

IN THE HIGH COURT OF SINDH, KARACHI

**Constitution Petition No. D- 34 of 1995
Constitution Petition No. D- 2659 of 1994
Constitution Petition No. D- 81 of 1995**

Date

Order with signature of Judge

**Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Agha Faisal**

Petitioners:

**M.F.M.Y Industries Limited
(in C.P No. D-34/1995)
Through Mr. Imran Iqbal Khan, Advocate.**

**M/s. Sapphire Textile Mills Ltd.
(in C.P No. D-2659/1994)
M/s. Gatron (Industries) Limited
(in C.P No.D-81 of 1995)
Through Mr. Abdul Ghaffar Khan,
Advocate.**

Respondent No. 1:

**Federation of Pakistan
Through Mr. Qazi Ayazuddin Qureshi,
Assistant Attorney General**

Respondents:

**Pakistan through Secretary & others
Through M/s. S. Mohsin Imam Wasti,
Muhammad Rashid Arfi and Asif
Ibrahim Memon, Advocates.**

Date of hearing:

09.02.2023

Date of Judgment:

08.03.2023

J U D G M E N T

Muhammad Junaid Ghaffar, J: These Petitions involve a common question of law that whether pursuant to repeal of the Licences and Permits Fee Order, 1979 and promulgation of Import Fee Order, 1993 through SRO 594(I)/1993 dated 17.07.1993, the Petitioners were still required to pay Import Licence Fee on their imports.

2. Learned Counsel for the Petitioners have contended that prior to the repeal of the 1979 Order, any importer who wish to import anything into Pakistan was required to obtain an Import Licence for which requisite fee was required to be paid. According to them after repeal of the said Order and abolishment of the condition to obtain licence, no service was being provided by the Government, therefore, levy and demand of such Import Licence Fee in terms of SRO 594(I)/1993 was illegal and *ultra vires* to the Imports and Exports (Control) Act, 1950; hence liable to be so declared. They have further contended that admittedly fee can only be levied when there is an element of *quid pro quo*, which is lacking in this

matter, and therefore any collection of such fee during the period under question was illegal and without lawful authority. One of the learned Counsel¹ also argued that when this fee was being abolished, it was announced by the Finance Minister in his budget speech that the amount of such fee was being merged into Customs Duties, and therefore, any further collection of the same amounts to double taxation. It has been lastly contended that subsequently 1994 onwards, the said fee was abolished, which supports the case of the Petitioners. In support they have relied upon the cases reported as ***Messrs Lucky Cement Ltd. Through General Manager, Peshawar Vs. Khyber Pakhtunkhwa through Secretary Local Government and Rural Development, Peshawar and others (2022 SCMR 1994), Ayaz Textile Mills Ltd. Vs. Federation of Pakistan through Secretary Commerce's, and another (PLD 1993 Lahore 194).***

3. On the other hand, learned Assistant Attorney General has opposed the contention of the Petitioners' Counsel and has relied upon the comments filed on behalf of the respective Respondents. According to him the fee was still payable and no case is made out by the Petitioners.

4. We have heard all learned Counsel as well as Assistant Attorney General and have perused the record as well. Admittedly, all imports under the Country, at the relevant time were being controlled in terms of Section 3 of the Imports & Exports (Control) Act, 1950, ("**Act**") and for import of any item, it was mandatory to obtain an Import Licence against payment of Fee from the office of Chief Controller of Imports & Exports ("CCI&E"). Thereafter, pursuant to issuance of Import Fee Order, 1993, certain changes were made and the requirement to approach the office of CCI&E to obtain a Licence was abolished and a new mechanism was introduced, whereby, an Importer was required to approach the concerned Bank directly for opening of a letter of credit. It would be advantageous to refer Section 3 of The Act, and Para 2 & 3 of the Import Fee Order, 1993, which reads as under: -

"3. **Powers to prohibit or restrict imports and exports:** (1) The Federal Government may, by order published in the official Gazette and subject to such conditions and exceptions as may be made by or under the order, prohibit, restrict or otherwise control the import or export of goods of any specified description, or regulate generally all practices (including trade practices) and procedure connected with the import or export of such goods, ******[and such order may provide for applications for licences under this Act, the evidence to be attached to such applications, the grant, use, transfer, sale or cancellation of such licences, and the form and manner in which and the periods

¹ Abdul Ghaffar Khan Advocate.

within which appeals and applications for review or revision may be preferred and disposed of, and the charging of fees in respect of any such matter as may be provided in such orders].

(2) No goods of the specified description shall be imported or exported except in accordance with the conditions of a licence to be issued by the Chief Controller or any other officer authorized in this behalf by the Federal Government.

(3) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted under * [Sec. 16 of the Customs Act, 1969 (IV of 1969), and all the provisions of that Act shall have effect accordingly].

(4) Notwithstanding anything contained in the aforesaid Act the Federal Government may, by order published in the official Gazette, prohibit, restrict or impose conditions on the clearance whether for home consumption ** [or warehousing or] shipment abroad of any imported goods or class of goods."

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"The
IMPORT FEE ORDER, 1993

Notification No. S.R.O. 594(1)/93, dated 17th July, 1993.--In exercise of the power conferred by sub-section (1) of section 3 of the Imports and Exports Control Act, 1950 (XXXIX of 1950), the Federal Government is pleased to make the following Order, namely:--

1. Short title and commencement.--(1) This Order may be called the Import Fee Order, 1993.

(2) It shall come into force at once.

2. Definition. In this Order, unless there is anything repugnant in the subject or context,--

- (a) "Authority means Vice-Chairman, Export Promotion Bureau, or any officer of the Export Promotion Bureau authorised by him to perform functions under this Order; and
- (b) "party" means a firm or a branch of a firm, institution, body, organization, person or group of persons applying for opening a letter of credit, against cash, loans, credits, barter, supplier's credit, PAYE Scheme, or any special trading arrangements or effecting import on consignment basis or through any other mode of payment or under NRI Scheme.

3. Fee payable--(1) Every party who applies for opening of a letter of credit for the import of any goods against cash, loans, credits, barter, supplier's credit, PAYE Scheme or any special trading arrangements or effects imports on consignment basis or through any other mode of payment under NRI Scheme shall pay fee at the rate of 6% ad valorem on C & F value of goods:

Provided that the Federal Government may permit release of goods by the Customs Authorities on payment of fee at the rates indicated below:-

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| (a) | Where goods are shipped before the opening of L/C against cash, loans, credits, suppliers' credit, barter, PAYE Scheme or registration of contract for import on consignment basis. | one percent additional fee over and above the prescribed normal fee deemed to have been payable at the time just before the date of shipment. |
| (b) | Where goods are shipped within twelve months after the expiry of initial twelve months of opening of L/C. | two percent of the un-utilized amount of L/C for each quarter beyond initial or extended validity period of L/C as the case may be. |

Provided further that the rate of fee for import of machinery, not locally manufactured in Pakistan for initial installation, expansion, balancing, modernisation and replacement, intended to be installed in the Rural Area as defined in the Ministry of Industries' Circular No. 6(12)/90. Policy, dated this 17th December, 1990, as amended from time to time, shall be two per cent ad valorem:

Provided further that the rate of import fee on the import of machinery not locally manufactured for industrial units to be set up in Special Industrial Zones in Port Qasim Area, Lahore--Islamabad Motorway Area and other parts of the country, as the Federal Government may, by notification in the official Gazette, specify, shall be two per cent ad valorem:

Provided further that on the import of machinery, not manufactured locally by the industrial units to be set up in the Province of Baluchistan, except Hub Chowki, an import fee at the rate of two per cent shall be charged.

5. From perusal of Section 3 of the Act as above, it can be seen that all imports into the country are regulated by the Federal Government subject to such conditions and exceptions as may be made by or under an order. It is also relevant to observe that at the relevant time, all goods were not importable into the Country until and unless so permitted by the Federal Government by way of grant of an import permit or Licence or otherwise by way of an express permission to do so. Until the promulgation of the Import Fee Order, 1993 under the 1979 Order, Import Fee was levied and was being paid without any dispute at different rates from time to time against which an import permit or import licence was issued. To that extent there is no dispute and imposition of such licence fee was never under challenge. The precise case of the Petitioners is that after abolishment of the office of the CCI&E and the condition to obtain a licence was done away with, no import licence fee could have been collected as no service was being provided in lieu thereof. However, with respect, in our view this contention does not appear to be correct and justified. It would be pertinent to mention that insofar as Section 3 of the Act, is concerned, there was no change brought in and the same still provided for charging of fees in respect of any such matter covered by Section 3 *ibid*, which includes regulating Imports including permitting the same. We may also observe that vires of Section 3 of the Act are not under challenge before us. It is not in dispute that even after abolition of the office of CCI&E and the condition to obtain an import licence till 1994, there was an office created by the Federal Government under Section 3 and instead of CCI&E, an authority was created, in terms of Import Fee Order 1993 (See Para 2 and 3), which was called Vice Chairman of the Export Promotion Bureau or any officer of the Export Promotion Bureau authorized to perform functions under the Import Fee Order, 1993. The intent and purpose of Import Fee Order 1993 clearly depicts that

notwithstanding abolishment of the condition to obtain an import licence, the import and export was still under Regulation and control of the Federal Government and for such purposes a mechanism was provided, whereby, instead of obtaining any import licence, an importer was to be first registered with the Export Promotion Bureau, and thereafter was required to obtain an Annexure, which was called as Annexure "B" in the form of a Certificate from the concerned bank and once it was obtained, an import fee was paid and only then a Letter of Credit could have been established. The said Annexure-B was then required to be submitted before the concerned Customs Authorities at the time of clearance of the goods and after its inspection, and in case of part-shipment, maintaining a debit / credit account of the total amount of Letter of Credit (similar to that of a face value of the Import Licence) and with further fulfillment of any other requirement, the goods were supposed to be released. Without production of such Annexure "B" from the concerned Bank, issued prior to the opening of Letter of Credit, no goods could be imported or released for that matter. Therefore, the argument that there was no *quid pro quo* or no service was provided is misconceived and is not supported in any manner to what has been stated hereinabove. A service was being provided and the question before us is not that whether such services commensurate with the amount of fee being charged by the Federal Government. This in fact cannot be measured or determined in our constitutional jurisdiction; moreover, there is no cavil with the proposition that generally the fee should be relatable to the services rendered by the statutory functionaries; however, fee may be charged for conferment of a benefit or privilege as well². Even otherwise per settled law the fee cannot be restricted only for rendering any material service but if any special benefit is conferred or any privilege is bestowed and for obtaining that privilege or benefit any amount is charged it will fall within the category of fee³. It is not in dispute that notwithstanding the promulgation of the Import Fee Order, 1993, the Act of 1950 still regulates import and export in the country and thus regulates trade and commerce, whereas such import and export is done by way of an import and export policy which is issued every year taking into consideration the economy of the country and its requirements. At the relevant time, general import and export, unless so provided by law, was prohibited, therefore, when any licence (Annexure B in this matter) to import or export any goods is granted it is a sort of benefit or privilege which is

² Ayaz Textile Mills Limited v Federation of Pakistan (PLD 1993 Lahore 194)

³ 1990 CLC 638 (Sindh Glass Industries Limited v Chief Controller of Imports & Exports)

conferred upon such a person⁴. To the argument that Finance Minister's speech had announced merger of fee with custom duty, we may say that Insofar as such speeches are concerned, in our view the same are without legal sanctity behind it and the Minister's speech is of no importance till the policies as highlighted in such speeches are given legal effect or cover by way of Notification or instruction duly issued by the ministry concerned⁵. Such speeches are usually motivated by political consideration and there is a considerable difference in between such speeches and that of a policy recognized by some statute or enactment⁶. Here in this case not only a privilege has been extended for permitting import of an item which otherwise could not be done by all, except such permission, but even a service is still being provided, through the Export Promotion Bureau as well as the Bank (which at the relevant time were Nationalized Banks). So in essence, the requirement of quid pro quo stands fulfilled, and the levy of such fee on this touchstone cannot be declared as illegal and without sanction of law. It is further settled that fees realized may not necessarily exactly correspond to expenditure incurred on administration of the Act⁷.

6. In view of hereinabove facts and circumstances of this case, in our considered view, no case for indulgence is made out as apparently a service though in somewhat different manner as was being provided under 1979 Order; but was still being rendered under the Import Fee Order, 1993; and therefore, the Importers were required to pay the fee in question; hence, these Petitions do not merit any consideration and are hereby ***dismissed***.

Dated: 08.03.2023

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J U D G E

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⁴ 1990 CLC 638 (Sindh Glass Industries Limited v Chief Controller of Imports & Exports)

⁵ METCO Shipbreakers v Pakistan (1996 MLD 144)

⁶ METCO Shipbreakers v Pakistan (1996 MLD 144)

⁷ Sheikh Muhammad Ismail & Co. Ltd v The Chief Cotton Inspector (PLD 1966 SC 388)

