

FEDERAL TAX OMBUDSMAN SECRETARIAT
Regional Office, Karachi

Review Application No.54/2013

Dated: 19.11.2013*

in

Complaint No. 1031/2013

M/s Hamsons Industries,
Deh Khanto Tappo Landhi,
Bin Qasim Town,
Karachi.

... Applicant

Versus

The Secretary,
Revenue Division,
Islamabad.

... Respondent

Dealing Officer : Ms. Razia Sultana Taher, Advisor
On behalf of the Applicant : Mr. Pervez Iqbal Kasi, Advocate
Mr. Naseer Malik, Advocate
On behalf of the Respondent : Mr. Feroz Alam Junejo, Additional Collector
Ms. Mehwish Shah, Assistant Collector

ORDER

This application was filed for review of Findings / Recommendations dated 14 September, 2013, whereby complaint No.290/KHI/CUST/(98)/1031/2013 dated 19.06.2013 was rejected with the following observations:

“In view of foregoing discussion the provisional assessment which includes the declared value and differential amount secured through PDC attained finality in terms of Section 81(4) of the Act, hence recovery of amount secured through PDC could not be termed as illegal and no case for refund of the same could be made out. The complaint having no merit is rejected.”

2. Reiterating the averments of the complaint the Applicant has sought review of rejection of his complaint mainly on the ground

* Date of registration in FTO Secretariat

that impugned Findings/Recommendations were passed without fully appreciating the provisions of Section 81 of the Customs Act (the Act) as well as the judgement of the Supreme Court dated 12.09.2012. Referring to the provisions of Section 81 of the Act, the Applicant placed reliance on the judgement of High Court of Sindh in the case of M/s. SUS Motors (Pvt) Limited Vs. Federation of Pakistan reported in 2011 PTD 235, Rehan Omer Vs. Collector of Customs Karachi reported in 2006-PTD 909 and order dated 12.09.2012 passed by the Supreme Court in Civil Petition Nos. 825 & 826/2011 and prayed as following :-

“In view of the detailed and comparative scrutiny of the Supreme Court’s judgement vis-à-vis High Court’s judgement, it is clear that provisional determination attained finality u/s 81(4) of the Customs Act at the declared value and the differential amount of Rs 6,955,893/- may be directed to be refunded to the Complainant”.

3. The Department contested the review application and supported the impugned Findings/Recommendations contending:-

- (i) that the matter involving issue of interpretation of Section 81(4) of the Customs Act, 1969, falls outside the Jurisdiction of FTO Office terms of Section 9(2)(b) of the FTO Ordinance;*
- (ii) that the complaint was barred by limitation under Section 10(4) of the FTO Ordinance as the GD was finalized 11.09.2008 and the claimed amount was recovered / paid in May 2012, but the complaint was filed on 18.06.2013;*
- (iii) that the operation of the judgement in the case of M/s. SUS Motors (PVT) Limited Vs. Federation of Pakistan and others (2011 PTD 235), being suspended by the Supreme Court of Pakistan, could not be relied upon;*

(iv) *that in view of Explanation of Section 81(4) of the Act, judgement of the High Court of Sindh in case of M/s. Orient Colour Lab (Pvt) Vs. the Director General, Customs (Valuation) Karachi, holding that even after the expiry of the period prescribed under Section 81(2) of the Act, the security amount was encashable, Findings / Recommendations in complaint Nos.143/LHR/CUST(09)/248/2013 (Forvil Cosmetics) and 285/KHI/CUST(127)/1100/2010 (Tasleem Traders) the prayer made by the Petitioner was unwarranted.*

4. The parties were afforded opportunity of hearing on 06.01.2014.

5. During hearing, the AR reiterating the averments of the review application contended that the incidence of differential amount of duty and taxes was not passed to end consumer as certified vide certificate dated 6th December, 2013 issued by Raza Siddiqui & Co, Chartered Accountant, therefore the same was refundable in terms of Section 19-A of the Act.

6. The Department reiterating the averments of parawise comments relied on case law and explanation of Section 81 of the Act.

7. Submissions of the parties have been considered in light of the documents available on record and the case law relied by the parties. At the very outset it is to observe that the operation of the judgement of High Court of Sindh in case of M/s SUS Motors (Pvt) Limited v/s Federation of Pakistan (2011 PTD 235) has been suspended by the Supreme Court of Pakistan vide order dated 07.07.2011 in CPLA No.64-K of 2011. Hence no reliance can be placed on a suspended judgement.

8. The order dated 12.09.2012 referred to by the Applicant is mainly an order rejecting a petition filed by the M/s. Orient Electronic (Pvt) Limited against the judgement dated 13.04.2011 passed in C.P Nos 1016 and 1017/2010 whereby the petitions were dismissed in limine vide short order dated 08.04.2011 . In the concluding para of the order the Supreme Court has laid down in clear and unequivocal terms *“that the interpretation placed by High Court on the aforesaid provisions is not in any way in conflict with the well recognized canons of interpretation of statutes. Yes, the customs duty or other levies have not been actually paid but their being guaranteed is no less than the actual payment. The argument that final determination has not been made within the period stipulated in Section 81(2) of the Act, being befittingly answered by the learned counsel for the Respondents merits no other addition”*. The petitions were dismissed as being without merit and leave was refused. Hence after passing of the order dated 12.09.2012 by Supreme Court no case for acceptance of declared value as final determination is made out.

9. The argument that the impugned Findings / Recommendations were based on misconception of the order of the Supreme Court is not correct. The instant case was on account of dispute of valuation of the goods imported and thereafter, which were assessed provisionally under Section 81 of the Act on the behest of the Applicant under Section 81(1) of the Act. On 06.09.2007, duty and taxes were paid on declared value and the differential amount was secured through PDC. The record shows that after provisional assessment, both the parties made no effort to determine the value of the goods. As such the period prescribed under Section 81(2) of the Act lapsed and the

Department termed the provisional assessment final in terms of Section 81(4) of the Act.

10. The contention of the Department that they communicated electronically to the Applicant about finalization of provisional assessment in terms of Section 81(4) of the Act, has been denied by the Applicant. Even if for arguments sake, the plea taken by the Applicant is accepted, it will have no bearing on the case of the Applicant for refund of differential amount paid by him for the reason that according to Section 81(4) of the Act, (prior to amendment by Finance Act, 2010) if the provisional assessment could not be finalized within the period prescribed under Section 81(2) of the Act, the provisional assessment shall attain finality and issuance of assessment order was not mandatory.

11. The provisional assessment as per the Explanation of Section 81(4) of the Act, means the amount of duties, taxes and other charges paid or secured against bank guarantee or post dated cheque (PDC). Although provisional release was allowed by the Department on the request of the Applicant, no evidence whatsoever was submitted by the Applicant to the Department, to support his declared value. Thus, after the expiry of period prescribed under Section 81(2) of the Act, the provisional assessment which in term of Judgement of the Supreme Court in Civil Petition Nos. 825 and 826/ 2011 included the declared value as well as the amount secured through PDC attained finality under Section 81(4) of the Act. The issue involved in the case has also been supported by the Findings/Recommendations in complaint No.285/KHI/CUST(127)/1100/2010. However the judgement of the High Court reported in 2006 PTD 909 after passing of order dated

12.09.2012 by the Supreme Court in Civil Petition Nos.825 and 826/2011 cannot be relied.

12. Adverting to the issue raised by the Applicant during argument about entitlement of the complaint for refund of amount of PDC in terms of Section 19-A of the Act as the incidence of duty and taxes secured vide subject PDC was not passes to end consumer. In said regard reliance has been placed on the certificate of M/s. Raza Siddiqui, Chartered Accountant. Admittedly the certificate is of no significance and does not entitle the Applicant for acceptance of the declared value. Besides Section 19-A of the Act does not create any right in favour of the Applicant (tax prayer) to claim refund if the incidence of duty and taxes was not passed to end consumer. In view of foregoing discussion there remains no ambiguity that encashment of security on expiry of the period under Section 81(2) of the Act, by treating the provisional assessment final in terms of Section 81(4) of the Act, being not in violation of law rules and procedure does not tantamount to maladministration as defined under Section 2 (3) of the FTO Ordinance, 2000.

13. Before parting with the file the issue raised by the Department about complaint being barred by time under Section 10(4) of the FTO Ordinance needs to be settled. The Applicant has not controverted the plea of the Department that the GD was finalized on 11.09.2008. The leviable duty and taxes were recovered by encashment of securities in May, 2012 but the complaint was filed on 18.06.2013 i.e. after more than one year of finalization of the matter, hence having regard to the provisions of Section 10(4) of the FTO Ordinance, the complaint on the face of it was hit by limitation.

14. In view of foregoing discussion the complaint though being time barred was examined on merit and the impugned Findings / Recommendations were issued after due application of Law and the case law of superior courts as well as FTO office, hence there is no room for review.

15. The review application is accordingly rejected.

(Abdur Rauf Chaudhry)
Federal Tax Ombudsman

Dated: 2014

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