

THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITION NO.1896-L OF 2020.

(Against the Order of Lahore High Court, Lahore dated 16.09.2020 passed in Custom Reference No. 35/2013)

M/s T & N Pakistan Private Limited.

... Petitioners

Versus

The Collector Customs etc.

... Respondents

For the Petitioners : Mia Ashiq Hussain, ASC
(Via video link from Lahore)

For the Respondents : Mr. Muhammad Khalid Chaudhry, ASC

Date of Hearing : 24.09.2021

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- This Civil Petition for Leave to Appeal is directed against the judgment dated 16.09.2020, passed by Lahore High Court, Lahore, in Custom Reference No.35/2013, which was decided against the petitioner.

2. The transitory facts of the case are that the petitioner had imported Polyester Fibre Manufacturing Plant from China in the year 2008-2009. On 12.02.2011, a show cause notice was issued to the petitioner that the goods were imported without payment of applicable duties and taxes. On receipt of show cause notice, reply was submitted by the petitioner. On 11.08.2011, an Order-in-Original was passed by the Additional Collector, wherein it was adjudicated that importer had provided Certificate of Origin without signature along with GDs mentioned at Serial No. 1 to 5 of the Table, mentioned in the order in Paragraph No.1, and along with GD No.812, mentioned at Serial No.6 in the Table, the signature on the certificate of origin provided by the importer did not match with the specimen signature circulated by the Federal Board of Revenue, Islamabad vide letter C.No.2(2)ICM/11/2005

dated 03.03.2009. In fact the petitioner was declined the benefit of SRO 659(I)2007 dated 30.06.2007 due to its own failure and noncompliance of prerequisites for availing concession or exemption. The petitioner preferred an appeal before Collectorate of Customs (Appeals) which was also dismissed on 19.12.2011 with analogous whys and wherefores. Thereafter, the petitioner approached Customs Appellate Tribunal but experienced the same aftermath. As a last resort, a Custom Reference Application was filed in the Lahore High Court, which was also decided against the petitioner.

3. The learned counsel for the petitioner argued that the petitioner had imported a "Fiber Manufacturing Plant" with the collaboration of Chinese Company and the same was cleared by Pakistan Customs through different G.Ds mentioned in the petition. The Additional Collector (Adjudication), Faisalabad vide Order-in-Original raised an unlawful demand of tax recovery and also imposed penalty. It was further contended that after availing all departmental remedies provided under the law, a Reference Application was moved by the petitioner before the learned High Court, which failed to exercise jurisdiction in terms of Section 196 of the Customs Act, 1969 and erroneously held no question of law arose and proceeded in oblivion of the China-Pak Free Trade Area Rules of Origin.

4. The learned counsel for the respondents argued that the Reference Application was full of factual controversies hence the learned High Court rightly decided against the petitioner. He further argued that despite providing ample opportunities to the petitioner, they failed to produce proper certificate of origin in order to avail the benefit of subject S.R.O.

5. Heard the arguments. The allegation against the petitioner that they obtained inadmissible exemption of custom duty under FTA SRO 659 (1)/2007, hence a show cause notice was issued as to why a sum of Rs.1,111,371/- may not be recovered under Section 18 and 32 (2) of the Customs Act with penal action as provided under Section 156 of the Customs Act. Since the petitioner found to have availed unlawful exemption of custom duty and taxes not admissible in terms of S.R.O 659 (1)/2007 and evaded the duty and taxes through misdeclaration hence recovery proceedings for

evaded duty and taxes was ordered in the order-in-original. The minutiae of the case history depict that the petitioner entreated for the benefit of SRO 659(1)2007 dated 30.06.2007 but in order to avail the benefit of aforesaid S.R.O, the petitioner was required to present Original certificate of Origin with the given specimen signature of Chinese Authorities. Since the petitioner failed to fulfill the mandatory requirements envisioned in the S.R.O, hence the claim was rejected. Even in the learned High Court, the petitioner was encountered and confronted with the same situation and called upon to show the original Certificate of origin but it failed to produce any document.

6. Section 19 of the Custom Act, 1969, germane to the General power to exempt from customs duties. The Federal Government whenever circumstances exist to take immediate action for the purposes of national security, natural disaster, national food security in the emergency situations, protection of national economic interests in situations arising out of abnormal fluctuation in international commodity prices, implementation of bilateral and multilateral agreements and to any International Financial Institution or foreign government owned Financial Institution operating under a memorandum of understanding, an agreement or any other arrangement with the Government of Pakistan, subject to such conditions, limitations or restrictions, if any, as it deems fit to impose, may, by notification in the official Gazette, exempt any goods imported into, or exported from, Pakistan or into or from any specified port or station or area therein, from the whole or any part of the customs-duties chargeable thereon and may remit fine, penalty, charge or any other amount recoverable under this Act.

7. It is somewhat obvious that S.R.O 659(I)/2007 was issued on 30.6.2007 in exercise of powers conferred by Section 19 of the Customs Act, 1969 in which the Federal Government was pleased to exempt, certain goods from the first day of July, 2007 in the import into Pakistan from Peoples Republic of China. (As per list of goods mentioned in the S.R.O) Provided the goods are manufactured or produced and imported in conformity with the Rules of Determination of Origin of Goods and the operational certification procedures for the Rules of Origin notified by the

Ministry of Commerce from time to time. The aforesaid S.R.O also refers to another S.R.O.1286(I)/2005 dated 24th December, 2005, by means of which, China-Pakistan Free Trade Area Rules of Origin, 2005 were notified by Federal Government pursuant to Free Trade Agreement (FTA) between the Islamic Republic of Pakistan and Peoples Republic of China and the said Rules were made effective from 1st January 2006. Under Rule 14, it is straightforwardly quantified that a claim that products shall be accepted as eligible for preferential concession shall be supported by a certificate of Origin issued by the government authorities designated by the exporting party and notified to the other party to the agreement in accordance with the Operational Certification Procedures as set out in Attachment-A, which outlined and delineated the procedure on the issuance of and verification of the Certificate of Origin (Form-X) and other related administrative matters. It is unequivocally clear that before claiming the benefit of the aforesaid SRO, the petitioner was bound to fulfill and live up to prescribed procedure as a mandatory requirement but the record reflects that throughout the proceedings, the petitioner remained unsuccessful and could not substantiate its entitlement of preferential concession and after considering the pros and cons, the reference application was dismissed by the learned High Court.

8. The letters of the law envisions that under Section 196 of the Customs Act, Reference Application is a remedy meant for deciding and answering a question of law which should arise from the order passed by the Customs Appellate Tribunal. The fact findings recorded by the Tribunal, unless wrong-headed or unjustified in fact and law the same could not be interfered in referral jurisdiction. The precise intent of remedy of reference provided under Section 196 to resolve and adjudicate only the question of law originating and stemming from the order passed by the Appellate Tribunal. The High Court cannot embark upon factual aspects or controversy. Here throughout the proceedings, only factual question was involved with regard to the production of certificate of origin. The authorities had not denied or disputed the provision of exemption flowing from the document of S.R.O but they were merely asking the petitioner to produce the certificates of origin as mandatory compliance but despite various opportunities provided by the lower fora, the petitioner failed to fulfill the

requisite formalities, even the judgment of the learned High Court depicts that an opportunity was also afforded to the petitioner at the time of hearing of reference to produce the original certificate of origin, but they failed to produce and ultimately the learned High Court reached to the conclusion that no question of law raises in the reference to consider under Section 196 of the Custom Act but the entire focus was on factual controversy which could not be agitated as question of law.

9. In the case of Collector of Customs Karachi and others. Vs. Messrs' Haji Ismail Co. and others. (2015 SCMR 1383), this court held that it is the Tribunal which is the forum meant for determining factual aspects. The High Court while exercising appellate jurisdiction under section 196 of the Customs Act, is not free to embark upon an unfettered inquiry into factual aspects which have been properly considered and decided by the Tribunal. In another case of Pakistan State Oil Company LTD. Vs. Collector of Custom, E&ST (Adjudication –II) and others. (2006 SCMR 425), it was held that a question of law does not require investigation of facts and thus, a question involving factual inquiry into facts or to which answer cannot be given without going into facts is not a question of law. While in the case of Collector of Customs, Port Muhammad Bin Qasim, Karachi Vs. Messrs' Kaghan Ghee Mills (PVT.) LTD. (2008 SCMR 1538), it was held that the High Court was correct in observing that the matter was decided at factual stage and no question of law was before it for adjudication which was necessary condition for maintainability of appeal under section 196 of the Customs Act.

10. In the wake of above discussion and reasons, this Civil Petition for Leave to Appeal is found to be without any substance which is dismissed and leave to appeal is refused.

Judge

Judge

Islamabad,
24.09.2021
Approved for reporting.