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Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE  
JUDICIAL DEPARTMENT**

**Customs Reference No. 33395 of 2017.**

Director Intelligence & Investigation-FBR.                      Vs.                      Shamraiz Khan & others.

**JUDGMENT**

Date of Hearing:	07.06.2018.
Applicant/ Department by:	Mr. Izharul Haq Sheikh, Advocate.
Respondents/ Taxpayer by:	Mr. Mukthar Ahmad Awan, Advocate.

**Shahid Jamil Khan, J:-** The Customs Reference, by department, is to assail order dated 04.05.2017 passed by the Single Bench of Customs Appellate Tribunal, Lahore (“**Appellate Tribunal**”) pleading that constitution of the Single Bench was not in accordance with law.

2. Learned counsel for applicant-department submitted that the appeal, filed before Appellate Tribunal, was entrusted, by the Chairman, to a Division Bench, which could not be decided by a Single Bench, unless conditions under subsection (4) of Section 194-C of the Customs Act, 1969 (“**Act of 1969**”) were fulfilled. He referred to a judgment by Supreme Court of Pakistan in *Collector of Customs, Customs House, Karachi v. Syed Rehan Ahmed (2017 SCMR 152)*, to argue that entrustment of a case under Section 194-C (4), as a matter of course, without application of mind, has been deprecated and the law laid down in *Director, Intelligence and Investigation (Customs and Excise), Faisalabad and another v. Bagh Ali (2010 PTD 1024)* was upheld.

3. Learned counsel for respondent opposed the submissions. He placed on record copy of order sheet, which confirms the fact that appeal was entrusted by the Chairman to Bench-II, for adjudication. However, on 14.03.2017, a note was written by both Members for entrustment of

case to one of them as value of appeal was not exceeding five million rupees. Upon this note, the case was assigned to the Technical Member, who passed the impugned order.

Learned counsel for respondent submitted that the condition of value of duty/taxes, not exceeding five million rupees, was fulfilled, therefore, the case was rightly entrusted by the Chairman under the subsection (4) to one of the Members of the Division Bench. It was contended that requirement of notification by the Federal Government for constitution of Single Bench was necessary under subsection 3(a) and under the subsection (4).

4. Arguments heard. Record perused.

5. We agree with the submission by learned counsel for respondent that a Notification for constitution of Single Bench is necessary only under subsection 3(a) of Section 194-C, as has already been held by a Division Bench of this Court vide order dated 14.04.2015, passed in **Customs Reference No.09 of 2010** titled "*M/s. Infomax Pakistan (Pvt.) Ltd. v. The Customs Appellate Tribunal etc.*", relevant part of which is reproduced:-

"2. The cases relate to orders passed by Single Member of the Tribunal, which have been originally entrusted to a single member Bench. Section 194C(3A) of the Customs Act, 1969 provides that "*the Chairman may constitute as many Benches consisting of a single member as he may deem necessary to hear such cases or class of cases as the Federal Government may, by order in writing*". However, this has to be done subject to order in writing by the Federal Government.

3. On Court query, learned Standing Counsel, who has sought instructions from the Registrar of the Tribunal, submits that no such notification or order in writing for delegating the authority issued by the Federal Government, notifying the cases to be assigned to a Single Member Bench, is available on record.

4. In view of the fact that no notification identifying such cases or class of cases by the Federal Government is available, all the cases, which have been decided by a Single Member Bench of the Tribunal without observing the aforesaid procedure, are **remanded** for fresh adjudication. These matters will be heard and decided after giving fresh notices to the concerned parties and hearing them by the Appellate Tribunal, which is formed in accordance with due process of law. The learned Appellate Tribunal will dispose of the matters expeditiously, preferably within four months from receipt of this order."

6. To examine subsection (4) of Section 194-C, it is reproduced for ready reference:-

“(4) The Chairman or any other member of the Appellate Tribunal **authorised**, in this behalf by the Chairman may, **sitting singly**, dispose of any case which has been allotted to the bench of which he is a member where:-

- (a) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 181; or
- (b) [\* \* \*]
- (c) in any disputed case, the difference in duty or tax involved or the duty or tax involved, or the amount of fine or penalty involved does not exceed [five] million rupees.”

[emphasis supplied]

The subsection (4) authorises the Chairman himself or any other Member of Appellate Tribunal to dispose of a case, sitting singly, where value of the case is not exceeding five million rupees or where goods are confiscated without option to pay fine in lieu of confiscation under Section 181.

The language of subsection (4) does not suggest that Division Bench shall request Chairman for entrustment of the case to one of the Members of Bench. A collective reading of this subsection shows that it is contemplating a situation where the Division Bench, to whom case was allotted, is nonfunctional due to absence or non-availability of one Member for any reason. Under this situation, the Chairman may himself (if he is Member of the Division Bench) dispose of the case, sitting singly, provided one of the conditions under clause (a) or (c) is fulfilled. If a case fulfilling these conditions, is allotted to any other Bench, the Chairman may authorise any of its available members to dispose of the case, sitting singly. The words “*sitting singly*” denote that constitution of Single Bench, under the subsection (4) is not necessary. Word “*authorised*” is used instead of allotment of a case. It means the case is already allotted to the Bench, which is nonfunctional, thus cases falling under the clauses (a) and (c) may be authorised for decision by any of the available members of that Bench. The rationale, as it appears, is that the cases covered by the clauses (a) and (c) may be heard and decided expeditiously, even if the Division Bench is nonfunctional.

7. Learned counsel for applicant-department rightly placed reliance on the judgment by Hon'ble Apex Court in Syed Rehan Ahmed's case (supra), operative part of which is reproduced hereunder:-

“6. We would like to observe at this stage that the phrase “any case which has been allotted to the bench of which he is a member” appearing in section 194-C(4) of the Act is of immense importance which clearly suggests that there must have existed a Bench constituted under section 194-C(2) of the Act consisting of two members (or Chairman and a member), out of which the Chairman or a member authorized by the Chairman, may sit singly and dispose of a case already allotted to such Bench. To hold otherwise would be to render the aforesaid phrase redundant and superfluous. This is precisely why subsection (2) of section 194-C has been made subject to subsection (4), the latter of which purports to create an exception to the former. Further, such decision by the Chairman to allow himself or any other member of a Bench to sit singly to dispose of cases falling within the ambit of section 194-C(4) should not be as a matter of course or right, rather should be done upon proper application of mind by the Chairman who shall himself make such decision, and not delegate it to any other officer to undertake as an administrative action. The Chairman is obliged to examine the circumstances warranting the decision of letting him or another member of a Bench to dispose of a matter sitting singly before taking such step. This is precisely what has been held by the learned Lahore High Court in the case of **Bagh Ali** (supra) as relied upon by the learned counsel which to our mind is good law.”

[emphasis supplied]

The excerpt from Bagh Ali's Case (supra) is also reproduced below:-

“9. ....

Thus, considering and construing section 194-C(3)(4) of the Customs Act, 1969 and section 46(9) of Sales Tax Act, 1990, from the plain reading thereof, it is abundantly clear that the Single Member Bench of the Tribunal has the jurisdiction to decide certain class of cases, but the jurisdiction is dependent and circumvented by certain conditions, especially with reference to subsection 4, of entrustment / allocation by the Chairman, which authority of the Chairman is circumscribed that such matter/case should have been earlier allotted to a Bench of which the Single Member should be a part/a Member. The words “of which he is a member” appearing in the section are of immense and fundamental importance for the interpretation thereof, which necessarily means that he should be a member of that Bench, which composes and comprising of more than one Member Bench. If the noted expression is interpreted otherwise, this part of the section shall be rendered redundant and superfluous, which law, fault and misstep cannot be attributed to the legislative instrument, especially when the words are quite lucid, lambert, lucent and refulgent. In our view, it is specifically and expressly the Chairman who has been empowered to meet certain exigencies, such as, where the case as entrusted and being heard by the Bench of more than one member, but due to certain circumstances, which may be innumerable, such as, one of the

members, going for a long leave, retirement, being posted to some other seat of the Tribunal, demise of a member, member technical being repatriated to the department etc. and the matter being a part-heard or even otherwise, the Chairman of the Tribunal could exercise the power of entrusting the case, keeping in view the expediency and exigency for the hearing by a Single Member, but, while exercising this authority, such Bench shall obviously be that Single Member Bench, who (the Member) was the member of that Bench, comprising of two members, to which the matter was originally allocated; this authority of the Chairman is not a routine, incidental and ministerial in nature, rather from the very spirit of the law, it requires a proper application of mind to decide the first place whether a particular matter should be so sent or not; in such a matter capable of being handled singly by the Member (Judicial) or Member (Technical) on account of its nature and the question involved therein; in any case, such an authority, at very inception when a case is initiated with the Tribunal or during the pendency thereof, cannot be delegated to the Registrar on account of the rule that where an authority has been conferred upon a particular person / officer, it has to be exercised by him alone and cannot be further delegated, this principles has the nexus with the maxim delegatus non potest delegare. Any other interpretation placed to the requisite section, in our view, would militate against the clear intent of the legislature and also the rules of interpretation / law noted above, which is not permissible. The pleas of the respondents' side regarding the principle of "substantial compliance" or "procedural in nature" are not attracted to the matters, as it is the question regarding the conferment of jurisdiction unto the Single Member Tribunal in the specific manner ordained by law, and mentioned earlier, the authority of the Chairman in this behalf is not exercisable as a matter of course, routine and in a clerical way, but is dependent upon the due application of the mind by the Chairman as to which case should be allotted to the Single Member Bench keeping in view the various aspects of the case, some of which have been highlighted above."

[emphasis supplied]

8. Re-examination of the facts of this case, in the light of law discussed above, leads to irresistible conclusion that the note as well as entrustment of case to one of the Members of the Division Bench was not within the spirit of subsection (4), therefore, is declared without lawful authority. Since the entrustment of case to learned Single Bench is not in accordance with law, therefore, impugned order is held to have been passed without jurisdiction.

9. In view of above, instant reference application is allowed. The impugned order is set-aside and the appeal shall be deemed pending before the incumbent Division Bench, which shall proceed to decide the same strictly in accordance with law.

10. Office shall send a copy of this judgment under the seal of the Court to the learned Customs Appellate Tribunal as per Section 196 (5) of the Customs Act, 1969.

**(Muhammad Sajid Mehmood Sethi)**  
**Judge**

**(Shahid Jamil Khan)**  
**Judge**

**APPROVED FOR REPORTING.**

**Judge**

**Judge**

*\* Mian Farrukh\**