 32 are barred and cannot be resorted to for the purposes of recovery of the escaped duty and taxes. This interpretation is not based on the correct appreciation of the scheme of the Act of 1969, particularly the distinct stages contemplated there under. The Act of 1969 is a self contained comprehensive statute, governing all matters relating to the import and export of goods, including levy and charge of duties/taxes, its assessment, recovery etc. The scheme of the Act of 1969 is broadly based on three stages, levy and charge of duty, assessment thereof at the time of import or export, as the case may be and recovery of duty, taxes and charge that has not been levied or has been short levied or has been erroneously refunded. The latter stage is manifestly distinct from the completion of assessment under sections 80 or 81, as the case may be. The provisions of the Act of 1969 are broadly divided into charging, machinery and procedural provisions. The levy and charge of customs duties or additional customs duties are governed under sections 18 and 18A of the Act of 1969. Chapter IX contains provisions relating to discharge of cargo and entry inwards of the imported goods. Section 79 prescribes the procedure and requirements to be fulfilled in connection with the assessment of goods for home consumption, warehousing or any other approved purpose. After the requirements have been fulfilled, the assessment is ordinarily made and completed under section 80 of the Act of 1969. Section 81 is an exception to the

ordinary mode of assessment under section 80. It empowers an officer of customs to provisionally determine the liability where it is not possible for the latter during the checking of the goods declaration to satisfy himself/herself as to the correctness of the assessment of goods made by the importer under section 79 for reasons that the goods require chemical or other test or a further inquiry. The differential amount is secured by security furnished by the importer of the goods. If the final determination is not made within the time specified under sub-section 2 then the provisional assessment becomes final. The finality is relatable to the assessment and does not affect or bar the subsequent proceedings in connection with recovery of duty, taxes or charge not levied or short levied. Section 81 empowers the officer of customs to provisionally assess the goods if the assessment is not possible under section 80 for reasons explicitly described in the former provision. Section 81 does not create a right in favor of the importer except that if the final determination is not made within the specified time then the assessment becomes final. The finality of the assessment under section 81 renders it at par with an assessment made under section 80. The finality of assessment under section 81 makes the provisional assessment final and not the declaration made by the importer under section 79. The assessment made under section 80 does not bar subsequent proceedings in connection with the offence under section 32 of the Act of 1969. Would the proceedings be barred under section 32 if the provisional assessment becomes final under section 81? The answer is in the negative and this is implicit from a combined reading of section 32. Section 32 is a penal section and describes, under clauses a to c, the acts that would constitute as an offence if done in connection with any matter of customs knowing or having reasons to believe that they are false in any material particular. Sub-sections 2, 3 and 4 provide for the mechanism and machinery for

recovering the duty, taxes or charge not levied, or short levied or erroneously refunded within the period specified in each eventuality. The expression 'relevant date' has been defined under sub section 5 of section 32 and clause (b) thereof expressly provides that the expression in case of section 81 means 'date of adjustment of duty after its final assessment'. The finality of provisional assessment in terms of section 81(4) or otherwise would be covered under the expression final assessment used by the legislature in clause (b) of section 32(5). The finality of assessment, whether under section 80 or section 81, as the case may be, does not preclude invocation of the offence under section 32, nor proceedings for recovery of duty, taxes or charge that has not been levied, short levied or erroneously refunded within the prescribed time from the relevant date. The finality of assessment under section 80 or section 81, as the case may be, is distinct from the offence described under section 32 and does not bar the proceedings thereunder, provided they are within the limitation period explicitly specified in the case of each eventuality separately. The High Court has not correctly appreciated the scheme of the Act of 1969 and the distinction between an assessment made under section 80 and section 81, as the case may be, and the offence and the mechanism described under section 32 *ibid*. The High Court, by interpreting finality of provisional assessment under section 81 as a bar against proceedings under section 32 has read into the fiscal statute, i.e. the Act of 1969, something not intended nor provided by the legislature. It is a settled principle of interpretation of a fiscal statute that tax and equity are strangers. We, therefore, hold that the finality assessment under section 80 or the provisional assessment under section 81 does not operate as a bar against proceedings relating to the offence described under section 32 of the Act of 1969 nor relating to the recovery of duty, taxes or charge not levied, short

levied or erroneously refunded, provided they are within the limitation period prescribed in the case of each eventuality respectively.

5. For the forgoing reasons, this appeal is allowed. Consequently, the impugned judgment is set aside and the reference application shall be treated as pending. The High Court is expected to decide the application on merits subject to affording opportunity of hearing to the parties.

Chief Justice

Judge

Judge

Islamabad the,

2nd May, 2023

NOT APPROVED FOR REPORTING.

(Aamir Sh.)