IN THE HIGH COURT OF SINDH, KARACHI

Present

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Zulfiqar Ahmad Khan

C.P. No. D-8281, 8134, 8249, 8260, 8338, 8410, 8471, 8475, 8590, 8595, 8662, 8677, 8709, 8730, 8749, 8850, 8949 of 2017, 06, 155, 217, 322, 619, 742, 917, 975, 1061, 1065, 1119, 1148, 1185, 1219, 1268, 1314, 1333, 1345, 1368, 1369, 1379, 1450, 1507, 1511, 1573, 1584, 1647, 1761, 1763, 1803, 1839, 2121, 2287, 2288, 2437, 2476, 2752, 3035, 3087, 3105, 3297, 3298, 3329, 3336, 3744, 3750, 3759, 3815, 3824, 3956, 3957, 3958, 4011, 4012, 4013, 4183, 4346, 4437, 4504, 4637, 4698, 4799, 4834, 4872, 4988, 4993, 5074, 5207, 5211, 5340, 5341, 5439, 5471, 5718, 5728, 5750, 5871, 5994, 6017, 6018, 6180, 6317, 6324, 6507, 6574, 6671, 6672, 6673, 6714, 6758, 6783, 6833, 6834, 6967, 6968, 6969, 6970, 6994, 6998, 7017, 7018 and 7021, 5207, 7356, 7273, 6933, 7327, 7338 of 2018, 7371, 8377, 7372 and 7393 of 2018 & 7411, 7412, 7463, 7555, 7564, 7626, 7627, 7693, 7771, 7795, 7740, 7890, 7891, 7845 and 7887 of 2018

Dates of hearing : 17.10.2018, 23.10.2018 & 14.11.2018

Date of judgment : 14.11.2018

For petitioners:

Mr. Asad Raza , Advocate
Mr. Salman Yousuf, Advocate
Ms. Dilkhurram Shaheen, Advocate
Mr. Imran Iqbal Khan, Advocate
M/s. Ghulam Hyder Sheikh and Mr. Manzar Hussain, Advocates
Mr. Darvesh K. Mandhan, Advocate
Mr. Mukesh Kumar G. Karara, Advocate
Mr. Nasrullah Korai, Advocate
Mr. Salman Aziz, Advocate
Mr. Adeel Awan, Advocate
Mr. Ghulam Nabi Shar, Advocate
Mr. Shayan Karimi, Advocate
Mr. Muhammad Ishaq, Advocate

For respondents:

Mrs. Masooda Siraj, Advocate
Mr. Muhammad Rashid Arfi, Advocate
Mr. Iqbal Khurram, Advocate
Mr. Khalid Rajpar, Advocate alongwith Abdul Rasheed Sheikh, Chief Collectorate (South), Saeed Ahmed Watto, ADC (West), Masood Ahmed, ADC (East) and Muhammad Qasim, DC, Law Port Qasim
Mr. Rana Sakhawat Ali, Advocate
Mr. Muhammad Khalil Dogar, Advocate
Ms. Nuzhat Shah, Advocate
Mr. Ghulam Murtaza, advocate
Mirza Nadeem Taqi, Advocate
Dr. Shah Nawaz, Advocate
Mr. Mir Hussain Abbasi, Assistant Attorney General

JUDGMENT

Zulfiqar Ahmad Khan, J:- Petitioners have been importing various goods, and upon payment of appropriate custom duties and taxes etc., had released their respective imports in the past under the provisions of

Section 79 of the Customs Act, 1969. While Petitioners were already aggrieved by various Valuation Rulings applicable to their goods, including Valuation Ruling No.1179/2017 dated 12.06.2017 alleging that those Valuation Rulings had been issued without taking direct input from the Petitioners and other interested parties, which was violative of the provisions of Section 25A of the Customs Act, 1969, and to redress this grievance, they had filed review applications under Section 25D of the Customs Act, 1969 before the Director General Valuations, which applications were pending, and since their consignments were arriving from time to time, the Petitioners got the same provisionally released under Section 81 of the Act, 1969 by securing the differential amount of duty and taxes etc., through various orders of this Court, however, lately when consignments arriving at port on the pretext of a circular bearing No.SI/Misc/13/2014-CC (Appr)/375 dated 22.11.2017 were held, additional petitions were filed challenging the impugned Circular in terms of which directions were issued that pursuant to an amendment brought in Rule 107 of the Customs Rules, 2001, the earlier practice of provisional release of consignments under Section 81 of the Act not to be continued in cases where the petitioners had challenged such Ruling by filing an appropriate Revision Application under Section 25D of the Customs Act.

2. Being posed with such unusual circumstances, the petitioners approached the department seeking release of the consignments provisionally under Section 81, but per learned counsel, all such attempts remained futile and the petitioners were forced to pay valuation assessed on the basis of challenged Valuation Rulings. Per learned counsel, Section 81 of the Customs Act, 1969 clearly provided a mechanism for the provisional release of consignments in cases where there was a dispute as

to valuation of the consignments, and required goods to be released provisionally upon securing differential amount of duty and taxes. Learned counsel further stated that the Circular in terms of which petitioners had been called upon to pay full and final valuation as determined by Valuation Rulings was unlawful, illegal, arbitrary and without jurisdiction. Petitioners through these petitions have sought declaration from this Court that the said Circular be declared without jurisdiction and of no legal effect and request is made that the respondents be directed to release the consignments of the petitioners provisionally by furnishing pay orders/bank guarantee of the differential amount. Amendments brought in Rule 107(a) through SRO 564(I)/2017 dated 01.07.2017 which gave birth to the said Circular are also challenged.

3. The respondents in their reply have stated that the amendment brought forward by SRO 564(I)/2017 changed definition of the expression *"**at or about the same time**"* under Rule 107(a) of the Customs Rules, 2001 and now the said expression is defined to mean *"within ninety days prior to importation or within ninety days after the importation of goods being valued, except in cases where Valuation Ruling issued under Section 25A exists, the Valuation Ruling shall remain in field unless rescinded, modified or replaced with a new Valuation Ruling".* It is stated that after the said amendment, as well as, per para 21 of the Sadia Jabbar case (PTCL 2014 CL 537), the department is trying to bring uniformity in its practice and the impugned Circular has been issued with such an objective. It was next stated that by mere filing of request of revision of any Valuation Ruling, or upon making an application of review under Section 25D of the Customs Act, the request itself does not entitle an importer for a provisional assessment under Section 81 of the Act 1969 and that intent of the

Circular is that the assessment in such cases must be made in accordance with the prevailing Valuation Rulings, until unless the said Valuation Ruling is rescinded, modified or repealed. It was also contended that in view of the overriding effect of Section 25A of the Customs Act over the provisions of Section 25, wherever a determination of customs valuation is to be made under Section 25A i.e. a value mentioned in a Valuation Ruling, the same has to be applied, save in the two instances of higher valuation given in the proviso to sub-section (2) of Section 25A. It was also stated that the Custom Officer assessing the goods has no discretion whatsoever to ignore or disregard the determination of the custom valuation so made, as long as such Valuation Ruling holds field i.e. until and unless a Ruling has been revised, rescinded, modified or repealed. It was also contended that Section 81 of the 1969 Act provides for provisional assessment only in cases, where it is not possible for the Customs Officer to satisfy himself of the correctness of the assessment of goods for the reasons that the goods requiring chemical or other test(s) or where there is a case of further inquiry i.e. that goods can only be released provisionally under these limited circumstances and if there is valuation dispute and whilst a Valuation Ruling is in the field, the Assistant Collector in derogation of the Valuation Ruling cannot sit assuming that it was a case of further inquiry just because an importer has filed a representation for the revision of the Valuation Ruling. It was last contended that the persons aggrieved from any Valuation Ruling have right to seek revision under Section 25D of the Act, 1969 as well as by filing appeal against the order-in-original before the Appellate Tribunal, and the assessment made on the basis of the impugned valuation ruling could also be challenged before the Collector (Appeals) under Section 193 of the Act, 1969, thus providing efficacious

alternate remedies to the petitioners, hence invoking writ jurisdiction of the High Court's is not well suited.

4. Heard the counsel for the parties, learned Assistant Attorney General and Department's representatives.

5. Admittedly, petitioners' goods are not banned items and there is only a dispute as to valuation. While Section 25A of the Customs Act, 1969 empowers the custom authorities to determine valuation of imported goods after following the procedure prescribed under Section 25, Section 25D of the Act of 1969 does provide for the possibility of challenging any valuation determined under Section 25A by filing revision petition before the Director General of Valuation. To safeguard the interest of commerce, Customs Act as well as the Rules made thereunder, in cases where valuation is in dispute, attempt to provide adequate mechanism for provisional release of goods. The most relevant provision of law is contained in Section 81 of the Act, 1969 which provides that in cases when it is not possible for a Customs Officer during the checking of the goods' declaration to satisfy himself of the correctness of the assessment of the goods (made under Section 79) for reasons that the goods require chemical or other tests or a further inquiry, a competent officer in these circumstances could order release of such goods provisionally upon provisional assessment of duties and taxes and other payable charges by securing the differential between the final determination of the duty over the amount provisionally determined. Also of relevance are Rules 109, 125, 439 and 440 of the Customs Rules, 2001, relevant part of Rule 125(2) also provides that there shall be no bar on provisional release of goods under Section 81 of the Act, 1969 in case of any dispute between the

importer and the appropriate officer in respect of valuation of the goods. Rule 439 of the Rules, 2001 also provides for the provisional release of the imported good by providing appropriate security when there are disputes regarding valuation, classification, exemption, or lab tests in respect of Valuation Rulings. Clause (a) of Rule 439, in case of Valuation Rulings made under Section 25A, requires the cases to be forwarded to the valuation department online, however mandates that in the interim, goods ought to be cleared provisionally.

6. As the controversy revolves around Circular dated 22.11.2017, we find it relevant to reproduce contents of the said Circular in the following:-

"GOVERNMENT OF PAKISTAN
OFFICE OF THE CHIEF COLLECTOR OF CUSTOMS
APPRAISEMENT (SOUTH)
8th FLOOR, CUSTOM HOUSE, KARACHI

No.SI/Misc/13/2014-CC (Appr)/375 Dated:22.11.2017

C I R C U L A R

Subject: **VALIDITY OF VALUATION RULING AFTER AMENDMENT OF RULE, 107(A) OF CUSTOMS RULES 2001.**

Rule 107 (a) of Chapter IX of Customs Rules 2001 has been amended vide SRO 564(I)/2017 dated 01.07.2017 whereby the Valuation Ruling (VR) issued under section 25A of the Customs Act, 1969 shall remain valid unless rescinded, modified or substituted with a new V.R. As such mere filing of request for revision of an existing VR or an application of review under section 25D of the Act shall not entitle the applicant / importer for provisional assessment under Section 81 ibid. The assessment in such cases shall be made in accordance with the prevailing VR till the same is rescinded, modified or repealed, as stipulated above.

This is for information of and compliance by all concerned.

(Muhammad Saeed Wattoo)
Additional Collector
SA to Chief Collector

Copy to:

1. The Member (Customs), Federal Board of Revenue, Islamabad.
2. The Chief Collector of Customs (North/Central), Islamabad/Lahore.
3. The Chief Collector of Customs, Appraisement/Enforcement (South), Custom House, Karachi.
4. The Director General, Directorate General of Customs (Valuation), Custom House, Karachi.
5. The Collector of Customs, MCC-Appraisement (East/West/Port Qasim), Karachi

6. The President, Federation of Pakistan Karachi Chamber of Commerce & Industry (FPCCI), Clifton Karachi
7. The President, Karachi Chamber of Commerce & Industry, Nichole Road, Karachi
8. The President, Karachi Customs Agent Association, Burhani Chamber, Opp. Custom House, Karachi
9. Notice Board for information of all concerned."

7. As it could be seen from the text reproduced in the above paragraph, the said Circular is issued as an outcome of the amendment brought in Rule 107(a) of Chapter IX of Customs Rules, 2001 as amended through SRO No.564(I)/2017. Rule 107(a) in its amended form is reproduced hereunder:-

> **Rule 107….(a)** "at or about the same time" means within ninety days prior to the importation or within ninety days after the importation of goods being valued except in cases where valuation rulings issued under Section 25A exists. The valuation rule remained in field unless rescinded, modified or repealed with the new valuation".

8. Its common knowledge that Section 25A was added in the Customs Act, 1969 upon advent of the WTO (World Trade Organization) System, which completely overhauled the previous method of determining customs value of the imported goods around the globe. The said section was originally inserted in the national legislature through Finance Act, 2006, however was substantially amended through Finance Act, 2007 and later on continued to be so amended through Finance Acts of 2009, 2010 and 2017. Through WTO System, also known as the Multilateral Trading System, governments *inter alia* agreed to make the business environment stable and predictable. WTO thus became an intergovernmental organization poised to regulate international trade. The Organization officially commenced it business on 01.01.1995 under the Marrakesh Agreement, signed by 124 nations (including Pakistan) earlier on 15.04.1994, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948. WTO is aimed to deal with regulation of trade

between participating countries by providing a framework for negotiating trade agreements, and a dispute resolution process aimed at enforcing participants' adherence to WTO agreements, which have been signed by representatives of member governments, and later on brought in respective countries' national legislations. Pakistan being no exception.

9. With regards customs, WTO set forth an entirely new globally unified system for the determination of the customs valuations for the goods imported into member countries. This model abolished the earlier concept of 'normal price' and a different conceptual framework was introduced, where valuations became matter of "determination" rather than "fixation". Developing countries including Pakistan were given five years to bring their national laws in conformity with the WTO model framework. Resultantly, the new system was enforced in Pakistan with effect from 01.01.2000, just after five years from 01.01.1995. Interestingly Section 25 was immediately inserted in the Customs Act, 1969 to take effect from WTO mandated commencement date of 01.01.2000.

10. WTO/GATT Agreement has in total 38 Articles, of which, Article VII relates to "Valuation for Customs Purposes". The said Article being of paramount relevance, is reproduced hereunder:-

"Article VII
Valuation for Customs Purposes

> 1. The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges* or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

2. (a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.* (b) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.* (c) When the actual value is not ascertainable in accordance with sub-paragraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.*

3. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.

4. (a) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognized by the Fund, or on the par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement. (b) Where no such established par value and no such recognized rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions. (c) The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the CONTRACTING PARTIES, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions. (d) Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory on the date of this Agreement, if such alteration would have the effect of increasing generally the amounts of duty payable.

> 5. The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes."

11. Contracting countries including Pakistan, for full implementation of the said Article VII, entered into an agreement called as "Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994" also. The said Implementation Agreement, comprises of 24 Articles, as well as, has a number of Notes appended to its various Articles. This Agreement exclusively applies to the valuation of imported goods for the purpose of levying *ad valorem* duties on such goods and stipulates that customs valuation shall, except in specified circumstances, be based on the actual price of the goods to be valued, which is generally shown on the invoice. This price, plus adjustments for certain elements listed in Article 8, creates the "transaction value", which constitutes the first and most important method of valuation referred to in the Agreement.

12. Part I of the said Agreement entitled "Rules on Customs Valuation" comprises of 17 articles. The *carved-in-stone* basis for customs valuation under GATT/WTO and the Implementation Agreement is kept as "transactional value" method, which is defined under Article 1 and the same is embodied in Section 25(1) of the Customs Act, 1969 to mean "the price actually paid or payable for the goods when sold for export to the country of importation". The said Article (if need be) may be read with Article 8 of the Implementation Agreement, which forms basis of sub-section (2) of Section 25 of the Customs Act, 1969. Article 8, to fully understand the extent of line items which could (or couldn't be) be

adjusted in the price actually paid or payable (under Article 1), is reproduced hereunder:-

> Article – 8. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:
>
> (a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:
>
> (i) commissions and brokerage, except buying commissions;
>
> (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
>
> (iii) the cost of packing whether for labour or materials;
>
> (b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:
>
> (i) materials, components, parts and similar items incorporated in the imported goods;
>
> (ii) tools, dies, moulds and similar items used in the production of the imported goods;
>
> (iii) materials consumed in the production of the imported goods;
>
> (iv) engineering, development, artwork, design work, plans sketches, undertaken elsewhere than in the country of importation and necessary for the production of the imported goods;
>
> (c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;
>
> (d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.
>
> 2. In framing its legislation, each Member shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:
>
> (a) the cost of transport of the imported goods to the port or place of importation;

(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and

c) the cost of insurance.

3. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

4. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

13. As it could be seen, Article 1 when read along with Article 8, create the entire universe of method of determination of customs valuation through transactional value method. Customs valuation based on the transaction value method, as it could be seen from the above, is largely based on documentary input from the importer. Article 17 of the Implementation Agreement grants Customs administrations a right to challenge these values to satisfy themselves as to the truth or accuracy of any statement, document or declaration. A "*Decision Regarding Cases Where Customs Administrations Having Reasons To Doubt The Truth Or Accuracy Of The Declared Value*" taken by the Committee on Customs Valuation pursuant to a Ministerial Decision at Marrakesh spelled out the procedure to be followed in such cases. As a first step, Customs may ask the importer to provide further explanation that the declared value represents the total amount actually paid or payable for the imported goods. If a reasonable doubt still exists after reception of further information (or in absence of a response) and Customs is of the opinion that the value cannot be determined according to the transaction value method, but before a final decision is taken, Customs must communicate its reasoning to the importer, who, in turn, must be given reasonable time to respond. In addition, the reasoning of the final decision must be

communicated to the importer in writing. Full text of the said Decision is reproduced hereunder:-

> "When a declaration has been presented and where the customs administration has reason to doubt the truth or accuracy of the particulars or of documents produced in support of this declaration, the customs administration may ask the importer to provide further explanation, including documents or other evidence, that the declared value represents the total amount actually paid or payable for the imported goods, adjusted in accordance with the provisions of Article 8. If, after receiving further information, or in the absence of a response, the customs administration still has reasonable doubts about the truth or accuracy of the declared value, it may, bearing in mind the provisions of Article 11, be deemed that the customs value of the imported goods cannot be determined under the provisions of Article 1. Before taking a final decision, the customs administration shall communicate to the importer, in writing if requested, its grounds for doubting the truth or accuracy of the particulars or documents produced and the importer shall be given a reasonable opportunity to respond. When a final decision is made, the customs administration shall communicate to the importer in writing its decision and the grounds therefore."

If a reasonable doubt still exists after reception of further information (or in absence of a response), customs may decide that the value according to the transaction value is not acceptable (and the same will be decided by other methods), but before a final decision is taken, Customs must communicate its reasoning to the importer, who, in turn, must be given reasonable time to respond. In addition, the reasoning of the final decision must be communicated to the importer in writing.

14. Upon ultimately having come to the conclusion that the customs value could not be determined through the transactional valuation method, the method known as transaction value of identical goods method (embodied in Article 2 of the Implementation Agreement and sub-section 5 of section 25 of the Customs Act, 1969) by following the sequential application of valuation methods is given as the next permissible option. The said transaction value of identical goods method is reproduced hereunder:-

> Article 2 - 1. (a) If the customs value of the imported goods cannot be determined under the provisions of Article 1, the customs value shall be the transaction value of identical goods sold for export to the same country of importation and exported **at or about the same time** as the goods being valued.
>
> (b) In applying this Article, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of identical goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.
>
> 2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the identical goods in question arising from differences in distances and modes of transport.
>
> 3. If, in applying this Article, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods. **[Emphasis supplied]**

15. As a third option, when both transaction value method and transaction value of identical goods method have failed, following the Sequential Application of Valuation methods, customs value is to be determined by using transaction value of similar goods method (as embodied in Article 3 of the Implementation Agreement and sub-section 6 of section 25 of the Customs Act, 1969). Article 3 is reproduced hereunder:-

> Article 3 - 1. (a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 and 2, the customs value shall be the transaction value of similar goods sold

for export to the same country of importation and exported **at or about the same time** as the goods being valued.

(b) In applying this Article, the transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the similar goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods. **[Emphasis supplied]**

16. If the customs value of the imported goods cannot be determined under the provisions of Articles 1, 2 and 3 of the Implementation Agreement, the customs values are to be determined under the provisions of Article 5 (para materia to Sub-section 7 of section 25) or, when the customs value cannot be determined under that Article, value has to be determined under the provisions of Article 6 (known as computed method as provided in Sub-section 8 of section 25) except that, at the request of the importer, the order of application of Articles 5 and 6 could be reversed. Full text of Article 5 which provides for deductive method is reproduced hereunder:-

Article 5 - 1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the

condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, **at or about the time of the importation** of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:

(i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;

(ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;

(iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and

(iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.

(b) If neither the imported goods nor identical nor similar imported goods are sold at or about the time of importation of the goods being valued, the customs value shall, subject otherwise to the provisions of paragraph 1(a), be based on the unit price at which the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation.

2. If neither the imported goods nor identical nor similar imported goods are sold in the country of importation in the condition as imported, then, if the importer so requests, the customs value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in the country of importation who are not related to the persons from whom they buy such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a). **[Emphasis supplied]**

17. If the customs value of the imported goods couldn't be yet determined under the provisions of Articles 1 through 6, inclusive, the Agreement requires that the customs values to be determined using reasonable means consistent with the principles and general provisions of

the Implementation Agreement read with Article VII of GATT 1994 on the basis of data available in the country of importation. This method is known as fallback method of valuation of goods. Article 7 in its later part provides as under:-

> Article 7 - 2. No customs value shall be determined under the provisions of this Article on the basis of:
>
> (a) the selling price in the country of importation of goods produced in such country;
>
> (b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;
>
> (c) the price of goods on the domestic market of the country of exportation;
>
> (d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;
>
> (e) the price of the goods for export to a country other than the country of importation;
>
> (f) minimum customs values; or
>
> (g) arbitrary or fictitious values.
>
> 3. If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

18. Also of relevance, Notes to Article 7 provide as under:-

> 1. Customs values determined under the provisions of Article 7 should, to the greatest extent possible, be based on previously determined customs values.
>
> 2. The methods of valuation to be employed under Article 7 should be those laid down in Articles 1 through 6 but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of Article 7.
>
> 3. Some examples of reasonable flexibility are as follows:
>
> (a) Identical goods - the requirement that the identical goods should be exported **at or about the same time** as the goods being valued could be flexibly interpreted; identical imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of identical imported goods already determined under the provisions of Articles 5 and 6 could be used.

> (b) Similar goods - the requirement that the similar goods should be exported **at or about the same time** as the goods being valued could be flexibly interpreted; similar imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of similar imported goods already determined under the provisions of Articles 5 and 6 could be used.
>
> (c) Deductive method - the requirement that the goods shall have been sold in the "condition as imported" in paragraph 1(a) of Article 5 could be flexibly interpreted; the "90 days" requirement could be administered flexibly.

19. As it could be seen from the foregoing ***"at or about the same time"*** expression has appeared in Articles 1, 2, 3 5 and Notes to Article 7. This means that methods given under sub-sections (1), (5), (6), (7) and (9) of Section 25 of the Customs Act, 1969 being the methods of determination of customs value by way of transactional value method, identical goods method, similar goods method, deductive goods method and even by fallback method when used by the Customs authorities to determine customs value of the imported goods, value of goods prevailing **at or about the same time** in the country of export has to be considered. Imagine if the legislature had chosen the phrase "at the same time" instead of "at or about the same time", Customs authorities would have been bound to value imported goods as per the value holding field in the country of export at the same instant when the transaction was made, which would had a practical difficulty because due to time difference between various countries, it would be impossible to find transactional value particularly when the markets were closed in the exporting country. That's why legislature and the Agreement used the phrase *"at or about the same time"* thus by bringing the word "*about*" in the phrase, this practical difficulty has been resolved. Furthermore neither GATT nor the Implementation Agreement (nor even the Customs Act, 1969) has

attempted to define the phrase "**at or about the same time**". Such an attempt only has been made through Rule 107 of the Customs Rules, to freeze *"at or about the same time"* to 90 days before or after the export. Its absurdity could be gauged from a simple example when **A** says that I was born on First January 2000 in Karachi and "at or about the same time" my cousin **B** was born in New York. Could one imagine that the cousin in New York had in fact taken birth any time between 1st January 2000 to 30th March 2000 if phrase "at or about the same time" was given to mean 90 days forward span. Absurdity does not stop here. In fact even by the earlier definition of Rule 107, if the New York cousin was born even 90 days prior to **A's** birth in Karachi, it would still mean that **A** and **B** were born "at or about the same time", thus a total freeze of 180 days was provided, which is utterly illogical and blatantly deceiving.

20. With this absurd background, it is not surprising to note that neither GATT's Article VII, nor the Implementation Agreement has any concept of Valuation Rulings freezing values of imported goods to any given length of time. The Agreement, as well as Section 25 only empowers customs authority to determine customs value on the basis of the values prevailing at or about the same time in the country of export and nothing else except giving "at" statutorily preference over "about,". The 90 days term as engineered by Rule 107(a) is clearly *ultra vires* of the 1969 Act, interestingly the Act chose not to define this term, and the said term as attempted to be defined by the 2001 Rules has never appeared anywhere in the Rules (except in two explanations in Rule 121) meaning thereby, there was no logical reason to define the said phrase in the Rules either. The truth is that the phrase *"at or about same time"* is the currency of valuation methods. Neither GATT 1994 nor the Agreement on

Implementation of Article VII has attempted to define this phrase. The Implementation Agreement under Article 2 while determining value on the basis of identical goods requires that the customs value shall be the transactional value of identical goods for export to the same country of importation and export at or about the same time as the goods being valued, as well as, under Article 3 while determining value of similar goods, customs value is held to be the transactional value of similar goods sold for export to the country of importation and exported at or about the same time as the goods being valued. Similarly in Article 5 which uses deductive method, the customs value of the imported goods (or identical or similar imported goods being sold in the country of importation in the condition as imported) are required to be based on the unit price at which the imported goods or identical or similar greatest aggregate quantity at or about the same time of importation of the goods being valued to persons who are not related to the persons from whom they buy such goods. In Notes to Article 7, the Agreement requires that the customs values determined under fall back method (Article 7), to the greatest extent possibility, be based on provisional customs values. It also requires that the matter of valuation deployed under Article 7 should be those laid down in Article 1 through 6, but reasonable flexibility in the application of such methods must be made in conformity with the aims and provisions of Article 7.

21. As it could be seen, the very intent of the GATT Agreement as well as the Implementation of Agreement, is that while determining the customs values through any of the accepted methods, the authorities must remain time-sensitive. It is probably understandable now that why the GATT or its Implementation Agreement hasn't provide for a

mechanism to freeze any valuation for a fixed longer number of days. While the Act 1969 restrained; the 2001 Rules took the plunge of defining the phrase *"at or about the same time"* through Rule 107(a) to spread it to and initial term for 180 days which the SRO 564 has stretched endlessly at the whims of the authorities. Infect *at or about the same time* being common English words, did not require any definition. No other country has attempted to do so. As *at or about the same time* would plainly mean *at or about the same time* and nothing else and any effort to freeze "at" or "about the same time" to last it for even initial ninety days even did not appeal to logic, particularly when commerce and trade being extremely time sensitive and being done at the speed of light, and international customs value for any goods prevailing today may not be the same a day after, and time being the currency of trade, no such freeze was possible. The very intent of hundreds of countries who entered into GATT Agreement and its Article VII Implementation Agreement was to bring their national laws in conformity with GATT standards, including their customs laws and customs valuation methods were agreed to offer a level playing field for their respective citizens, thus the preamble of GATT Agreement rightly provided that the countries entering into the Agreement have recognized that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods. These countries were desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade

and to the elimination of discriminatory treatment in international commerce. Such objective, in our humble view cannot be met by unilaterally bringing any changes in the national legislature tangently opposed to the intent of WTO agreements, which were agreed after hard negotiations.

22. As one could expect, the phrase “at or about the same time” being integral part of the valuation mechanism under GATT must have been used in a ditto fashion in national legislations of all GATT/WTO member countries, which turns out to be established fact. For example, the US legislation called US Code 19 dealing with Customs Duties through its Section 1401a entitled “Values” corresponds with Section 25 of our Customs Act, 1969. Said section as anticipated by GATT and the Implementation Agreement uses “at or about the same time” rule for the determination of transactional values. In case referred as W546217 Application for Further Review of Protest No. 2304-95-100183; Appraisement of Fresh Asparagus; Transaction Value of Identical and Similar Merchandise; 19 U.S.C. 1401a(c) where Customs held that the fresh Mexican summer season asparagus was appropriately appraised based on the transaction value of identical or similar merchandise upon previously accepted transaction values from eight different importers having been used to serve as bases for appraisement of customs values, the importer protested on such interpretation of the phrase "at or about the time of exportation" alleging that: (a) all the various values should have been tested for validity, been compared, and the lowest one should have been used to appraise all the summer season asparagus imports; (b) that such an interpretation of the phrase "at or about the time" appearing in several different contexts in Section 1401a was contrary to the statutory

mandate since if law intended "at" to be statutorily preferred over "about", the statute would have so indicated with hierarchical language or something to that effect; and (c) the "at" or "about" mandate warrants valuation determinations based on accurate and commercially realistic factors as opposed to simply relying on merchandise exported on, or as close as possible to, the date of exportation of the merchandise being appraised. Assuming that the statutory time limitations of "at" or "about" are equally preferred, it was contended that it would be reasonable that "about" the time of exportation has to encompass any Mexican summer season's asparagus exported during that one season since on examination of the product and the trade indicated that in the Mexican import produce business initial settlement during the busy season often are made on a weekly, biweekly, or longer basis. However, in the case of Mexican summer season asparagus imports, generally, no final settlement is usually made until the end of the entire season and, from a commercial vantage point, the brief summer season for Mexican asparagus is treated as one unit of business. The public policy kept in mind was that valuation has to be realistic and all the benefits must pass on to the public, which has right to buy produce at minimum prices. Artificial jacking of prices would only lead to poverty and abuse of national resources.

23. The issue before the Court was whether the words "at" or "about" included in the "at or about the time of exportation" phrase are to be applied in a hierarchical or collective fashion, and in what manner the language is to be interpreted when the law provided that the transaction value of identical or similar merchandise was the transaction value, accepted as the appraised value of merchandise identical or similar to the merchandise currently being appraised which was exported to the country

at or about the time that the merchandise being appraised was exported into the country. With regards the phrase "at or about the time" it was held that the said phrase was clearly meant to cover a period of time, as close to the date of exportation as possible, within which commercial practices and market conditions which affect the price remain the same, since it was recognized that such determinations will vary as between different kinds of goods and the attendant factors and circumstances unique to the merchandise and industry. For instance, factors influencing supply and demand, such as fluctuations in the quality, availability, and desirability of a product are to be taken to have a profound impact on the price a buyer will pay for a merchandise from one occasion to the next. It was held to be appropriate to consider such factors in any reasonable interpretation of the "at" or "about" language. However, in the case of perishable produce where prices fluctuate seasonally, weekly, or even daily, it was held that a time period of one week, i.e., seven calendar days, before or after the date of exportation of the merchandise being appraised, was more than enough to represent a time period "about" the time of exportation. Insofar as other merchandises are concerned, this time period was to reasonably represent a period of time as close to the date of exportation as possible within which commercial practices and market conditions that affect the price generally remained the same. The court was of the opinion that the terms "at" or "about" included in the "at or about the time" phrase are to be applied in a hierarchical fashion, with resort to values "at" first and then "about" later on. Hence, in selecting a transaction value of identical or similar merchandise, it was found appropriate to consider transaction values for produce that has been exported "at" the same time as the imported good, i.e., by using

transaction values for goods exported **on the exact date** as the imported good being appraised. If no transaction value was available for the good exported **on the exact date**, it then was held to be appropriate to consider transaction values for produce exported "about" the same time as the goods imported, that is, by using transaction values for produce exported on the date closest to the date of export of the imported goods being appraised, followed by the next closest date to the date of exportation of the goods being appraised, and so forth. In either case, if several transaction values were provided for the same goods on the exact or closest date of exportation, the lowest to be utilized, and once a transaction value is found, only the value or values on the date closest (before and after) to the date of exportation were to be considered. Resorting to values at a further date within even fourteen day total time period as used by customs authorities was held to be inappropriate.

24. This ruling was still challenged by the importer in the US Courts of International Trade in the case known as Four Seasons Produce, Inc. where the Plaintiff argued that that the phrase “at or about the time of exportation” should be interpreted so as to give equal value to the words “at” and “about” and that Customs’ interpretation which gives a hierarchal preference to the word “at” is contrary to legislative intent. Thus, in determining the “lower or lowest” values applicable to the goods, customs must consider values of merchandise exported throughout the entire fifteen day period around and on the date of exportation of Plaintiff’s merchandise. Essentially, Plaintiff wanted the Court to read “at or about” to mean “at and about”, which the court declined observing that there is no indication that legislature intended “or” to be read as “and” and while judicial decisions can be found in which ‘or’ has been interpreted in a

manner other than common grammatical rules would suggest, such interpretations are not the norm and general purpose dictionaries, as well as numerous other judicial decisions define and employ 'or' as a disjunctive and giving "or" its plain meaning where, in the context of the statute at issue, a disjunctive construction neither produced an anomaly nor was contrary to the intent of the legislature. Thus, the Supreme Court concluded that the phrase "at or about" is not ambiguous and that legislature intended it be read as having its plain meaning such that "at" values are preferred over the "about" values. Therefore, legislature intended authorities to value merchandise, which does not have a transaction value at the time of exportation by using values of identical or similar merchandise on the date the appraised merchandise is exported, without referring to a longer period of values "about" the date of export of such merchandise. With regards 'about' it was held that while it is clear that legislature intended a hierarchical distinction as between "at" values and "about" values, but it is less clear that legislature intended that a hierarchical distinction be applied to exportation dates solely "about" the time Plaintiff's merchandise was exported.

25. In HQ 546217 dated April 8, 1998, Customs addressed the issue of what is meant by the requirement of "at or about the same time" with respect to the transaction value of identical or similar merchandise and concluded that "at or about the same time" should cover a period of time, as close to the date of exportation as possible, within which commercial practices and market conditions which affect the price remain the same. It was admitted that these types of determinations will vary as between different kinds of goods and the circumstances unique to the particular merchandise and industry. In the case of perishable produce (asparagus

for example) authorities concluded that a time period of one week before or after the date of exportation (a total of fourteen days) was appropriate to represent a time period "about" the time of exportation. In HQ 546217, customs also determined that the terms "at" or "about" are to be applied in a hierarchical fashion. Hence, in selecting a transaction value of identical or similar merchandise, it would first be appropriate to consider transaction values which have been exported "at" the same time as the subject goods were appraised. If no transaction value was available for goods exported on the exact date when the goods were appraised, it would then be appropriate to consider transaction values for goods exported "about" the same time as the goods at issue. In HQ 546217, it was also held that it would be appropriate to use the transaction value for the produce at issue exported on the date closest to the date of export of the produce being appraised, followed by the next closest date.

26. In the case reported as H255619: Application for Further Review of Protest No. 0401-14-100052; Price Actually Paid or Payable where there was a gap of 50 days between two imports, the requirement of "at or about the same time" were held to have not been met as per the following reasons:-

> "Furthermore, though the protestant did not submit additional information to find a previously accepted value for identical or similar merchandise exported at or about the same time as the entry in question, CBP has a previously accepted value of $ 2.39/kg of dehydrated garlic granules, exported on November 1, 2012, and entered on December 5, 2012 from Qingdao, China. In this case, the imported merchandise in question was for a similar quantity (18,000 kg), concerning the same merchandise and industry (dehydrated garlic granules), and occurring during the same season (in late Fall before Winter started on December 21, 2012) as the entry for the previously accepted value, which would indicate appraisement under transaction value of identical or similar merchandise, per 19 U.S.C. § 1401a(c). However, because the entry for the previously accepted value, was not exported "at or about the same time" as the entry in question (exported on

> October 3, 2012, and entered on November 2, 2012), it cannot be used as a previously accepted."

27. In the circumstances at hand where not only through the amendment in clause (a) of Rule 107 the earlier period of plus-minus ninety days for the determination of the customs values prevailing at or about the same time has been stretched till the valuation is revisited, in our humble opinion, has put a serious dent to the flexibility and framework of trade and commerce offered by GATT, which flexibility did not come cheap. Developing countries painstakingly negotiated these concessions. The WTO rounds at Uruguay and Doha in 1986 and 2001 respectively brought reduction in tariff (about 40%) and sought subsidies including an agreement to allow full access of textile and clothing from developing countries (which largely benefited Pakistan and Bangladesh) and a mechanism for the protection of Intellectual Property Rights was also agreed. It is for that reasons that we see the amendments in Rule 107(a) brought in by SRO 564(I)/2017 dated 01.07.2017 are not only made in violation of the principal legislation i.e. Customs Act, 1969, in our humble view it also negates the very mechanism established under WTO system embodied in Section 25 of the Customs Act. Therefore, such amendment in Rule 107 clause (a) through SRO 564(i)/2017 dated 01.07.2017, cannot be interpreted in terms of impugned Circular No.SI/Misc./13/2014:CC(Appr)/375 dated 22.11.2017 issued from the Office of the Chief Collector of Customs Appraisement (South), Custom House, Karachi, according to which "at or about the same time" expression has been endlessly stretched from initial 180 days (sic) till the date such Valuation Ruling *is rescinded, modified or replaced"*. Reliance in this regard can also be placed in the case of Sadia Jabbar v/s Federation of Pakistan

(PTCL 2014 CL 537), wherein, it has been held that a Valuation Ruling "must therefore ordinarily be regarded as valid for a period of ninety days from the date of issuance, and any aggrieved importer has the right to approach the concerned officer after the ninety day period mentioned above, and he would then have to give reasons why the ruling has not been revised or rescinded". Further reliance can be placed in the case of Danish Jahangir v. The Federation of Pakistan through Secretary/Chairman and 2 others (2016 PTD 702), wherein, it has been held that:-

> "In view of hereinabove facts and circumstances we while disposing of instant petition direct the respondents as under:--
>
> (1) In cases where the Valuation Ruling is more than 90 days old and an importer has approached Director Valuation in terms of Para 21 of the judgment in the case of Sadia Jabbar supra, fresh consignments of such importers shall be allowed provisional release in terms of Section 81 of the Customs Act, 1969 by securing the differential amount of duty and taxes in the shape of Pay Order/Bank Guarantee as the case may be, by the Director Valuation or the concerned Collector without fail.
>
> (2) In cases where a proper revision application has been filed by an importer in terms of Section 25-D of the Customs Act, 1969, before the Director General, Valuation, and pending such review/revision, a fresh consignment is imported, then at the request of the importer who has filed such revision/review, the consignment in question shall be released in terms of Section 81 of the Customs Act, 1969 after securing the differential amount of duty and taxes in the shape of Pay Order/Bank Guarantee as the case may be, by the Director General Valuation, without fail.
>
> (3) Needless to observe that any willful disobedience and defiance of these directions shall entail initiation of contempt of court proceedings against such delinquent officer(s).

28. Without prejudice to our hereinabove findings regarding legality and interpretation of amendment in Rule 107(a) of the Customs Rules, 2001 through SRO 564(i)/2017 dated 01.07.2017, we may further observe that the Chief Collector Customs and/or for such purpose the Federal

Board of Revenue has no authority to issue any circular and administrative direction of the nature, which may interfere with the judicial or quasi-judicial function entrusted to the various functionaries under Statute. Any circular or instructions issued by the F.B.R. or by any other officer performing functions under the administrative control of F.B.R, relating to interpretation of any statutory provision, rule or regulation, cannot be treated as judicial interpretation, hence not binding on authorities performing judicial ad/or quasi-judicial functions. Reliance in this regard can be placed in the case of Central Insurance Company v/s Central Board of Revenue (1993 SCMR 1232), wherein, the Hon'ble Supreme Court, while examining the legality of a Circular issued by the Central Board of Revenue, interpreting the provisions of Income Tax Ordinance, 1979, has been pleased to hold as under:-

> "22. It is evident from the above provisions that though the Central Board of Revenue has administrative control over the functionaries discharging their functions under the Ordinance, but it does not figure in the hierarchy of the forums provided for adjudication of assessee's liability as to the tax. In this view of the matter, any interpretation placed by the Central Board of Revenue, on a statutory provision cannot be treated as a pronouncement by a forum competent to adjudicate upon such a question judicially or quasi-judicially. We may point out that the Central Board of Revenue cannot issue any administrative direction of the nature which may interfere with the judicial or quasi-judicial functions entrusted to the various functionaries under a statute. The instructions and directions of the Central Board of Revenue are binding on the functionaries discharging their functions under the Ordinance in view of Section 8 so long as they are confined to the administrative matters. The interpretation of any provision of the Ordinance can be rendered judicially by the hierarchy of the forums provided for under the above provisions of the Ordinance, namely, the Income Tax Officer, Appellate Assistant Commissioner, Appellate Tribunal, the High Court and this Court and not by the Central Board of Revenue. In this view of the matter, the interpretation placed by the Central Board of Revenue on the relevant provisions of the Ordinance in the Circular, can be treated as administrative interpretation and not judicial interpretation.

29. Keeping in view hereinabove legal position as emerged under the facts and circumstances of instant case and by respectfully following the

ratio of the above cited judgments, the impugned Circular No.SI/Misc./13/2014: CC(Appr)/375 dated 22.11.2017, was declared to be illegal, without lawful authority vide our short order dated 14.11.2018 and these are the reasons for such short order.

Judge

Judge

Karachi: May 28, 2019