

**ORDER SHEET**  
**THE HIGH COURT OF SINDH AT KARACHI**

Special Customs Reference Application No.878 of 2017

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Date Order with signature of Judge(s)

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**13.10.2021**

Mr. Muhammad Khalil Dogar, advocate for the applicant.

The applicant has assailed the judgment dated 07.07.2017 ('Impugned Judgment') passed by the learned Customs Appellate Tribunal and raised multifarious questions in such regard. Briefly stated, a consignment of telecommunication equipment was imported, cleared and released in the year 2012. In 2014, the department sought advice from the PCT Committee in respect of the relevant goods and the view point was advised by the committee in December, 2014. On the basis of the subsequent opinion, of the committee, recovery notices were issued to the importer and it's clearing agent, respondent herein. The adjudication process culminated in the Impugned Judgment whereby the appeal of the respondent was allowed, hence this reference.

2. It is considered appropriate to reproduce the pertinent constituents of the Impugned Judgment herein below:

"07. After perusal of the record available on file and contents of ground mentioned in the appeal alongwith arguments extended by both the parties it has been noticed and observed that appellant being the authorized clearing agent of M/s. Pakistan Telecommunication Company Limited filed the Goods Declaration against release of three consignments of telecommunication equipments from China under PCT heading 8517.6990 the liability of payment of applicable duty and taxes alongwith other taxes determined and finalized by the department and same were accordingly released as per the importers declaration in the year of 2012. It is also observed from the record that on 28-10-014 Additional Collector Additional Collector Air Freight unit Islamabad Airport (MCC Islamabad) sought a clarification from PCT Committee Custom House Karachi. The matter of classification of Set Top Box Imported by M/s. PTCL was taken up the PCT Committee for deliberations on meeting of Customs Tariff Classification Committee held on 01-12-2014 and again 22-12-2014 where the view point of all the concerned parties including M/s. PTCL was submitted before the Committee. The PCT Committee issued its opinion about classification of set top box on 27-12-2014 and the same was officially sent to the Additional Collector vide C.No.(640)KAPE-ADC(I)/2014 dated 27-12-2014. On face of above cited opinion the Deputy Collector (R&D) MCC Appraisal Custom House Karachi also issued recovery notice (covered by Order-in-Original Nos.120/2015-15 dated 10-07-2015). Accordingly show cause notice No.Adji-II/Coll/SCN-113/MCC-East(&D)/Cont-478-P11/PTCL/2015 was issued to M/s. PTCL to the effect that the impugned goods were actually chargeable inter alia to customs duty @ 30% sales tax 16% additional sales tax 3% and income tax 5% as against 5% 0% and 5% respectively paid by M/s. PTCL and impugned goods were rightly classifiable under PCT 8517.6990. Under such circumstances the important question arises whether the Goods Declaration made by the appellant and composing of description, quantity and value and origin which all found correct (except PCT heading) meant to have attracted the provisions of Section 32(1) of the Customs Act, 1969, especially in context of phrase 'untrue in material particular'. This court held that the assumption is not enough to invoke very serious provisions of the Section 32 of the Customs Act, 1969, which can only be invoked for the reasons to believe and not for reasons to suspect. Reliance is placed on PTCL 2009 CL 330 which explains the mis-declaration and the phrase 'material particular'.

08. It is also observed from the record of the case that the issue of description, quantity, value and origin with reference to the PCT heading are been contested by the main importer to the PCT heading are been contested by the main importer in case of Customs Appeal No.K-1254 & 1255/2015, this august Tribunal passed the comprehensive and speaking judgment dated 16-12-2015 wherein the subject impugned show cause notice No.Adj-II/Coll/SCN-113/MCC-East(R&D)/Cont-478-P-I/PTCL/2015 dated 02-04-2015 was vacated and said impugned Order-in-Original No.120/2015-2016 was set aside. Taking into consideration the subject observations as held by the Tribunal in the aforementioned Customs Appeals as well as the controversy and proposition discussed in the present appeal this court has no other option except to follow the ratio decidendi observed by this court and as such hereby pass an order and vacate the impugned show cause notice dated 02-04-2015 and set aside the Order-in-Original No.120 of 2015-2016

as the same are illegal, void ab initio, without having any warrant of law. Appeal is accordingly allowed with no order as to cost.

09. Judgment passed and announced accordingly.”

3. The learned tribunal has noted that assumptions of mis-declaration cannot be given legal tender and that in any event the show cause notice / proceedings against the actual importer had already been set aside. It is imperative to denote that no element of *mens rea* had been established with respect to the respondent and that the department / present applicant had failed to establish any culpability in respect of the clearing agent / present respondent through cogent documentary evidence or otherwise. It is imperative to observe that *mis-appreciation* of evidence by the learned tribunal was never the case of the applicant before us.

4. The applicant has proposed various questions of law which we, respectfully, consider extraneous and dissonant to the Impugned Judgment. The learned Appellate Tribunal has already appraised the evidence and concluded in favor of the respondent. Even otherwise the necessary element of *mens rea* was *admittedly* never established, hence, no penalty was liable to be imposed upon the clearing agent / present respondent. It is trite law that the learned Tribunal is final arbiter of facts<sup>1</sup> and that factual controversies are not amenable before the reference jurisdiction of this court.

5. In view hereof, we are of the considered view that the applicant has failed to raise any question of law arising out of the Impugned Judgment meriting the consideration of this court, therefore, the present reference is hereby dismissed *in limine*.

6. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Customs Appellate Tribunal, as required per section 196(5) of the Customs Act, 1969.

JUDGE

JUDGE

Khuhro/PA

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<sup>1</sup> Per *Munib Akhtar J* in *Collector of Customs vs. Mazhar ul Islam* reported as 2011 PTD 2577.