[Customs Appellate Tribunal]

Before Ch. Niamatullah, Chairman/Member Judicial-I and Ghulam Ahmed, Member (Technical-II)

Messrs RAZAQUE STEELS (PVT.) LTD.
through Authorised Director

versus

ADDITIONAL COLLECTOR OF CUSTOMS, KARACHI

Customs Appeal No.K-975 of 2010, decided on 9th September, 2013.

M. Junaid Ghaffar for Appellant.

Jamshed Ali Khan (A.O.) and Farooq Khan (L.O.) for Respondents.

Date of hearing: 23rd July, 2013.

ORDER

GHULAM AHMED, MEMBER (TECHNICAL-II).---By this order, we will dispose of Customs Appeal No.K-975 of 2010 filed by the appellant against Order-in-Appeal No.4180 of 2010 dated 11-8-2010, passed by the Collector of Customs, (Appeals), Karachi.

2. Brief, facts of the case as reported are that the appellant imported a consignment of Hot Rolled Deformed Round Steel Bars and got cleared the same without payment of value added tax as leviable on all taxable goods (excluding those imported by manufacturers for in-house consumption), at import stage @ 2% in terms of provisions of Rules 58(A) and 58(B) of the Sales Tax Special Procedure Rules, 2007 vide Notification S.R.O. 480(I)/2007 dated 9-6-2007 as amended vide S.R.O.525(I)/2008 dated 12-6-2008 and consequent income tax. This omission resulted into short realization of value addition tax and

consequential income tax amounting to Rs.1,974,375 and Rs.39,488/ respectively which is recoverable from the appellant. Thus, the appellant and his clearing agent were accordingly charged under the relevant provisions of law.

3. The Additional Collector of Customs, MCC Appraisement-I Karachi, did not agree with replies of respondent and passed the Order-in-Original No. 48 of 2010 dated 13-4-2010 reproduced as under:--

> "I have gone through the case record and also considered the arguments of both sides and it has been observed that value addition tax @ 2% on imported goods at the import stage was chargeable in terms of provisions of Rules 58(A) and 58(B) of the Sales Tax Special Procedure Rules, 2007, which was chargeable on taxable goods (excluding those imported by manufacturers for in-house consumption). The imported goods Hot Rolled Deformed Round Steel Bars were themselves a finished product being hot rolled and as per the facts of the case the same cannot be termed as goods imported for in house consumption. The Rule 58(B) of the Sales Tax Special Procedure Rules, 2007 issued vide S.R.O. 480(I)/2007 dated 9-6-2007 and amended by S.R.O. 525(I)/2008 dated 12-6-2008, which is reproduced hereunder:
>
> "58(B): Payment of sales tax on account of minimum value addition.---(1) The sales tax on account of minimum value addition (hereinafter referred to as value addition tax in this chapter), shall be levied and collected at import stage on goods in addition to the tax chargeable under section 3 of the Act or a notification issued thereunder:
>
> Provided that the value addition tax shall not be charged on the goods as are imported by a manufacturer for in-house consumption.
>
> (2) The value addition tax paid at import stage shall form pmi of input tax and the importers shall deduct the same from the output tax due for the tax period, subject to limitations and restrictions under the Act, for determining his net liability. The excess of input tax over output tax shall be carried forwarded to the tax period as provided in section 10 of the Act"
>
> In view of above, I conclude that the importer had failed to pay the value addition tax @ 2% and consequent income tax at import stage at the time of importation of the subject goods, I therefore direct the importers to make payment of short realized amount of value addition tax equal to Rs.1974375 and WHT of

Rs.39488 within thirty days of issue of this order, failing which recovery proceedings shall be initiated against the importers under the relevant provisions of law. Further, in terms of clause 14 of section 156(1) of the Customs Act, 1969, a personal penalty of Rs.50,000 is imposed on importer as well as clearing agent each. In this case requisite extension of 'sixty days under subsection (3) of section 179 of the Customs Act 1969 was granted by the competent authority.

This order shall apply mutatis mutandis to another case of the same importer bearing No.SI/MISC/323/2009-III, whereby, an amount of Rs.1052255 is recoverable as value addition tax and Rs.21045 as WHT.

4. The appellant being aggrieved with Order-in-Original No. 48 of 2010 dated 13-4-2010 filed an appeal before the Collector of Customs, (Appeals) Karachi. The Collector of Customs (Appeals) rejected the appeals as under:--

"I have examined the entire case record and given careful consideration to the arguments advanced before me. The appellant's principal contention is that since he is a manufacturer and the hot rolled steel bars are cut to various sizes in accordance with the requirements of the customers, it could be said that the impugned goods were meant for in-house consumption by a manufacturer. However, I do not find enough merit in the aforesaid argument: since the goods imported in this case (i.e. hot rolled steel bars) are themselves a finished product the same cannot be construed as meant for in-house consumption by a manufacturer in the manufacture of other goods. Clearly; the exception mentioned in the notification is meant for intermediate goods and the hot rolled steel bars are not such intermediate goods by any stretch of imagination. Therefore, the 2% value addition tax levied through the amending Notification S.R.O. 525(I)/2008 dated 12-6-2008 was payable by the appellant. The other argument of the appellant is that since the amount of sales tax paid by him at the time of import would have been received back by him at the time of further supply of the goods in any case, no revenue loss had been caused by him by not paying the 2% value addition tax under reference. The aforesaid argument, too, is untenable: under the law, the appellant was required to pay the amount of tax (i.e. Rs.2,013,863) which he deliberately failed to do and the law requires that the aforesaid evaded amount of revenue should be recovered. I, therefore, endorse the adjudicating officer's order for recovery of the said amount. The facts and circumstances of

the case clearly establish that the appellant had deliberately, and with mala fide intent, evaded the legitimate Government revenue of Rs.2,013,863 because when the impugned goods were imported the notification dated 12-6-2008 was in the field. Therefore, the penalty of Rs.50,000 imposed on the appellant is fully justified, rather lenient in view of the extent of revenue loss caused in this case. Thus, the arguments advanced by the appellant do not find any support from the evidence on record. I, therefore, hold that the impugned order is correct in law and on facts and there is no reason to interfere with the same. The appeal is rejected accordingly.

5. Being aggrieved and dissatisfied with the Order-in-Appeal, the appellant filed the Instant appeal before this Tribunal on the grounds as under:-

(a) That the act of the Adjudicating authority of issuing a corrigendum in respect of Show-Cause Notice No. SI/MISC/ 323/2009-III was at the outset was illegal, without jurisdiction and against the norms of justice and equity as neither the same was covered under a bona fide mistake nor a typing error as through this corrigendum altogether a different imported consignment was brought in the net of the already issued show-cause notice by substituting the description, GD No. and alleged amount of short recovery which is not permissible under the law. The said action, including the passing of the order-in-original and subsequent appellate order are therefore liable to be declared as illegal and nullity in the eyes of law. That it is further submitted that through the corrigendum/hearing notice the hearing of the case was fixed on 9-4-2010 whereas the order-in-original depicts that the last hearing was fixed on 11-3-2010 and hence there was no practical or physical hearing conducted on 9-4-2010 and further the order-in-original was already prepared and passed and the issuance of the said corrigendum was only an afterthought to cover up the unlawful act of the Adjudicating authority. Therefore the order-in-original so passed was illegal, without any lawful authority and is liable to be set aside including the appellate order so passed.

(c) That even otherwise, the order-in-original passed was without any lawful authority and beyond the period of adjudication provided for under section 179 of the Customs Act, 1969, as well as under section 36 of the Sales Tax Act, 1990. At the relevant time, the order was to be passed within 120 days of the contravention report or the show-cause notice, which in the instant case has been passed much beyond the period of 120 days

as the show-cause notice was issued on 22-10-2009 and the last date of hearing was 11-3-2010 and finally the order-in-original was passed on 13-4-2010 without any plausible explanation or reason or extension of time as provided in section 179 of the Customs Act or section 36 of the Sales Tax Act and hence the order-in-original is not sustainable in the eyes of law being time barred in terms of the express provisions of law. This interpretation of the law has been upheld by the Honorable High Courts as well as Customs Tribunal in various cases. Reliance is placed on (*Hanif Straw Board Factory v. Additional Collector* reported as 2008 PTD 578, 2008 PTD 60 in the case of *Super Asia Muhammad Din Sons (Pvt.) Limited v. The Collector of Sales Tax Messrs Rollins Industries v. Collector of Customs* reported as 2010 PTD (Trib.) 1146. Therefore the order-in-original as well as impugned order is not sustainable in the eyes of law being time barred in terms of the express provisions of law.

(d) That even otherwise at the outset it is submitted that learned respondent acting as Additional Collector of Customs does not have any jurisdiction under the Sales Tax Act, 1990 to invoke the recovery provisions of the Sales Tax Act, 1990 namely section 36. It is settled proposition of law that a person or a department entrusted to collect some tax or duty pertaining to some other statute cannot change or alter the nature of that very tax or duty and hence since the department is only a collecting agency for the Sales Tax leviable at the Import stage in terms of section 3 of the Sales Tax Act, 1990, does not ipso facto make the respondent an appropriate officer to issue any demand notice under the Provisions of the Sales Tax Act, 1990 in terms of section 36 as he does not have any jurisdiction.

(e) That the alleged short recovery of Sales Tax levied under section 3 of the Sales Tax Act, 1990, cannot be made good in terms of section 32 of the Customs Act, 1969, as under section 32, of the Customs Act only a custom duty or charge can be recovered for which a notice is to be issued in terms of either subsection (2) or (3) of section 32 of the Customs Act, 1969. No amount of sales tax or for that matter Income Tax can be recovered through notice under section 32 of the Customs Act, 1969, as firstly these levies are separate and distinct in nature and have been levied under different statutes, and secondly there are separate provisions, provided for under the Sales Tax Act, 1990, and the Income Tax Ordinance, 2001 for short recoveries of these levies, if any. This submission is being made as the Sales Tax Act, 1990 and the Customs Act, 1969, though taxing statutes,

but operates in two different fields. The section 3 of the Sales Tax Act introduces a mechanism for levying the Sales Tax on all imported items unless otherwise exempted and its time and manner of payment is governed by section 6 of the Act ibid, wherein it provides a machinery/procedure for the time and manner of payment of sales tax as if it were a duty under the Customs Act, 1969, but there is a marked difference between the charging section of a statute and the machinery part thereof. Therefore, the provisions of 6 of the Sales Tax Act, 1990, does not in any manner involve the imposition or levy of the tax, but is only a mode or manner of its collection. Thus, merely because, the provisions of section 6 of the Sales Tax Act, 1990, provides, that this sales tax is to be collected in the same manner and at the same time, as if it were a duty of Customs payable under the Customs Act, 1969, does not converts it into a custom duty recoverable in terms of section 32 of the Customs Act, 1969. Therefore any notice for recovery of Sales Tax, in terms of section 32 of the Customs Act, 1969 and any such order based on such illegal notice, is illegal, without jurisdiction and any order passed on the basis of such a notice is void and liable to be set aside.

(f) That the provisions of section 6 of the Sales Tax Act, 1990 does not in any manner provide the Customs Authorities to initiate any recovery proceedings of any alleged short levied amount of Sales Tax in terms of section 32 of the Customs Act, 1969 as the Sales Tax Act, 1990 very clearly and expressly provides a mechanism and procedure for recovery of any short levied amount of Sales Tax under section 36 of the Sales Tax Act, 1990 and therefore no short recovery proceedings can be initiated against the appellants in terms of section 32 of the Customs Act, 1969.

(g) That the Central Board of Revenue has already notified the appointment of officers in respect of recovery proceedings under of the Sales Tax Act, 1990 by virtue of which the Recovery in respect of cases of Sales Tax can be dealt with by the Collectorate of Sales Tax in their respective jurisdictions, and not by the Assistant or the Deputy Collector of Customs, as the case may be. Therefore, in all fairness the exercise of jurisdiction by the learned respondent which has not been conferred on through any of the statutes and issuance of subject show-cause notice suffers from palpable legal infirmities and is liable to be withdrawn and all the subsequent acts based on the same are also without any jurisdiction and illegal. It is also pertinent to note that assessment and recovery are two different

aspects of a taxing statute and it is not provided under the law that the persons who have been authorized to assess and collect the tax at the time of collection of customs duty are also authorized to recover any short levy of the same. It is need less to mention here that once the assessment has been done and the payment of the determined amount is made the Customs Authorities are exhausted of the powers conferred on them under section 6 of the Sales Tax Act, 1990 and cannot issue any demand or notice either under section 32 of the Customs Act, 1969 or under section 36 of the Sales Tax Act, 1990 for short recovery of any amount of Sales Tax.

(h) That without prejudice to the above it is further submitted that show-cause notice is even otherwise illegal and without lawful authority in as much as the same has been issued in terms of all the subsections of section 32 i.e. (1), (2) and (3), which is nothing but an absurdity as subsections (1) and (2) govern altogether different situations as compared to subsection (3), hence the whole exercise of issuing the show-cause notice and subsequent order so passed are a nullity in the eyes of law.

(i) That it is further submitted that none of the ingredients of subsections (1) and (2) were available before the adjudicating authority as the appellant had not indulged into any mis-declaration in the matter and had only claimed a bona fide exemption which was and is still available to the appellant. Hence the issuance of show-cause notice for mis-declaration does not merits any consideration as the department had all along processed the CD on the basis of such claim and therefore the appellant cannot be saddled with imposition of any penalty or fine in the matter.

(j) That on merits of the case it is submitted the appellant is a registered person under the Sales Tax Act, 1990 principally as a "**Manufacturer**" and in addition to this it is also registered as an Importer and Wholesaler. However for the purposes of paying sales tax it is primarily registered as a Manufacturer and would not be covered through any other S.R.O. issued under delegated legislation. It is pertinent to mention that the purpose of introduction of payment of 2% additional tax at import stage was at the behest of the Importers who were not in a position to maintain accounts and hence to avoid such documentation and audits by the department an S.R.O. 678(I)/2007 dated 6-7-2007 was introduced which was later on amended by S.R.O. 525(I)/2008 dated 11-6-2008 read with S.R.O. 862(I)/2008 dated 20-8-2008. In the first S.R.O. the levy of such additional tax

was exclusively on the Importers, which was thereafter broadened but even then there was an exemption for the manufacturers in the said SRO. The rationale behind this exemption was admittedly on the ground that the Manufacturer was in fact required to make value addition at the time of sale of his goods and was not obliged to pay the additional tax at the import stage, otherwise the same would had led to double taxation that is payment of sales tax at both the stages on the same transaction. (Copies of SRO's are annexed as Annexure G/1 to G/3).

(k) That the appellant had paid the sales tax at the import stage @ 16% plus an amount of Rs.780/T at the time of sale of the goods in terms of Rule 58(1) of S.R.O. 862(I)/2008 dated 20-8-2008 and thus making extra payment on every Ton sold on account of Value addition at the time of sale, therefore in all fairness the act of the appellant is more beneficial to the revenue in the aggregate and cannot be subjected to alleged short recovery on a transaction on which already a higher amount of tax has been paid. It is also pertinent to mention here that the maximum amount of adjustable sales tax that the appellant can show on any Sales Tax Invoice and that too only for Sales Tax registered customers is Rs.7,308. This is as per S.R.O. 862(I)/2008. Therefore the action of the respondent is illegal and not based on sound footings and hence liable to be set aside. That it is pertinent to mention that the appellant is engaged in the Manufacturing of Bars and its operations are fully covered under the definition of "***Manufacture***" as well as Manufacturer as defined in sections 2(16) & (17) of the Sales Tax Act, 1990 which is reproduced for ease of reference,

(16) 'manufacture' or 'produce' includes:--

(a) any process in which an article singly or in combination with other articles, materials, components, is either converted into another distinct article or product or is so changed, transformed or reshaped that it becomes capable of being put to use differently or distinctly and includes any process incidental or ancillary to the completion of a manufactured product;

(b) process of printing, publishing, lithography and engraving; and

(c) process and operations of assembling, mixing, cutting, diluting, bottling, packaging, repacking or preparation of goods in any other manner;

(17) 'manufacturer' or 'producer' means a person who engages,

whether exclusively or not, in the production or manufacture of goods whether or not the raw material of which the goods are produced or manufactured are owned by him; and shall include--

(a) a person who by any process or operation assembles, mixes, cuts, dilutes, bottles, packages, repackages or prepares goods by any other manner;

(b) an assignee or trustee in bankruptcy, liquidator, executor, or curator or any manufacturer or producer and any person who disposes of his assets in any fiduciary capacity; and

(c) any person, firm or company which owns, holds, claims or uses any patent, proprietary, or other right to goods being manufactured, whether in his or its name, or on his or its behalf, as the case may be, whether or not such person, firm or company sells, distributes, consigns or otherwise disposes of the goods:

Provided that for the purpose of refund under this Act, only such person shall be treated as manufacturer-cum-exporter who owns or has his own manufacturing facility to manufacture or produce the goods exported or to be exported;

It is easily discernable from the perusal of this definition that the process carried out by the appellant i.e. sorting, straightening, sandblasting, cutting, bending, rebundling amounts to manufacture and is fully covered and exempted from the purview of 2% additional sales tax. It is also submitted that if the situation would have been vice versa the department would have made out a case against the appellant for not paying the sales tax on value addition as the process carried out by the appellant was covered under the definition of manufacture. Therefore the action of the respondent is not sustainable on this ground alone and liable to be set aside.

(l) That the persons on whom the 2% additional sales is leviable are the one who sell their products after imports in same state and do not alter or change the nature of the product and hence the same is not applicable on the appellant for this reason also.

(m) That the appellant supplies its goods to various buyers who require the goods to be in different lengths and packing's and place orders from time to time for which the appellant carries out the process of cutting and repacking and subsequently supply them and for this various papers were annexed with the appeal but the same have not been considered by the learned Collector Appeals. Further the appellant had also annexed the photos of

the complete process carried out by the appellant which has also not been considered.

(n) That in fact the whole controversy perhaps is not in respect of any short payment, rather it is in respect of the timing of the payment as the appellant has admittedly paid the sales tax on value addition at the time of sale @ Rs.780/T in addition to payment of ad Val sales tax @ 16% at the import stage and since the tax paid at the import stage was admittedly appellants input tax, the question of any short payment does not arise. The whole controversy could at the most be resolved by examination of the returns filed by the appellant and discharge of its liability viz-a-viz sales tax payable in total as the demand of sales tax at this belated stage is nothing but burdening the appellant with **double taxation** which ultimately is either admissible for input or refund otherwise. Therefore the whole exercise carried out by the respondents is nothing but tainted with mala fides and is liable to be set aside by this Honorable Tribunal.

6. The respondent has submitted. Cross Objection to the Memo of Appeal on behalf of the respondent which are reproduced as under:--

(i) That the contention of appellant is incorrect, keeping in view that under the provision of law, any typographical error, which warrants rectification in such cases, the necessary correction can be made. In the subject case them GD no amount of value addition and quantity of the goods was got corrected, which made as per the provision of law.

(ii) That the contention of appellant is incorrect, the omission committed in respect of clerical mistake were duly got corrected and the judgment was passed on 10-4-2010, which is well evident from the case record.

(iii) That the contention of the case record would reveal that even on 8-4-2010 the appellant made request for an adjournment for fortnight (copy enclosed) which was not allowed, due to the reason that the referred case was required to be finalized in terms of Section 179 of the Customs Act, 1969.

(iv) That the contention of the appellant is incorrect, keeping in view that Honourable High Court vide 2012 PTD (Trib.) 1697 held that appropriate Customs Officer clearly possesses the power to recover any short levied taxes, which he was required to collect, but has not been collected.

(v) That the contention of the appellant is incorrect, the factual position of the case is that not only the Honourable High Court

vide 2012 PTD (Trib.) 1697 held that appropriate officer of Customs has the power to recover any non short levied tax, which he was required to collect but not been collected, moreover, in terms of section 3(A) of section 32 of the Customs Act, 1969 empower the Customs that where any duty or charge has not been levied or has been short levied or has been erroneously refunded or this is discovered as a result of an audit or examination of an importer account or by any means other then examination of the documents provided by the importer at the time the goods were imported, the person liable to pay any amount in that account shall be served with notice within three years.

(vi) That the contention of appellant is incorrect, the mentioning of section 32(1), (2) and (3) is a typographic error however, the provision of penal clause (14) of section 156(1) given in the notice clearly proves that show-cause was issued in terms of sections 32(1) and (2) of the Customs Act, 1969.

(vii) That the contention of the appellant is incorrect, keeping in view that they have deliberately not paid the value addition at the rate of 2%, which resulted a heavy loss of Rs.1974375 to the government exchequer.

(viii) That the contention of the appellant is incorrect, due to the reason that imported goods i.e. Hot Rolled de-framed steel base were themselves a furnished product being not rolled and as per the facts of the case, the same can not be termed as goods imported for in house consumption.

(ix) That the contention of the appellant is incorrect, as already stated in above lines that value added tax at the rate of 2% is leviable on all liable goods (excluding those imported by the manufacturing for manufacturing / in house consumption) at import stage @ 2% in terms of provision of rules 58(A) and 58(B) of the Sales Tax Special Procedure Rules 2007 vide S.R.O. 480(I)/2007 dated 9-6-2007 as amended vide S.R.O. 525(I)/2008 dated 12-6-2008 and consequent income tax, said mis-declaration resulted in short recovery of as customs duty and sales tax Rs.1974375 and Rs.39488, the case record clearly shows that the contention of the importer that he is manufacturer and the hot rolled steel bars are further processed for its various sizes in accordance with the requirement of the customer however, said contention was incorrect and not acceptable owing to the reason that imported goods i.e. not rolled steel bars themselves are furnished product and the same can not be treated

as meant for an in house consumption by a manufacturer for the manufacturing of the other goods, moreover, the exemption granted in the notification is meant for intermediate goods and the hot rolled steel bars are not such intermediate goods. As such 2% value addition was required to be paid by the appellant.

(x) That the contention of the appellant vide this para is incorrect the 2% addition sales tax is leviable on all taxable goods (excluding those imported by manufacturer for manufacturing / in house consumption) at import stage @ 2% in terms of provision of Rules 58(A) and 58(B) of Sales Tax Procedure Rules 2007 vide S.R.O. 480(I)/2007 dated 9-6-2007 as amended vide S.R.O. 525(I)/08 dated 12-6-2008 and consequent income tax. In the subject case the imported goods Hot rolled deformed rolled round steel bars were themselves a furnished product being hot rolled and as per the facts of the case the same can not be termed as goods imported for in house consumption, hence were liable for the application of value added tax at the rate of 2%.

(xi) That the contention of the appellant is incorrect, keeping in view that imported goods i.e. Hot Rolled Deformed Steel bars were themselves a furnished product being hot rolled and could not be treated as goods imported for in housing consumption, the further packing or its different length did not change its original status of furnished product, which was found at the time of import.

(xii) That the contention of the appellant is incorrect keeping in view that the appellant were required to pay the addition value at the rate of 2% at the time of import, which they have not paid, hence are liable for its recovery under the provision of law.

7. Rival parties heard and case records perused in the instant case the Tribunal desires to first dispose-off the contentious issue of issuance of corrigendum dated 6-4-2010 to the show-cause notice dated 22-10-2009, in order to ascertain the legality of the said corrigendum it is appropriate to reproduce section 206 of the Customs Act, 1969 for the sake of ease:--

> *Section 206: Correction of clerical error etc.---Clerical or arithmetical errors in any decision or order passed by the [Federal Government], the Board or any officer of customs under this Act, or errors arising therein from accidental slip or omission may, at any time, be corrected by the [Federal Government], the Board or such officer of customs or his successor in office as the case may be.*

Upon perusal of the provision of section 206, it can be observed that the Federal Government, the Board or any officer of the Customs can correct clerical or arithmetical error arising therein from accidental slip or omission in any decision or order passed. Meaning thereby that correction through a corrigendum dated 6-4-2010 in show-cause notice dated 22-10-2009 is not permissible under law this shows that the respondent No.1 has acted in very cursory, and, perfunctory manner, rendering the corrigendum as of no legal effect as the same least cured the defect of show-cause notice dated 22-10-2009 issued by him, rendering it nullity to the provision of section 206 ibid, hence without power/jurisdiction and as such void and ab-initio by virtue of doing of a thing in a manner other than provided by law as held by the Superior Judicial Fora in reported judgments PLD 1971 Supreme Court 61, PLD 1973 Supreme Court 236; 2003 PTD 2457 2006 SCMR 129.

8. Upon perusal of show-cause notice, it is noticed that the Adjudicating authority (respondent No.1) has relied upon certain provision of the Sales Tax Act, 1990 and for recovery of Sales Tax has invoked section 36 ibid and section 148 of Income Tax Ordinance, 2001, the Advocate of the appellant has strongly contended that the respondent has no powers for recovery of Sales Tax and Income Tax under section 36 of the Sales Tax Act, 1990 and section 162(l) of the Income Tax Ordinance, 2001. On the other hand the respondent are of the opinion that the customs is empowered to collect Sales Tax at import stage under section 6 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001 and can also recover the taxes under the provision of section 202 of the Customs Act, 1969.

9. As to the issue of collection of Sales Tax and Income Tax by the customs authorities as recoveries, it viewed that section 6 of the Sales Tax Act and section 148 of Income Tax Ordinance, 2011 empowers the Collector to recover sale tax on the import of goods. It is pertinent to mention here that Finance (Amendments) Ordinance, 2009 was re-promulgated on 9-2-2010. Besides both provisions of section 32(2) and (3) of the Customs Act mention any duty and charge which has not been levied or has been short levied. It does not restrict to the word exclusively as Customs duty or Custom charge. In case section 32 ibid could have been exclusive dealing with Custom duty, it should have been Customs duty or Custom charges and not Custom matters. More so, inherently an agency which is to collect the taxes at the import stage has the powers to recover the same under the powers delegated with its collection to avoid procedural complications. This view has been held in number of cases decided upon by the Honorable Tribunal.

10. That as regards to the moot point that whether the goods

imported by the appellant in the same state have gone through the process of manufacturing, for determination of the said fact one has to take into consideration the definition of the word "Manufacture" or "Produce" and "Manufacturer" or "Producer" given in section 2(16) and (17) of the Sales Tax 1990, which reads as under:--

" Section 2(16):- Manufacture' or 'Produce' includes--

(a) any process in which an article singly or in combination with other articles, materials, components, is either converted into another distinct article or product or is so changed, transformed or reshaped that it becomes capable of being put to use differently or distinctly and includes any process incidental or ancilliary to the completion of a manufactured product

(b) process of printing, publishing, lithography and engraving; and

(c) process and operations of assembling, mixing, cutting, diluting, bottling, packaging, repacking or preparation of goods in any other manner;

Section 2(17).---'Manufacturer' or 'Producer' means a person when engages. Whether exclusively or not, in the production or manufacture of goods whether or not the raw material of which the goods are produced or manufactured are owned by him; and shall include--

(a) a person who by any process or operation assembles, mixes, cuts, dilutes, bottles, packages, repackages or prepares goods by any other manner,

(b) an assignee or trustee in bankruptcy, liquidator, executor, or curator or any manufacturer or producer and any person who disposes of his assets in any fiduciary capacity; and

(c) any person, firm or company which owns, holds, claims or uses any patent, proprietary, or other right to goods being manufactured, whether in his or its name, or on his or its behalf, as the case may be, whether or not such person, firm or company sells, distributes, consigns or otherwise disposes of the goods:

Provided that for the purpose of refund under the Act, only such person shall be treated as manufacture-cum-exporter who owns or has his own manufacturing facility to manufacture or produce the goods exported or to be exported."

That as alleged in the Show-Cause Notice that the goods imported by the appellant namely hot-rolled deformed round steel bars of PCT 7214.2090 has not gone through the process of manufacture as defined in section 2(16) of the Sales Tax Act, 1990 instead are to be sold in same state condition, therefore the appellant is liable to pay 2% Sales Tax in lieu of value addition in terms of provision of Rules 58(A) & 58(B) of the Sales Tax Special Procedure Rules 2007 vide S.R.O. No.480(I)/2007 dated 9-6-2007 as amended vide S.R.O. 525(I)/2008 dated 12-6-2008, this opinion of the department is completely nullity to the Order of the FBR issued vide STGO No.3 of 2007 dated 30-7-2007 that "***the provision of Chapter X of the Sales Tax Special Procedure Rules, 2007 shall not apply to the persons registered as manufacturers whether or not registered in any category***" binding on the field formation in terms of section 223 of the Customs Act, 1969, non adherence tantamount to defiance and provisions of section 2(16) & (17) of the Sales Tax Act, 1990 which clearly states that if any article imported in same state condition is either converted into another distinct article or product or is so changed, transformed or reshaped that it became capable of being put to use differently or distinctly or includes any process incidental or ancillary to the completion of manufactured product falls within the definition of 'manufacture' or 'produce' and the person or the unit engaged in such activity squarely falls within the ambit of 'manufacturer' or 'producer', the appellant after importing the impugned goods carried out the process of sorting, straightening, sand blasting, cutting, bending, etc. falls within Clause (a) of section 17 ibid, rendering the goods undergone the process of manufacturing and is not liable to pay Sales Tax @ 2% on value addition, this opinion further stood validated from reported judgment 2004 PTD 791 of Hon'ble High Court of Sindh that the "Act of cutting in plates to size, which were ultimately molded and converted into container, was a process incidental into manufacturer of tin container, was a process incidental into manufacturer of tin container which was the final product. Such act of cutting tin plates to size would amount to manufacturer within the definition of terms "Manufacturer as given in S.2(25) of Central Excise Act, 1944" and the Supreme Court in reported judgment 2006 PTD 2627 that the definition of "manufacturer" as given in S.2(25) of Central Excise Act, 1944 would include numerous processes incidental as well as ancillary to the manufacture of final product, cutting into size was an essential process for achieving final product, no can could be produced without cutting of tin to required size, such process would fall within the definition of "manufacture" being incidental to manufacturer of final product."

11. Notwithstanding, it is also observed that the adjudicating authority irrespective of the fact that he invoked the provision of Sales

Tax Act, 1990 lacks proper knowledge of the provision of the Act and the mechanism of value addition, the entire sales tax regime is evaluated tax system leviable on value addition with the respected seller of each stage passing burden to buyer. The tax payer pays notified tax at the time of import or purchase under section 3 of the Sales Tax Act, 1990 and use that in manufacture in his unit or sell in same state condition after value addition and filed Sales Tax Return cum Payment Challan for the tax month on or before 15th Day of the next month under section 26 ibid through which he determined his tax liability under section 7, while deducting input paid by him at import stage, to which he is entitled under the said provision subject to the provision of section 73 ibid. The word used in section 7 is entitle', which according to Jewett's Dictionary of English Law means "to give a right to". The law is thus giving a right to the appellant and availing of this right later than stipulated period, if the output tax exceeds the input tax, the tax payers pays that along with return filed under section 26 ibid and in case the input tax exceed to output tax, he claims refund in the monthly Sales Tax Return cum Payment Challan under section 10 ibid. The statutory right of tax payer to claim input tax or adjustment against the output tax is well supported under the provision of section 10 of the Act.

12. That when a taxpayer is registered as manufacturer he has to pay the tax @ 16% at import stage under section 6 of the Sales Tax Act, 1990 and on supply of the said goods either in same state condition or after value addition, he is duty bound to pay the excess output tax along with Sales Tax Return cum payment Challan under section 26 ibid. The condition for payment of 2% further Sales Tax under Rules 58A and 58B of the Sales Tax Special Procedure Rules, 2007 notified by S.R.O. 480(I)/2007 dated 9-6-2007 as amended vide S.R.O. 525(I)/08 dated 12-6-2008 is meant for commercial importer not for manufacturer. Resultant, it is immaterial that whether manufacturer import same state goods or raw material as he has to sell that after value addition and has to pay tax on his sale, no question arise of evasion or short payment.

13. In the instant case the appellant paid leviable tax on imported goods @16% under section 3(1) (b) and thereafter on supply paid Sales Tax @ Rs.6/unit of the electricity consumed in manufacturing of the goods in terms of devised Sales Tax Special Procedure for payment of tax by the Board vide S.R.O. 862(I)/2008, which comes to Rs.780/MT, stood validated from the Monthly Sales Tax Return cum Payment Challans and their schedules annexed with the memo. of Appeal, which is far more than the 2% additional tax as alleged in the show-cause notice, raising demand through the order-in-original is nullity as the appellant has already paid the notified tax at import stage and simultaneously at supply. The issuance of show-cause notice and passing

of order-in-original in the instant case was not warranted as manufacturer was not liable to pay 2% additional tax at import stage, resultant the said act of the respondent is tantamount to "Double Taxation", which is not permitted under any provision of the Sales Tax Act, 1990 nor in the Articles of The Constitution of Islamic Republic of Pakistan, rendering it ultra virus of the Act and Constitution and the law laid down by the Superior Judicial Fora in reported judgment 1992 PTD 593, 2003 PTD (Trib.) 928, 2010 PTD 1515, 2009 PTD (Trib.) 2025.

14. The show-cause notice by the respondent No. 1 was issued on 22-10-2009 and order under the proviso of subsection (3) of section 179 of the Customs Act, 1969 should had been passed by the respondent within 120 days from the date of issuance of show-cause notice or within a further extended period of 60 days due to emergence of "exceptional circumstances" prior to expiry of initial period of 120 days after serving a notice to the person concerned as held by the Hon'ble Supreme Court of Pakistan in 1999 SCMR 1881 and thereafter recording the exceptional circumstances for the extension of further period. In the instant case the order-in-original was passed on 13-4-2010 after the expiry of initial period of 120 days without any extension as evident from the order which is silent in this regard beside nothing was placed on record of the Tribunal for confirmation of the fact by the respondent No.1 that as to whether any extension was given by the Collector of Customs in lawful legal prescribed manners in the provision of the Act and by the Superior Judicial fora. Rendering the order-in-original barred by time 28 days and as such without power/jurisdiction and not enforceable under law as held in reported judgments 2007 PTD 117, 2008 PTD 60, 2007 PTD 2092, 2010 PTD (Trib.) 1636, 2010 PTD (Trib.) 2117, 2009 SCMR 1126, 2002 MLD 180, 2003 PTD 1354, 2003 PTD 1797, 2008 PTD 578, 2009 PTD 762, 2009 PTD (Trib.) 107, (2010) 109 Taxation 221(sic), 2011 PTD (Trib.) 79, 2011 PTD (Trib.) 987, 2011 PTD (Trib.) 1010, 2011 PTD (Trib.) 1146 and 2012 PTD (Trib.) 1650.

15. In view of the foregoing the order-in-original is based upon proceeding which is infested with patent illegalities and which is held to be null and void. As such the order-in-original as well as impugned order of the Collector (Appeals) based on such proceedings is also ab-initio null and void and are therefore, set aside. Hence the subject appeal is allowed as no order to costs.

16. Order passed accordingly.
