

[Customs Appellate Tribunal]

Before Muhammad Nadeem Qureshi, Member (Judicial-I)

Messrs M.I. TRADERS, LAHORE

versus

ADDITIONAL COLLECTOR OF CUSTOMS

Customs Appeal No.K-460 of 2012, decided on 25th November, 2013.

Nadeem Ahmed Mirza for Appellant.

Ehtasham Paracha , Appraising Officer for Respondent.

Date of hearing: 24th October, 2013.

ORDER

MUHAMMAD NADEEM QURESHI MEMBER (JUDICIAL-I).---

By this order, I will dispose off Customs Appeal No.K-460 of 2013 filed by the appellant against Order-in-Original No.40800 dated 10-9-2012, passed by the respondent, Karachi.

2. Brief facts of the case are that the appellant Messrs M.I. Traders, Lahore imported a consignment declared to contain assorted Choco Toffee and Candy 17901.90 kg at US\$. 1.00 per kg declaring total (net weight) 17901.90 kg) at declared value US\$ 17901.90/from Messrs Alpha Shipping Ltd. Fern Wood Avenue Hao 2HFW London, United Kingdom vide IGM No. 321 dated 14-8-2012, Index No. 173 arrival as per S.S Vessel "Hnajan Venezia". They filed GD No. KPPI-HC-6629 dated 16-8-2012 through "WeBOC" System" through clearing agent M/s. K.S.K Enterprises. They sought release thereof under PCT Heading 1704.9090 carrying CD @ 30% Sales Tax @ 16% Additional Sales Tax 3% Income Tax @ 5%. The goods were stuffed in a container No. MWCU-6681334. In order to verify the importers declaration the GD was referred for physical examination through WeBOC System. The Examination staff reported the mis-declaration in description and undeclared item which are endorsed as under:

- (1) CADBURY/NESTLE BRAND CHOCOLATE BAR/CANDIES, ASSORTED FLAVOUR AND PACKING, APPROX NET

WEIGHT: 7414 KGS DATE OF EXPIRY 2/3/5/6-2013 , I/O U.K.

(2) CADBURY/NESTLE BRAND TOFEE and CANDIES, ASSORTED FLAVOUR AND PACKING, APPROX NET WEIGHT: 5906 KGS DATE OF EXPIRY 5/6/10-2013 , I/O U.K.

(3) RED BULL SOFT DRINK , MODE OF PACKING 1X250 GRMS EACH, 1X24 TIN EACH CARTON , QTY 720 CARTONS, APPROX. QTY, 4320 LTRS, DATE OF EXPIRY 01/2014 APPROX. WEIGHT 4320 KGS , I/O UK CHECKED WEIGHT 100% AT QICT VIDE WEIGHMENT SLIP NO. 1821634 DATED 17-8-2012 AND TOTAL WEIGHT FOUND 21240 KGS. APPROX.

From above it is clear that as per physical examination report (1), The Cadbury Nestle Brand Chocolate (7414 kg) has been found which is appropriately classifiable under PCT heading 1806.9000 carrying CD @ 30% Sales Tax @ 16% Additional Sales Tax @ 3%, Income Tax @ 5% assessable at US\$. 5.00 per kg vide Valuation Ruling US /25A 347 (No.Reg. Misc/07/2009-1 dated 25-6-2011). Beside Item No. 3 Red bull (4320 kg) has been found as undeclared which is appropriately assessable under PCT heading 2202.1010 carrying CD@30% Sales Tax @ 16% Additional Sales Tax @ 3% Income Tax @ 5%. The ascertained value of the offending good is worked out at Rs.3985751. Therefore, the importer has attempted to get clear the Cadbury Nestle Brand Chocolate (7414 kg) & Red Bull (4320 Kg) under the garb of Assorted Choco Toffee and Cadbury. Had this mis-declaration in description and undeclared goods been no detected, the Exchequer would have been suffer a loss of revenue to the tune of Rs.1463914. This act of the importer constitute an offence of mis-declaration within the meaning of sections 16 and 32(1) and (2) of the Customs Act, 1969 read with section 3(1) of the Import and Export (Control) Act, 1950. This offence is punishable under clause (9) of section 156(1) of the Customs Act, 1969 read with section 3(3) of the Imports and Exports (Control) Act, 1950.

3. The appellant controverted the allegation through reply to show cause notice, the respondent after consideration of that passed Order-in-Original No. 40800 dated 10-9-2012, Para 3 of the order is relevant and which states inter-alia:--

"The contention stated above has been examined. Mr. Madan Lal, Principal Appraiser was asked to explain the department view point. As framed in the contravention report he stated there was a wilful attempt to evade duty/taxes by mis-declaration

PCT, Classification and by giving vague description of the goods to avoid application of valuation ruling on chocolate of PCT 1806.9000, moreover, Red Bull drink was found undeclared which is inter-alia is chargeable to Federal Excise duty as well. The contention of the department is found to be on merits and there is a clear attempt to evade duty and taxes by the modus operandi stated above. Therefore, the charges framed in the show cause notice are established under section 32 of the Customs Act, 1969 read with section 3 of the Import and Export Act, 1950 punishable under clause 14 of section 156(1) of the Customs Act, 1969 and section 3(3) of Imports and Exports (Control) Act, 1950. However, the departmental representative stated that the correct offending value of goods is Rs.2,830,575 instead of Rs.3985751 as stated in the contravention report. I, therefore order confiscation of the offending goods under the penal clauses mentioned above. However, an option is given to importer to redeem the goods upon payment of 35% of the redemption fine of the ascertained value of the offending goods beside payment of duty/taxes leviable thereon. As the importer has been sufficiently penalized through imposition of 35% redemption fine I see no need to imposed further penalty on him. However, the importer and clearing agent are warned to be careful in future."

4. On the date of Mr. Nadeem Ahmed Mirza, Consultant appeared on behalf of the appellant, reiterated the arguments incorporated in the memo. of the appeal and further argued that the Government of Pakistan in exercise of power conferred under section 3 of Customs Act, 1969 (IV of 1969) read with section 179 thereof has withdrawn the power of adjudication from the Executive Collectorate and has formed Collectorate of Customs (Adjudication) vide S.R.O. No. 886(I)/2012 dated 18-7-2012, which is effective from 1-8-2012, Meaning thereby that every adjudication after 1-8-2012 has to be done by the officer of Collectorate of Customs (Adjudication) and not by the Executive Collectorate. While issuing show cause notice dated 4-9-2012 the respondent has transgressed the authority vested with the Collectorate of Customs (Adjudication) rendering the issuance of show cause notice being in-flagrant violation of law and as such coram non judice, hence void and ab-initio. He further argued that, it is mandated upon the respondent to pass order-in-original within four corners of show cause notice which revolves around section 32(1) and (2) of the Customs Act, 1969 without mention of any section of Sales Tax Act, 1990 or Income Tax Ordinance, 2001. Contrary, the respondent passed order-in-original for the payment of Sales Tax and Income Tax in the instant case by travelling beyond the charter of show cause notice. Such orders are being

termed palpably illegal. Reliance is placed on the reported judgment 1987 SCMR 1840. The Collector of Central Excise and Land Customs and others v. Rahm Din. Wherein their lordship of Supreme Court held that, "Order being ultimately based on a ground which was not mentioned in the show cause notice or earlier taken was palpably illegal on face of its." He contended that, no charges for mis-classification or PCT heading can be invoked under the provision of section 32(1) and (2) of the Customs Act, 1969 as per direction contained in Sub-para (B) of para 101 of CGO, 12/2002 dated 15-6-2002, which is mandated to be adhered by the field formation under the provision of section 223 of the Customs Act, 1969. He further contended that, it makes no difference that whether the goods in question were found "Cadbury Nestle Brand Chocolate Bars/Candies or Cadbury/Nestle Brand Toffee and Candies or Red Bull Soft drink" falling under PCT heading 1704.9090 or 1806.9000 or 2202.1010 because all attracts levy of custom duty @30%, sales tax @16% and income tax @5%. Hence, no mis-declaration in material particular to the extent of description/PCT heading. No charge of value misdeclaration can be levelled unless direct evidence of import is available which has to be supplied in support of allegation as per direction contained in para 78 of CGO, 12/2002 dated 15-6-2002. Thereafter in such like situation the difference should be more than 30% between declared and the evidence. Simultaneously no charge of misdeclaration has ever been levelled by any Collectorate against any Importer when assessment of the consignment is made on the basis of Valuation Ruling issued by Directorate General of Valuation under section 25A of the Customs Act, 1969 or on data maintained by the Collectorate under Rule 110 of the period expressed in Sub-Rule (a) of Rule 107 of Customs Rules, 2001, if that would had been the case, not a single consignment would had been cleared by any Collectorate because in every case the value is enhanced on the basis of Valuation Ruling or data without the charges of misdeclaration. Therefore, the charge of misdeclaration of value is without any substance and nullity to the provision of Act and existing practice and as such hold no ground.

5. Mr. Ehtasham Paracha, appraising Officer appeared on behalf of the department/respondent submitted and reiterated the comments on the memo. of appeal and argued in accordance with the same. He further argued that, the appeal is not maintainable for the reason that the person who has filed the appeal is not authorized by the appellant to file instant appeal on behalf of the appellant. No such specific authorization and/or power of attorney is available with the memo. of appeal. The person who had authorized the consultant to file appeal himself had not placed on record any authorization from the appellant to file appeal and/or to further authorized to file such appeals. The appeal is therefore liable to dismiss on this ground alone. He rebutted and argued that at the time of

commencement of quasi-judicial proceeding in the matter newly formed Collectorate of Customs (Adjudication) has not been functional. During the period when the Adjudicating Collectorate was not functional, matter could not be kept pending and where there was any illegality found it ought to have been treated in the same manner as it would be dealt before issuance of S.R.O. No. 886(I)/2001 dated 18-7-2012. The Federal Board of Revenue, in view to save importers from undue delay in finalization of such matter and to remove difficulties and hardship, vide letter C.No. 2(2) L&P/89(PT) dated 6-8-2012 specifically authorized the respondent to adjudicated such matter. He further contended that till the time the Adjudication Collectorate became functional, the Federal Board of Revenue extend the aforesaid specific authorization from time to time. Therefore respondent acted under the direction of Board adjudicated upon the matter and passed the impugned order, which order in all fairness is legal and valid order. He further contended that respondent had all the powers to adjudicated upon the matter, which relates to levy of Sales Tax and Income Tax at import stage and the learned respondent did not commit any legality as alleged by the appellant. The case-law of the Superior Courts cited by the appellant is therefore not applicable. He further contended and argued that no one was allowed to violate the law and if any one found involved in any offence committed by him, an action in accordance with law was taken against him as in the case of the appellant. The respondent had not deviated from the prescribed procedure and power conferred upon him under the Act. He also argued that the show cause notice was issued on glaring misdeclaration on actual description of the goods, which is an offence under section 32(1) of the Customs Act, 1969. The leviable duty, sales tax and income tax was accordingly recoverable under the relevant provision of the Customs Act, 1969, Sales Tax Act, 1990 and Income Tax Ordinance, 2001 leviable there upon at import stage. He further argued that the appellant mis-declared the physical description to get the clearance of the goods on lower value as against the actual value in terms of the Valuation Ruling. The imported goods (as per found description) were assessable on higher value as per the valuation ruling as against the declared description. The appellant has misdeclared the actual description of the goods in order to evade legitimate revenue of the government exchequer and had made a clear attempt to get the goods on lower value by way of this evident misdeclaration. He further stated that the Show Cause Notice and order passed thereon are well within the ambit of law and passed after the detail scrutiny of the evidence available on record and as such observations made thereon by the learned Collector Customs at the time of passing the order-in-original are in conformity with the legal requirements and needs not to be interfere and pray to maintain the order-in-original and reject the appeal in better interest of justice.

6. Rival parties heard and case records perused prior to dilating upon other issues the objection raised into maintainability of the appeal is taken for decision. Upon perusal of the record of the appeal, it has been found that the appellant himself and for arguing the case before the Tribunal, the learned Consultant has been duly authorized by the appellant, hence the preliminary objection raised by the respondent is without any substance and overruled as the appeal has been validly filed under the provision of section 194-A of the Customs Act, 1969.

7. The Government of Pakistan in exercise of power conferred under section 3 of Customs Act, 1969 (IV of 1969) read with section 179 thereof has withdrawn the power of adjudication from the Executive Collectorate and has formed Collectorate of Customs (Adjudication) vide S.R.O. No. 886(I)/2012 dated 18-7-2012, which is effective from 1-8-2012, copy of which is available as Exhibit "H" at pages 25-27 of the memo. of appeal. The respondent in the capacity of Additional Collector of Customs, MCC of PMBQ (Executive Collectorate) is non-existent authority in the S.R.O. 886(I)/2012 dated 18-7-2012 w.e.f. 1-8-2012, instead he issued show cause notice dated 4-9-2012 beyond 31-7-2012, when he was empowered to adjudicate the cases of such type. Rendering, the whole exercise is coram-non-judice as contended by the appellant consultant carries weight. Resultant, he is non-existent authority under section 179 of the Customs Act, 1969. Such authority cannot adjudicate the case opted to issue show cause notice to the appellant, despite not warranted. The argument that the Board has issued directions through letters to adjudicate cases beyond 1-8-2012, hold no ground as order so issued by the Board is also illegal by virtue of the fact that a notification can be amended through a subsequent notification and not by any executive order. On this issue we have already held in Customs Appeal No. K-24/2013 Messrs Paramount Corporation v. Additional Collector of Customs (Adjudication) MCC (PaCCS) and Customs Appeal No. K-471/2012 Messrs S.S. Trading v Additional Collector of Customs (Adjudication) MCC (PaCCS) that "the Board can only amend a notification in terms of section 5(1) read with section 179(2) of the Customs Act, through notification for dispensation of the powers, to overcome the exceptional circumstances caused during the transitional period faced by the respondent Collectorate. The subject legal infirmities were communicated officially through official correspondence to the Board by the Executive Collectorate even then the Board has not made any compliance, the Board had not made any plausible efforts to address the said situation and never tried to issue notification for entrustment of powers for conducting the adjudication proceeding in accordance with law. Further stood validated from the reported judgments 2002 PTD 2457, PLD 1971 Supreme Court 61, PLD 1973 Supreme Court 236, PLD 1964 SC 536, 2001 SCMR 838, 2003

SCMR 1505, 2006 SCMR 129, PLD 1996 Karachi 68, 2006 PTD 978 and PLD 1971 Supreme Court 184. The respondent is not designated an Officer of Inland Revenue under the provision of, Clause (c) of subsection (3) of section 25 of the Sales Tax Act, 1990 and Section 120 of the Income Tax Ordinance, 2001 and as such is not empowered to issue show cause notice and pass order-in-original in respect of matter relating to Sales Tax and Income Tax and section 36 of the Sales Tax Act, 1990 and sections 192 and 195 of Income Tax Ordinance, 2001. Hence, by issuing show cause notice and passing order-in-original the respondent usurped the power of Officer of Inland Revenue to which he is not vested, Rendering the issuance of show cause notice and order-in-original being a flagrant violation of law and as such coram non-judice. The action is taken in the absence of availability of powers or show cause notice or order-in-original has been passed without jurisdiction/power, such order are of no legal effect as held by their Lordship of Supreme Court of Pakistan that "it is an element to principle that if a mandatory condition for the exercise of jurisdiction by Court, Tribunal or Authority is not fulfilled then the entire proceeding which follows become illegal and suffer from want of jurisdiction/powers. Any order passed in continuation of these proceedings in appeals or revisions equally suffers from illegality and are without jurisdiction" Major Syed Walayat Shah v. Muzaffar Khan and 2 others (PLD 1971 SC 184), Omer and Company v. Controller of Customs, (Valuation): (1992 ALD 449 (1) Karachi AAA Steel Mills Ltd. v. Collector of Sales Tax and Central Excise Collectorate of Sales Tax (2004 PTD 624), PLD 1976 Supreme Court 514 Ali Muhammad v. Hussain Buksh and others and PLD 2001 Supreme Court 514 Land Acquisition Collector, Noshehra and others v. Sarfraz Khan and others, S.T.A. 444/03, S.T.A. 465/07, 2010 PTD (Trib.) 1636, [(2010) 101 TAX 221 (H.C. Kar)] and 2010 PTD 465, 2010 PTD (Trib.) 2158, 2011 PTD (Trib.) 1010, 2011 PTD (Trib.) 1680, 2011 PTD (Trib.) 2086. It is well settled principle of law that, if the law had prescribed method for doing of a thing in a particular manner such provision of law is to be followed in letter and spirit and achieving or attaining the objectives of performing or doing of a thing in a manner other than provided by law would not be permitted as declared in the landmark judgment of Director, Directorate General of Intelligence and Investigations and others v. Messrs Al-Faiz Industries (Pvt.) Ltd., and others reported as 2006 SCMR 129. For invoking provisions of misdeclaration under section 32 of the Customs Act, 1969 prima facie, an element of "mens rea" should be present i.e. there should be an attempt of wilful and deliberate false declaration. The importers may not be charged for mis-declaration under section 32 of the Customs, Act, 1969, in the following situation:--

- (a) Where an importer makes a correct declaration on bill of entry

or opts for 1st appraisal for determination of correct description, PCT heading of quantity of goods.

- (b) When a consignment is found to contain goods for description other than the one declared falling under separate PCT heading but chargeable to same rate of duty.
- (c) Where the description of goods is as per declaration but incorrect PCT heading has been mentioned in the bill of entry no mis-declaration case under section 32 of the Customs Act, 1969, be made out provided there is no change in the rate of customs duty as a result of ascertained PCT heading.

8. By virtue of the said fact appellants case falls within the four corners of sub-para (B) (ii) of para 101 of CGO. 12/2002 dated 15-6-2002 and judgment in field of CESAT, Bench III in Customs Appeal No.K-151/2006 dated 28-1-2008 and reported judgment 2010 PTD (Trib.). 1983 Messrs Khawaja Metals v. Collector of Customs (Appeals) and 2010 PTD (Trib.) 2576 of Messrs Iqbal Traders v. Collector of Customs (Appeals) supports the same proposition.

9. Perusal of show cause notice and comments of the respondent's representative, it has been noticed that the respondent has taken into account the leviable amount of Sales Tax, Income Tax and Federal Excise duty, but no provision of the Act/Ordinance has been spelled out in the show cause notice due to the reason that he was well aware of the fact that the Customs has only the power to collect sales tax at import stage under section 6 of the Sales Tax Act, 1990, section 148 of the Income Tax Ordinance and section 3 of the Federal Excise Act, 2005, but not empowered to adjudicate the cases of Sales Tax, Income Tax and Federal Excise Duty under section 11 of Sales Tax Act, 1990, section 162(1) of the Income Tax Ordinance, 2001 and section 14 of Federal Excise Act, 2005 and this stood validated from the expression of these Sections reproduced here-in-below:--

Section 6 of the Sales Tax Act 1990. Time and manner of payment:---(1) The tax in respect of goods imported into Pakistan shall be charged and paid in the same manner and at the same time as if it were a duty of customs payable under the Customs Act, 1969 (and the provisions of the said Act (including section 31A thereof) shall so far as they relate to collection, payment and enforcement of tax under this Act on such goods where no specific provisions exist in the Act apply;"

Section 148 of the Income Tax Ordinance 2001:- Imports.---
(1) The Collector of Customs shall collect advance tax from every importer of goods on the value of the goods at the rate specified in Part II of the First Schedule.

- (2) Nothing contained in subsection (1) shall apply to any goods or class of goods or persons or class of persons importing such goods or class of goods as may be specified by the Board.
- (5) Advance tax shall be collected in the same manner and at the same time as the customs duty payable in respect of the import or, if the goods are exempt from customs duty, at the time customs duty would be payable if the goods were dutiable.
- (6) The provisions of the Customs Act, 1969 (IV of 1969), in so far as relevant, shall apply to the collection of tax under the section.
- (7) The tax collected under this section shall be final tax on the income of the importer arising from the importer subject to subsection (1) and this subsection shall not apply in the case of import of :-
 - (a) raw material, plant, machinery, equipment and parts by an industrial undertaking for its own use;
 - (b) fertilizer by manufacturer of fertilizer and
 - (c) {motor vehicles in CBU condition by manufacturer of {motor vehicles}
 - (d) Large import houses , who---
 - (i) Have paid-up capital of exceeding Rs. {250} millions
 - (ii) Have imports exceeding Rs. 500 million during the tax year;
 - (iii) Own total assets exceeding Rs. {350} millions at the close of the tax year.
 - (iv) Is single object company
 - (v) Maintain computerized records of imports and sale of goods;
 - (vi) Maintain a system for issuance of 100% cash receipts on sales.
 - (vii) Present accounts for tax audit every year
 - (viii) Is registered with Sales Tax Department; and
 - (ix) Make sales of industrial raw material of manufacturer registered for sales tax purposes}
- (8) the tax collected from a person under this section on the import of edible oil {and packing material for a tax year shall be (minimum tax)

(9) In this section---

"Collector of Customs" means the person appointed as Collector of Customs under section 3 of the Customs Act, 1969 (IV of 1969), and includes a Deputy Collector of Customs in Additional Collector of Customs or an officer of customs appointed as such under the aforesaid section;

[Value of goods" means the value of the goods as determined under the Customs Act, 1969 (IV of 1969), as if the goods were subject to ad valorem duty increased by the customs duty federal excise duty and sales tax, if any payable in respect of the import, of the goods.

"Section 3 of Federal Excise Act, 2005: Duties specified in the First Schedule to be leveled.---(I) Subject to the provisions of this Act and rules made there-under, there shall be levied and collected in such manner as may be prescribed duties of excise on---

- (a) goods produced or manufactured in Pakistan,
- (b) goods imported into Pakistan,
- (c) such goods as the Federal Government may, by notification in the official Gazette, specify as are produced or manufactured in the non-tariff areas for sale or consumption therein ; and
- (d) [services provided in Pakistan including the services originated outside but rendered in Pakistan]

At the rate of [fifteen] per cent of ad valorem except the goods and services specified in the First Schedule, which shall be charged to Federal Excise duty as , and at the rates, set forth therein.

- (2) duty in respect of goods imported into Pakistan shall be levied and collected in the same manner and at the same time as if it were a duty of customs payable under the Customs Act, 1969 (IV of 1969) and the provisions of the said Act including section 31A thereof shall apply.
- (3) The Board may, by notification in the official Gazette on lieu of levying and collecting under subsection (1) duties of excise on goods and services, as the case may be, levy and collect duties:-
 - (a) On the production capacity plants, machinery undertaking, establishment or installation producing or manufacturing such goods or

- (b) On fixed basis, as it may deem fit, on any goods or class of goods or on any services or class of services, payable by any establishment or undertaking producing or manufacturing such goods or providing or rendering such services.
- (4) Without prejudice to other provisions of this Act, the Federal Government may levy and collect duty on any class or classes of goods or services by notification in the official Gazette at such higher or lower rate or rates as may be specified in such notification.
- (5) The liability to pay duty shall be:-
 - (a) In case of goods produced or manufactured in Pakistan, of the person manufacturing or producing such goods.
 - (b) In case of goods imported into Pakistan, of the person importing such goods.
 - (c) In case of services provided or rendered in Pakistan, of the person providing or rendering such services "[provided where services are rendered by the person out of Pakistan, the recipient of such services in Pakistan shall be liable to pay duty]; and
 - (d) In case of goods produced or manufactured in non-tariff areas and brought to tariff area for sale or consumption therein, of the person bringing or causing to bring such goods to tariff areas.]

Explanation:- Subject to subsection (1) for the purpose of this section "goods" means the goods specified in CHAPTERS 1 to 97 and "services" means the services specified in CHAPTER 98 of the First Schedule to the Customs Act, 1969 (IV of 1969).

Section 14 of Federal Excise Act, 2005: Recovery of unpaid duty or of erroneously refunded duty or arrear of duty etc.---

- (1) Where any person has not levied or paid any duty or has short levied or short paid such duty or where any amount of duty has been refunded erroneously, such person shall be served with notice requiring him to show cause for payment of such duty provided that such notice shall be issued within {five} years from the relevant date.
- (2) The {Federal Excise Officer} empowered in this behalf, shall after considering the objection of the person served with a notice to show cause under subsection (1) determine the amount of duty payable by him and such person shall pay the amount so determined along with default surcharge and penalty as specified by such officer under the provisions of this Act. [:]

Provided that an order under this section shall be made within one hundred and twenty days of issuance of show cause notice or within such extended period as the Commissioner may, for reasons to be recorded in writing, fix, provided that such extended period shall in no case exceed sixty days:

Provided further that any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or the time taken through adjournment by the petitioner not exceeding thirty days shall be excluded from the computation of the period specified in the first proviso]

- (3) Where any amount of duty levied and penalty imposed or any other amount payable under this Act is due from any person, such amount or sum shall be recovered in such manner as is prescribed under this Act or Rules made there-under:
- (4) Notwithstanding, anything contained under any other law for the time being in force where any business or activity involving liability to charge, levy and pay duty under this Act is sold discontinued or liquidated, the amount of unpaid or recoverable duty shall be the first charge on the assets of the business.

Explanation.---For the purpose of this section [refund included drawback of duty and] the expression "relevant date" means the date on which the payment of duty was due under subsection (3) and in case where any amount of duty has been erroneously refunded, the date of its refund.

"Section 11 of the Sales Tax Act 1990:---Assessment of Tax and Recovery of Tax not levied or short levied or erroneously refunded:-(3) Where by reason of some collusion or a deliberate act any tax or charges has not been levied or made or has been short levied or has been erroneously refunded, the person liable to pay any amount of the tax or charge or the amount of refund erroneously made shall be served with a notice, requiring him to show cause for payment of the amount specified in the notice.

- (4) Where, by reason of any inadvertence, error or misconstruction, are tax or charge has not been levied or made or has been short levied or has been erroneously refunded, the person liable to pay the amount of tax or charge or the amount of refund erroneously made, shall be served with a notice requiring him to show cause for payment of the amount specified in the notice:

Provided that, where a tax or charge has not been levied under

this subsection, the amount of tax shall be recovered as tax fraction of the value of supply

- (5) No order under this section shall be made by an officer of Inland Revenue unless a notice to show cause is given within 5 years, of the relevant date, to the person in default specifying the grounds on which it is intended to proceed against him and the officer of Sales Tax shall take into consideration the representation made by such person and provide him with an opportunity of being heard.

{Provided that order under the section shall be made within {one hundred and twenty} days of issuance of show cause notice or within such extended period as {the Commission { } may, for reason to be recorded in writing, fix provided that such extended period shall in no case exceed [ninety days]:

[Provided further that any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or the time taken through adjournment by the petitioner not exceeding sixty days shall be excluded from the computation of the periods specified in the first proviso]

Section Income Tax Ordinance, 2001: 162... Recovery of tax from the person from whom tax was not collected or deducted:---(1) Where a person fails to collect tax as required under Division II of this Part {or Chapter XIII or deduct tax from a payment as required under Division III of this Part [or Chapter XII] , the Commissioner may {pass an order to that effect and} recover the amount not collected or deducted from the person from whom the tax should have been collected or to whom the payment was made.

- (2) The recovery of tax under subsection (1) does not absolve the person who failed to deduct tax as required under Division III of this Part {or Chapter XII] from any other legal action in relation to the failure, or from a charge of additional tax or the disallowance of a deduction for the expense to which the failure relates, as provided for under this Ordinance.(Emphasis is ours)

Section 14A of the Federal Excise Act, 2005Short paid amounts recoverable.---Notwithstanding the provisions of this Act or the rules made there-under, where a registered person pays the amount of duty less than the duty due as indicated in his return , the short paid amount of duty along with default surcharge shall be recovered from such person by

stopping removal of any goods from his business premises and through attachment of his business bank accounts without prejudice to any other action under this Act or the rules made there-under:

Provided that no penalty under this Act or rules made there-under shall be imposed unless a show cause notice is given to such person.

10. From conscientious study of section 6 of the Sales Tax Act, 1990 and 148 of the Income Tax Ordinance 2001 and section 3, of the Federal Excise Act, 2005 it is vividly clear that the customs is empowered to collect the Taxes and Federal Excise Duty on import of the goods as like custom duty on the value determined under section 25 of the Customs Act, 1969. The said section does not empower the customs to initiate adjudication/recovery proceeding for the short collected/paid Sales Tax, Income Tax and Federal Excise Duty, either due to collusion or connivance or inadvertence, error or misconstruction. For proceeding for these type of recovery a show cause notice has to be issued under section 11 of the Sales Tax Act, 1990, section 162(1) of the Income Tax Ordinance, 2001 and Provision of Section 14A of Federal Excise Act, 2005 the authority to issue show cause notice under section 11 of the Sales Tax Act, 1990 and section 162(1) of the Income Tax Ordinance, 2001 and sections 14 and 14A of the Federal Excise Act, 2005 are Officers of Inland Revenue and the Commissioner of Income Tax, in these section Additional Collector of Customs figures no where. He assumed the power not vested with him under the provision of sections 11, 162(1) and 14 of the, Sales Tax Act, 1990, Income Tax Ordinance, 2001 and Federal Excise Act, 2005 respectively.

11. On the strength of above deliberation, it is my considered opinion that respondent does have the authority to collect Sales Tax Income Tax and Federal Excise Duty at import stage in the capacity of collecting agent and is not empowered to adjudicate the cases of short payment/recovery due to any reason as expressed in the respective sections of the Acts/Ordinance, hence the contention of the respondent representative that custom is empowered to adjudicate the cases of Sales Tax, Income Tax and Federal Excise Duty is not legal, justifiable and not tenable in the eyes of the law. Instead void and ab-initio and coram non judice. As held by the Hon'ble High Court of Sindh in reported judgment as 2010 PTD 465 Collector of Customs, Model Customs Collectorate v. Messrs Kapron Overseas Supplies Co., (Pvt.) Ltd., that assuming power despite none render the proceeding as ab-initio void. The Hon'ble High Court dismissed the reference while holding that "any transgression of such jurisdiction for not being a technical defect would

render entire exercise of authority to be ab-initio, void and illegal." "the exercise of jurisdiction by an authority is a mandatory requirement and its non fulfillment would entale the entire proceeding to be "coram non judice." In PLD 2004 Supreme Court 600 All Pakistan Newspaper Society and others v. FOP and others the Hon'ble Chief Justice of Pakistan while presiding as Judge held in clear term that "determination of jurisdiction by court seized with the matter is one of the important elements in administration of justice as if justice has been provided basing upon coram non judice order then same would have no legal sanction behind it.". Whereas, the Hon'ble Supreme Court of Pakistan in yet another landmark judgment reported at 2006 SCMR 129 titled as DGI&I and others v. Al-Faiz Industries (Pvt.) Ltd., and others held that:--

"If the law have prescribed method for doing a thing in a particular manner such provision of law is to be followed in letter and spirit and achieving or retaining the objective of performing or doing of a thing in a manner other than provided by law would not be permitted---each and every words appearing in a section is to be given effect and no other word is to be rendered as redundant or surplus - when the legislature required the doing of a thing in a particular manner then it is to be done in that manner and all other manner or modes of doing or performing that things are barred -- if the doing of a thing is made lawful in a particular manner the doing of that thing in conflict with the manner prescribed will be unlawful as per maxim "Expression facit cessare tacitum"

12. I, therefore hold that the exercise of jurisdiction on this point by the respondent in addition to adoption of recovery proceeding by them is declared as ab-initio void and as such coram non-judice.

13. Even otherwise, the show cause notice is without mentioning the applicable provisions of Sales Tax Act, 1990, Income Tax Ordinance, 2001 and Federal Excise Act, 2005, whereas charges against the appellant has been held by the respondent. Resultant, the respondent travelled beyond the charter of show cause notice, hence palpably illegal. It is settled law that where provisions in orders have/been invoked without their mention in the show cause notice, such orders are held void of law. In case of Collector Central Excise and Land Customs and others v. Rahmdin reported as 1987 SCMR 1840, the Apex Court has held that:--

" Order of adjudication being ultimately based on a ground which was not mentioned in the show cause notice was palpably illegal on the face of it."

That no charge under section 32 of the Customs Act, 1969 can be invoked on the appellant (levelled in the show cause notice and held correct in order-in-original) as the rates of duty and taxes on the declared goods and found good are one and the same. This does in no way suggest the imposition of redemption fine for difference in declared and found goods. In consonance of the Act/Rules, sub-para B(ii) of para 101 of CGO 12/2002 dated 15-6-2002 is relevant and which directs the field formation that an importer may not be charged for misdeclaration under section 32 of the Customs Act, 1969, in the following situation:

- (i) Where an importer makes a correct declaration on bill of entry or opts for 1st appraisement for determination of correct description, PCT heading of quantity of goods.
- (ii) When a consignment is found to contain goods for description other than the one declared falling under separate PCT heading but chargeable to same rate of duty.
- (iii) Where the description of goods is as per declaration but incorrect PCT heading has been mentioned in the bill of entry no mis-declaration case under section 32 of the Customs Act, 1969, be made out provided there is no change in the rate of customs duty as a result of ascertained PCT heading.

14. It is also observed with concern that the respondent has over sight the contents of Para 78 in CGO, 12/2002 dated 15-6-2002, which had been incorporated by the Board on the basis of numerous reported judgment of the Superior Judicial Fora that for leveling allegation of mis-declaration of value, it is upon the department to substantiate the allegations through an incriminating undisputable direct evidence in the shape of evidential invoice of the said product of the period expressed in Rules 107(a) of Customs Rules, 2001, same was re-validated by the Board through sub-para (3) of 101 and clause (d) of Notification No. S.R.O. 499(I)/2009 dated 15-6-2009. No evidence has been produced by the respondent as directed in para 78 at any stage i.e. preparation of contravention report, during the adjudication proceeding or before the Tribunal, irrespective of the fact that for disputing the said value of the imported goods, it was mandated upon the official of MCC of PaCCS to transmit view messages under Sub-Rule (1) of Rule 109 of Chapter-IX and 437 of Sub-Chapter III of Chapter XXI of Custom Rules, 2001 to the appellant for transmitting/scanning additional documents. On the contrary no such exercise was conducted by either of the officials, as evident from the fact that no copies of the transmitted view messages have been placed on record by them or to be led or

rebutted for appellant. No decision was also communicated with grounds as enunciated in sub-rule (3) of Rule 109 confirming that no evidence was available with the official of MCC of PMBQ for levelling the charges/allegations. The department has miserably failed to discharge the onus of establishing that the price declared by the appellant of the imported goods are not fair and been mis-declared within the meaning of section 32 of the Customs Act, 1969, rendering the allegation are merely without any concrete and positive evidence and this cannot warrant a finding of falsity to the declaration in "material particular". Hence the charges of misdeclaration of value are declared to be unsubstantiated and as such of no legal effect hence, ab initio void. The same view has been taken by the Hon'ble Supreme Court of Pakistan and High Courts and Tribunal in judgments, reported Customs Appeal No. K-249/2000/13372, Customs Appeal No. K-35/2002, Customs Appeal No. K-1670/2001, 2005 PTD (Trib) 617, 1668/LB and 1669/LB of 2002, Customs Appeal No. K-1281/05, 1986 MLD 790 Karachi PLD 1996 Karachi 68, 2006 PTD 909, 2002 PTD 2957, 2007 SCMR 1357 = 2007 PTD 1858, 2008 SCMR 438, 1992 SCMR 1083, 2008 PTD 1250 and 2008 SCMR 438.

15. It has further been observed from the record and proceedings that the field formations level no charges of mis-declaration on the importer when the officials complete the assessment of the consignment on the basis of Valuation Ruling issued by Directorate General of Valuation under section 25A of the Customs Act, 1969. This is so because of the fact that value of the goods is to be assessed as per Valuation Ruling in field and vogue irrespectively of the value declared. The Valuation Ruling can only be over ruled where there is an evidence of higher value undisputed as per legal mechanism provided there-under. By virtue of the fact that proving of charge of mis-declaration of value needs high standard of proof. It is difficult to digest the wisdom of respondent shown in the order which on one hand ordered completion of the assessment of the appellant consignment on the basis of data maintained under Rule 110 of the Customs Rules, 2001 and Valuation Ruling No. 347 dated 25-6-2011, whereas, on the other hand holding the appellant guilty of mis-declaration of value, while completely ignoring the fact that the good declaration contain no column for giving declaration to the fact of valuation ruling. Thus rendering, the charge of mis-declaration of value is without any substance, and nullity to the provision of Act, Rules and regulations framed there-under and existing practice, this opinion stood validated from the judgment of Bench-II of this Tribunal in Customs Appeal No. 542 of 2013 Messrs Shoaib Tayyab International v Additional Collector, Collectorate of Customs (Adjudication-II), which has been complied with, consequent to which it attains finality and became an order-in-rem.

16. Hence keeping in view all such observations made above and the strength of judgments passed by the superior courts noted above and in conformity of aforesaid observations made thereon, I am of the considered view that the proceedings in the subject case are infested with patent deficiencies and violations of statutory requirements, regarding issuance of Show Cause Notice, all subsequent proceedings and orders passed thereon tantamount to substantive illegalities, adequate breach of natural justice has been equated with breach of law and super structure built thereon are hereby declared illegal, void, ab-initio and accordingly set aside, appeal is therefore allowed with no order as to cost.

17. Order passed accordingly.