IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 92 of 2014

Plaintiffs:	**M/s. Haidri Beverages (Pvt.) Limited and Another.** **Through Mr. Malik Ahsan Mehmood a/w Mr. Akhtar Ali Memon Advocates.**
Defendant No. 1, 2 & 3:	**Federation of Pakistan & Others** **Through Mr. Ishrat Zahid Alvi Assistant Attorney General.**
Defendant No. 4:	**Collector of Customs, Port Qasim, Karachi** **Through M/s. Kashif Nazeer & Irfan Ali Advocates.**

Suit No. 47 of 2014

Plaintiffs:	**M/s. Riaz Brothers (Pvt.) Limited.** **Through Mr. Amin M. Bandukda Advocate.**
Defendant No. 1, 2 & 3:	**Federation of Pakistan & Others** **Through Mr. Ishrat Zahid Alvi Assistant Attorney General.**
Defendant No. 4:	**Collector of Customs, Port Qasim, Karachi** **Through M/s. Kashif Nazeer & Irfan Ali Advocates.**

Suit No. 276 of 2014

Plaintiffs:	**M/s. Haidri Beverages (Pvt.) Limited and Another.** **Through Mr. Saeed Ahmed Awan Advocate.**
Defendant No. 1, 2 & 3:	**Federation of Pakistan & Others** **Through Mr. Ishrat Zahid Alvi Assistant Attorney General.**
Defendant No. 4:	**Collector of Customs, Port Qasim, Karachi** **Through M/s. Kashif Nazeer & Irfan Ali Advocates.**

Date of hearing: **18.02.2020 & 11.03.2020**

Date of judgment: **16.04.2020**

J U D G M E N T

Muhammad Junaid Ghaffar, J. All these three Suits involve a common legal question, and therefore, they have been heard together finally and are being decided through this common Judgment.

2. The precise controversy involved herein is that whether the Plaintiff's industry ("**beverage industry**") is an agro-based industry, being entitled for exemption and benefits allowed vide SRO No.575(I)/2006 dated 05.06.2006 ("**SRO 575**"). Additionally, the Plaintiffs have also impugned certain letters issued by the Defendants, whereby, such exemption has been denied; however, the precise question remains that whether the Plaintiffs are entitled for the exemption as claimed.

3. At the very outset I may state, and this is without any disrespect to any of the learned Counsel, that their arguments have been noted and recorded in this judgment collectively for ease, convenience and to avoid overlapping, if any, as it is only a common legal question which has to be addressed. It has been contended that serial No.1(I) Clause 9 of SRO 575 grants exemption from customs duty and sales tax on the machinery imported by the Plaintiffs for filling, closing, sealing or labeling bottles, cans etc. under HS Code 8422.3000; whereas, the Ministry of Food and Agricultural in the past had been certifying the beverage industry as an agro-based industry; that this was a consistent past practice and reliance has been placed on Letter dated 09.01.2008; that pursuant to such inducement, the Plaintiffs imported the said machinery; however, vide impugned Letter dated 02.01.2014 unilaterally and without providing any opportunity, such requisite certificate has been refused by the Ministry of Food on the basis of some clarification dated 19.06.2013 issued by the Federal Board of Revenue (**"FBR"**) in respect of SRO 575; that the SRO in question is a legislative instrument issued by the Federal Government under Section 19 of the Customs Act, 1969 and Section 13 of the Sales Tax Act, 1990 for which FBR has no lawful authority of interpretation; that the competent authority to issue certificate regarding bonafide use of the imported plant and machinery is the Ministry of Food who had since long been issuing such certificates and suddenly pursuant to clarification of FBR, has refused to issue fresh certificates to the

Plaintiff's which is against the consistent practice followed; that no opportunity was provided to the Plaintiffs so as to rebut and challenge the action of the Defendants; that there is no speaking order in field and the impugned clarification lacks reasoning; hence, liable to be set aside; that the question that whether beverage industry falls within the ambit of agro-based industry already stands clarified by Ministry of Food vide Letters dated 09.01.2008, 08.08.2006 and 28.08.2006 by holding that classification of beverage industry in the category of agro-based industry, is based on the United Nation's International Standard Industrial Classification of all Economic Activities ISIC System, Revision-4; that the documents title "Agro Industry for Development" published by Food and Agricultural Organization (FAO) of the United Nations and the United National Industrial Development Organization provides that agro-based industrial sector is taken to include manufacture of foods, beverages, tobacco etc., as per FAO, 1997; that the document titled "Agro Industry Water Resources and Public Health" published by Food and Agricultural Organization (FAO) of the United Nations and the United National Industrial Development Organization provides that agro-based industry can be classified in one of the following categories that includes beverage industry as well; that Section-C, Division-11 of United Nation's International Standard Industrial Classification of all Economic Activities ISIC System, Revision-4 provides manufacturing of beverages, ISIC, Rev.; that there are various categories of industries specified in the relevant SRO which includes the beverage industry in question; that the definition in the SRO is not exhaustive as it is using the word "like" and "etc.".; that the assumption by FBR in its impugned letter dated 19.06.2013 that input of beverage industry is dependent on synthetic / carbonated concentrate is misconceived, as primarily the beverage industry utilizes sugar which is an agro-based product; that concentrate for aerated beverages in all forms including syrup are classified under HS Code 2106.9010, whereas, the Plaintiffs use natural flavors combined with sugar; hence, their industry is an agro-based industry, and therefore, the Plaintiffs are entitled for exemption and the benefit of the SRO in question. In support they have relied upon the cases reported as ***R. B. Avari & Co. (Pvt.) Ltd. V. Federation of Pakistan and 2 others (2006 PTD 1609), M/s. Ihsan Sons (Pvt.) Ltd., Karachi V. Federation of Pakistan and 2 others (2006 PTD 2209), M/s. Central Insurance***

Co. & Others V. The Central Board of Revenue Islamabad and Others (1993 SCMR 1232), Javed Akhtar V. Punjab Provincial Transport Authority (1997 CLC 1168), Commissioner of Income Tax V. Miss Aasia Film Artist (2001 PTD 678), Taj Muhammad V. Town Committee, Fateh Jhang (1994 CLC 2214), Chief Commissioner, Karachi & Another V. Mrs. Dina Sohrab Katrak (PLD 1959 (Pak) 45), Gouranga Mohan Sikdar V. The Controller of Import and Export & 2 Others (PLD 1970 SC 158), Mollah Ejahar Ali V. Government of East Pakistan (PLD 1970 SC 173), Chairman, Federal Board of Revenue, Islamabad and another V. Mrs. Naureen Ahmed Tarar and others (2020 SCMR 90), M/s. Radaka Corporation & Others V. Collector of Customs & Another (1989 SCMR 353), Nazir Ahmed V. Pakistan & 11 Others (PLD 1970 SC 453) **and** ***Commissioner of Income Tax V. Shiva Shanker Bore Wells (1999 PTD 498).***

4. Learned Counsel appearing on behalf of the Customs Department has contended that the Plaintiff's industry i.e. beverage industry is not specifically mentioned against Clause 9 of serial No. 1(I) of the SRO, whereas, it cannot be presumed that their industry is falling within the word, "like"; that certification of the Ministry of Food and reliance so placed on its earlier letters by the Plaintiffs is misconceived, as it is the assessing officer who has to decide and apply his mind as to whether an importer is entitled for any exemption claimed; that earlier through Order-in-Original dated 06.04.2011, in an identical issue of another beverage industry, the exemption was denied which has attained finality, and the Plaintiffs presently, cannot plead any ignorance nor can rely on any departmental practice in their favor; that the beverage industry does not fall within the definition of an agro-based industry as it is using synthetic / carbonated concentrate inputs; hence, is disqualified; that mere use of sugar in any manufacturing process could not ipso facto classify an industry as an agro-based industry; that if the intention would have been to grant any exemption to the beverage industry, then clause (9) ibid as above would have included it. In view of these submissions, he has argued that the Plaintiffs are not entitled for any such exemption.

5. Learned Assistant Attorney General has contended that the impugned letters and notifications have been issued after proper consideration and application of mind and cannot be disputed, whereas, the Plaintiffs industry is not an agro-based industry and reference to the classification of United Nations is misconceived.

6. I have heard all the learned Counsel and perused the record. The precise facts as stated are that Plaintiffs are manufacturers of beverages under various brand names including ***Pepsi*** and ***Mountain Dew***. Their contention is that beverage industry is an agro-based industry as it utilizes sugar as a major component of its input along with natural flavors, and therefore, they are entitled for the benefit of exemption as contemplated in SRO 575. It is their case that they have imported machinery for bottling purposes classifiable under HS Code 8422.3000 which is covered and mentioned against Clause No. 9 of serial No. 1(I) of the SRO; hence, the said exemption is available to them. Their case is also premised on the doctrine of departmental past practice, as according to them, Ministry of Food, had in the past, issued certificates to that effect, and has suddenly, retracted from such consistent practice which cannot be approved by the Court in view of settled law. Finally, they have also relied upon certain recommendations and clarifications issued by the Food and Agriculture Organization of United Nations. All these Suits have been heard finally by consent on the following legal issues in terms of Order 14 Rule 2 CPC.

1) Whether the Suit is maintainable?

2) Whether the Plaintiffs are entitled for exemption from Customs Duty and Sales Tax under SRO 575 on the import of machinery in question?

3) Whether the Plaintiffs industry i.e. beverage industry is an agro-based industry for the purposes of exemption under SRO 575?

4) What should the Decree be?"

7. Insofar as Issue No.1 that as to whether the Suits are maintainable is concerned, it appears that after passing of the judgment by the Hon'ble Supreme Court in the case reported as ***Searle IV Solution (Pvt.) Ltd and others V. Federation of Pakistan and others*** **(2018 SCMR 1444)**, the Bank Guarantees furnished by Plaintiffs pursuant to ad-interim orders, through which the consignments in question were

released, have been encashed to the extent of 50% of the disputed amount pursuant to various orders passed on different dates in all these Suits, and therefore, in view of such compliance, all these Suits are maintainable notwithstanding the ouster clause as provided in Section 217 of the Customs Act, 1969. However, the fate of the amount of 50% already paid to the department, and the 50% still lying secured / deposited with the Nazir of this Court, would depend on the final outcome of these Suits. This issue is answered accordingly.

8. Issue No. 2 & 3 are interlinked and therefore, they are being dealt with and decided together. The exemption in dispute is provided against Serial No.1(I) clause (9) of the Table to the said SRO. It would be advantageous to refer to the relevant provisions of SRO 575 which reads as under: -

> **S.R.O. 575(I)/2006**.- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), and clause (a) of sub-section (2) of section 13 of the Sales Tax Act, 1990, and in supersession of its Notification No. S.R.O. 575(I)/2005, dated the 6th June, 2005, the Federal Government is pleased to exempt plant, machinery, equipment and apparatus, including capital goods, specified in column (2) of the Table below, falling under the HS Codes specified in column (3) of that Table, from so much of the customs-duty, specified in the First Schedule to the said Act, as is in excess of the rates specified in column (4) thereof, and the whole of Sales Tax leviable under the Sales Tax Act 1990 12[,provided that sales tax exemption shall not apply to Sr. Nos 13[1, 5, 17[5A] 21, 22, 23, 28, 28A, 29 and 36] of the said Table] , subject to the following conditions, besides the conditions specified in column (5) of the Table, namely:-

TABLE

S. No.	Description	PCT heading	Custom Duty	Conditions
(1)	(2)	(3)	(4)	(5)
1	**Agricultural Machinery**			
	(I) Machinery, Equipment and Other Capital Goods for Miscellaneous Agro-Based Industries Like Milk Processing, Fruit, Vegetable or Flowers Grading, Picking or Processing etc.			1. In respect of goods of Sr.No.1(I), the [Division concerned] shall certify in the prescribed manner and format as per Annex-B that the imported goods are bonafide require-ment. The authorized officer of [that Division] shall furnish all relevant information online to Pakistan

				Customs Computerized System [omitted] against a specific user ID and password obtained under section 155D of the Customs Act, 1969.
	1) Packing or wrapping machinery (including heat shrink wrapping machinery).	8422.4000	0%	2. The goods shall not be sold or otherwise disposed of within a period of five years of its import except with the prior approval of the FBR.
	2) Scales for continuous weighing of goods on conveyors.	8423.2000	0%	
	3) Machinery for the preparation of meat or poultry.	8438.5000	0%	
	4) Conveyor belt of a kind used in slaughter house.	[8428.3300]	0%	
	5) Evaporators for juice concentrate.	[8419.8990]	0%	
	6) machinery used for dehydration and freezing	8419.3100, 8418.6990	0%	
	7) Heat exchange unit.	8419.5000	0%	
	8) Machinery used for filtering and refining of pulps/juices.	[8421.2200]	0%	
	9) Machinery for filling, closing, sealing or labeling bottles, canes etc.	8422.3000	0%	

9. Perusal of the aforesaid SRO reflects that in exercise of the powers conferred by Section 19 of the Customs Act 1969 and Section 13 of the Sales Tax Act, 1990, the Federal Government has exempted plant, machinery, equipment and apparatus, including capital goods, specified in column (2) of the Table to the SRO and falling under HS Code specified in column (3) of that Table from so much of the customs-duty, specified in the First Schedule to the said Act, as is in excess of the rates specified in column (4) thereof, and the whole of Sales Tax Act, 1990 subject to certain conditions, including the conditions specified in column (5) of the Table. Serial No.1 of the Table covers agricultural machinery, whereas, at sub-serial No.(I) machinery, equipment and other capital goods for agro-based industry, like Milk Processing, Fruit, Vegetable or Flowers Grading, Picking or Processing etc. has been specified and against Clause 9 of this Serial No. machinery for filling, closing, sealing or labeling bottles, cans etc. classifiable under HS Code

8422.3000 has been mentioned. Similarly, the said exemption as above is subject to a further condition as specified in Column (5) of the Table which provides that in respect of goods at Serial No.1(I), the [Division concerned] shall certify in the prescribed manner and format as per Annex-B that the imported goods are bonafide requirement. It further provides that the authorized officer of [that Division] shall furnish all relevant information online to Pakistan Customs Computerized System. As to Column (5) of the Table, for the present purposes, there are two aspects involved insofar as this certification is concerned. First is, that whether the certification of Ministry of Food is required at all. And second, that whether the Ministry of Food is required to certify that any industry is an agro-based industry or not. This is important and relevant because all along learned Counsel appearing on behalf of the Plaintiffs have premised their case on various such certificates and letters issued in the past and according to them such consistent past practice cannot be deviated to the detriment of the Plaintiffs. However, when condition in Clause (5) ibid is minutely examined, it transpires that though the Ministry of Food has to issue a certificate in a prescribed manner; but it is only to the extent that the *imported goods are bonafide requirements of the importer*. Now the condition, with utmost respect, though itself seems to be very vague; but at least does not require that a certificate is to be issued to the extent that a particular industry or for that matter, the imported machinery by that particular industry is for an ***agro-based industry***. The only requirement is that it should be certified in the prescribed manner (Annex-B) that the imported plant and machinery is a bonafide requirement of the importer. And the only inference once can draw is that the certification should be (like in the instant case) that the machinery imported by the Plaintiffs (for filling or closing bottles and cans) is their bonafide requirement i.e. pertaining to beverage industry. In that situation, the other argument of the Plaintiffs' Counsel that since HS code 8422.3000 is also mentioned against clause (9) of the relevant Serial Number, is also of no relevance. Machinery for filling or closing bottles and cans, irrespective of its use in any type of industry would be classified under this HS code; but that would not, impliedly, also mean that it is for agro-based industry as mentioned or described against Serial No.1(I) ibid. Therefore, having imported machinery which is classifiable under HS code 8422.3000 would not ipso facto entitle the Plaintiffs to qualify for the exemption in

question. This argument is totally misconceived and cannot be entertained. Similarly, if the same machinery is imported by any of the industries specifically mentioned against Serial No. 1(I), be it a milk processing industry; or fruit or vegetable; or picking or processing industry, a similar certification ought to have been made. Nowhere in column (5) as above, any certification of Ministry of Food has been provided or mandated so as to certify that a ***particular industry is an agro-based industry***. This apparently has been adopted as an illegal or wrong practice so to say. The notification does not mandate any such certification. In view of such position, even if in the past any such certificates have been issued by the Ministry of Food, they are of no help to the Plaintiffs case and they cannot claim to be protected under any past consistent departmental practice. Any argument predicated on any such certification fails and is of no help to the Plaintiffs case. Resultantly, no such departmental past practice can come to their rescue.

10. Insofar as the exemption and interpretation of the relevant serial number and the description provided therein is concerned, it would suffice to observe that though the words used are Machinery for miscellaneous Agro-based industries like milk processing, fruit, vegetable or flower grading, picking or processing etc. and is not exhaustive as correctly contended on behalf of the Plaintiffs' Counsel; but at the same time, one needs to appreciate that the use of word ***"like"*** has to be related to the type of industry already mentioned in the SRO. ***"like"*** means of the same appearance, kind, character, similar, analogous or bearing resemblance. Black's Law Dictionary (seventh Edition) defines it as equal in quantity or degree; corresponding exactly; and similar or substantially similar. Therefore, mere use of word ***"like"*** will not make the beverage industry as an agro based industry as it has no relevance with the type of industries mentioned before it. It is also an admitted fact that the product being manufactured by the Plaintiffs has no direct nexus with any agro-based industry. Mere use and consumption of sugar would not make an industry so as to be called as an agro-based industry. The intention of the legislature appears to be to promote the industry which are dependent on agriculture. If the argument of the Plaintiff's Counsel that major consumption of sugar makes their industry as an agro-based industry is accepted, then I am

afraid even various other industries would then fall within the ambit of an agro-based industry. The Plaintiffs are manufacturers of aerated beverages like ***Pepsi*** and ***Mountain Dew*** as mentioned in their plaint and have contended that since sugar is their main consumption as raw material, which in turn is an agriculture produce; hence, their industry is an agro-based industry. This argument, is though attractive; but does not seems to be correct or appreciable. Further, it is also pertinent to note that if the intention had been to grant exemption to beverage industry as well, then nothing prevented the legislature from mentioning the beverage industry under serial No. 1(I) as this industry is not a new industry and was existing when this SRO was issued. Once again and for the sake of repetition it may be observed that mere use of the word ***"like"*** cannot be stretched so as to include any industry which is using sugar and be called as an agro-based industry. It has to have some nexus or like nature with that of the industries mentioned against Serial No.1(I) as above. It does not appear to be the intention of the legislature to grant any exemption to the beverage industry as is being claimed, and therefore, I am of the view that based on the settled principles of interpretation specially an exemption notification or clause, the Plaintiffs industry does not fall within the definition of agro-based industry; hence, they are not qualified or entitled for any such exemption.

11. Insofar as reliance on the classification given by United Nations or any other authority is concerned, with respect I may observe that such classification has no nexus with the notification of exemption in question, and may at the most, has a persuasive consideration or value; but cannot be relied upon while interpretating an exemption notification. Similarly, as noted earlier, since the Ministry of Food has no authority to give any certification to the effect that a particular industry is an agro-based industry; hence, even if such certification has been given in the past, this would not entitle the Plaintiffs to claim any benefit of such departmental practice.

12. In this matter what the Plaintiffs are seeking is an exemption under a particular Notification. And the principles governing the grant of or refusal of such claim are already settled. The first is that the onus of such a claim is on the person seeking such an exemption who is

required to show that his case falls within the exemption so claimed. The second is that if there are two reasonable interpretations possible in respect of such exemption, the one against the taxpayer will be adopted. However, the third is that if a taxpayer's case comes fairly within the scope of such exemption, then it is not to be denied on the basis of any supposed intention, contrary to the legislative intent. Here in this matter, the Plaintiffs case falls within the first two; hence, not entitled for the exemption in question. A learned Division Bench of this Court in the case reported as ***Commissioner Inland Revenue, Zone-II, Karachi V. Messrs Kassim Textile Mills (Pvt.) Limited, Karachi*** (**2013 PTD 1420**), while dealing this issue has been pleased to hold as under;

> 10. The position with regard to any exemption from a tax is different, although the relevant principles are again well established. These principles may briefly be stated as follows. Firstly, the onus lies on the taxpayer to show that his case comes within the exemption. Secondly, in case two reasonable interpretations are possible, the one against the taxpayer will be adopted. But, thirdly, if the taxpayer's case comes fairly within the scope of the exemption, then he cannot be denied the benefit of it on the basis of any supposed intention to the contrary of the legislature or authority granting it. Subsection (2)(c) is of course not an exemption from the tax imposed under subsection (1). However, it confers a benefit and in a larger and broader sense, an exemption also confers a benefit. The interpretation of subsection (2)(c) can therefore be analogized to that of an exemption, at least for purposes of applying the aforesaid principles of interpretation."

13. Similar view has been expressed recently by the Hon'ble Supreme Court in the case reported as ***Oxford University Press V. Commissioner of Income Tax, Companies Zone-I, Karachi and others*** (**2019 SCMR 235**), in the following terms;

> "9. The principles relating to the proper interpretation and application of exemption clauses in fiscal legislation are well established and require only a brief recapitulation. As correctly submitted by learned counsel for the appellant, as presently relevant these are as follows. Firstly, the onus lies on the taxpayer to show that his case comes within the exemption. Secondly, if two reasonable interpretations are possible the one against the taxpayer will be adopted. But, thirdly, if the taxpayer's case comes fairly within the scope of the exemption then he cannot be denied the benefit of the same on the basis of any supposed intention to the contrary of the legislature or authority granting it. It is in light of these principles that Clause 86 must be interpreted and applied."

14. As to the other objection regarding interpretation by FBR of an exemption notification issued by the Federal Government is concerned, this again is though attractive; but at the same time, the Courts have also held that if an interpretation is in line with the legislative instrument and is correct, then the same can be accepted. Nonetheless in this matter the Plaintiffs instead of contesting the matter before the department have directly approached this Court and since the matter is now being decided on their request, as to the correct interpretation of the SRO in question, this objection has no relevance. And lastly, whether an importer is entitled for any exemption pursuant to any notification or not, it may be noted that it is the primary duty of the concerned department and the officer to assess the goods declaration filed by an importer. If an exemption is denied, the importer has all the means and right to challenge the same under the departmental hierarchy as provided in the relevant statute. Therefore, to say that a notification cannot be interpreted by FBR has no relevance for the present purposes as it is settled law that any such interpretation is not binding upon the quasi-judicial officers as settled by the Hon'ble Supreme Court in the case reported as ***Central Insurance Company & Others v Central Board of Revenue*** (**1993 SCMR 1232**).

15. In the case reported as ***Messrs Premier Mercantile Services (Pvt.) Ltd. V. Commissioner of Income Tax, Karachi*** **(2007 PTD 2521)** it has been held by a learned Division Bench of this Court that if any interpretation by FBR is found to be in accordance with law, then it cannot be rejected for this reason only. The relevant findings are as under;

> "We would also like to point out that though C.B.R. does not figure in the hierarchy of the forums whose interpretation or explanation is binding, but, if a law has been correctly interpreted by C.B.R., it cannot be rejected for this reason only."

16. The Hon'ble Supreme Court in the cases reported as ***Kohinoor Chemical Co. LTD. and another V. Sind Employees' Social Security Institution and another*** **(PLD 1977 SC 197)**, ***Bashir Ahmed Khan v Muhammad Ali Khan Chowdhry & Others*** **(PLD 1960 SC 195)** and ***The United Netherlands Navigation Co. Ltd., v The Commissioner of Income Tax South Zone*** (**PLD 1965 SC 412**) has been pleased to hold

that though such departmental construction of a statute may be relevant; but it is not binding on the Courts.

17. Here in this matter on the one hand, the Plaintiffs have come directly before the Court instead of challenging the impugned action of the department under the relevant hierarchy and get it decided by the relevant authorities, and at the same time, they have raised objection on the clarification / interpretation of FBR. Since they have chosen to challenge the same directly before this Court which is now being decided through this judgment; hence, this objection is misconceived and otherwise not maintainable.

18. As to the question regarding following a departmental practice, the Hon'ble Supreme Court in the case reported as ***Muhammad Nadeem Arif and others V. Inspector-General of Police, Punjab, Lahore and others*** **(2011 SCMR 408)** has been pleased to hold that any departmental practice, if found to be in violation of the rule or statute, cannot be followed. Any such practice, being in violation of law cannot be sustained on the principle of long standing practice. The relevant observations are as under;

> ".....The departmental construction of statute, although not binding on the Court, can be taken into consideration specially if it was followed by the department consistently and applying this principle Siddiq Akbar's case was decided while interpreting section 12 of the Police Act on 8-5-1998. The department consistently followed those instructions of the Inspector-General of Police which were issued without approval of the Provincial Government. The instructions as well as departmental practice are illegal and violative of the directions or instructions on departmental practice conflicting with the parent statute or rule cannot remain operative and must be ignored even though they have been followed long, have been found to be convenient and have worked fairly in practice. No one is obliged to obey such directions/instructions/departmental practice. The role of the directions/instructions is to supplement, never to contradict or conflict with rules. A direction/instruction cannot abridge, or run counter to, statutory provisions. If there is any conflict between the rules and the directions/instructions/departmental practice, the rules prevails. Instruction or departmental practice cannot amend or supersede the rules. A rule can be amended by another rule and not by a direction/ instructions/departmental practice. Therefore, the argument qua department has consistently followed the instructions have no force. The afore-said dictum is binding on each and every organ of the State by virtue of Articles 189 and 190 of the Constitution."

19. In the case reported as ***Noor Muhammad Butt & others V. The Chief Settlement and Rehabilitation Commissioner, Lahore, & Others*** **(PLD 1968 SC 336),** the Hon'ble Supreme Court has been pleased to

hold that legal competence of an officer to do some act could not be affected by any departmental practice, if he is otherwise not competent in law to do such act. The relevant finding is as under;

> "The Chief Settlement Commissioner had thus no power to dispose of a big mansion except by unrestricted public auction as provided in the Schedule. It followed that the order by Syed Hashim Raza dated 14-11-1959 accepting the joint offer by the e appellants Nos. 1, 15 and 16 for the purchase of the Mela Ram Building for a sum of Rs. 10,50,000 was beyond his competence and as such was rightly set side by Pir Ahsanuddin on review.
>
> The report submitted by the Department regarding the instances quoted by the appellants about the disposal of big mansions by the Chief Settlement Commissioner otherwise than by unrestricted public auction showed that there was no parallel case from which it could be inferred that it was a common practice with the Chief Settlement Commissioner to summon the persons who had given highest bids at an auction and to ask them to increase the amount and dispose of buildings in their favour. In any case the question involved was of legal competence which could not be affected by any departmental practice."

20. In the case reported as ***Collector of Customs V. Shaikh Shakeel Ahmed*** **(2011 P T D 495),** a learned Division Bench of this Court was seized of a matter which is exactly identical in facts. It was pleaded before the Court that since long there was a departmental practice to follow a certain classification and interpretation of a tariff heading and suddenly it could not be changed to the detriment of the Petitioner and in support various cases of the superior Courts were cited including the case reported as ***Radaka Corporation (Supra)*** which have also been relied upon by the Plaintiffs' Counsel in this case. However, the learned Division Bench was pleased to repel this contention and even distinguished the cases relied upon by holding that the judgments of the Court to the effect that past practice should continue was only after being satisfied that such practice was in accordance with law and the departure from such practice was not legally valid. The relevant observations are as under;

> 20. As is apparent from the examination of these judgments, in all the above cases relied on by the learned counsel for the respondent, the Court had directed that the past practice should be continued after being satisfied that the past practice was in accordance with law and the departure from such practice was not legally valid and past practice could not be sustained as it could not qualify on merits as the correct interpretation. The cases are all distinguishable because in the present case we are of the opinion that the departmental practice was completely in violation of the law as there cannot be two views that baby diapers would not fall within the PCT Heading 4818.4010 the description of

> which was diapers for patients but being baby diapers fell in the description of "other" and had to be assessed under PCT Heading 4818.4090.
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> 21. We have also examined the judgment relied on by the learned counsel for the applicant. In the case of Messrs P & G International quoted supra, this Court has specifically held that practice cannot override a provision of law and if any practice has been carried on in contravention of any law/rules such practice has to be stopped.
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> 22. In the case of Abdul Mateen quoted supra this Court had observed that the concept of departmental practice assuming sanction of a law is no longer good law.
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> 23. We have also. examined the judgment of the Honourable Supreme Court in the case of The Engineer-in-Chief Branch and another v. Jalaluddin (PLD 1992 SC 207) wherein the Honourable Court went so far as to hold that if the order passed is illegal then perpetual rights cannot be gained on the basis of an illegal order and in such a case even the principle of locus poenitentiae would not apply.
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> 24. ***We are therefore of the considered opinion that if there is past departmental practice which is being carried on a wrong interpretation and in violation of law then such a practice has to be stopped and the interpretation in accordance with law has to be given effect to***. Since we have already held that the baby diapers imported by the applicants have to be classified under PCT Heading 4818.4090 and had wrongly been classified under PCT Heading 4818.4010, therefore, we are of the considered opinion that the order of the Tribunal holding that the baby diapers are classifiable under 4818.4010 in accordance with the past practice followed by the department cannot be sustained. For these reasons we had answered the reframed question No.1 in negative against the respondents and in favour of the applicant."

21. Another learned Division Bench of this Court in the case reported as ***Johnson and Johnson Pak (Pvt.) Ltd. V. Pakistan and others*** **(2008 P T D 345)** has been pleased to hold that though Courts have not always approved departure from consistent past practice; however, administrative department could not ignore a legal provision and choose to follow a consistently wrong practice. Again the case of ***Radaka Corporation (Supra)*** was cited before the learned Division Bench; but was distinguished. The relevant observations are as under;

> "9. Mr. Zaidi's reliance on the consistent practice prevailing prior to 1987 appears to be equally untenable. Indeed we are conscious of the fact that the Courts have not always approved departure from consistent past practice as can be gathered from the observations of the Honourable Supreme Court in Radhaka Corporation v. Collector of. Customs (1989 SCMR 353). Nevertheless, such principle has been applied only when both interpretations of the relevant rule were possible and the department has been consistently following one. What needs to be considered in this case is that the past practice was deviated from not because of a letter issued by the respondent No. 2 but because of the fact that a specific provisions of the P.C.T. Schedule was overlooked and this fact was identified in the aforesaid letter. Indeed there is no principle of law which requires an administrative department to ignore a legal provision and chose to follow a consistently wrong practice."

22. In view of hereinabove facts and circumstances of this case, I am of the view that the Plaintiffs have not been able to make out a case in their favor, in that the "beverage industry" cannot be called or classified as an "agro-based industry" for the purposes of exemption claimed under SRO 575. Accordingly Issue Nos. 2 & 3 are answered in the negative, whereas, Issue No. 4 is answered by dismissing the Suits along with all pending applications. Office to prepare Decree accordingly. The amount retained by the Nazir of this Court through Bank Guarantees pursuant to interim arrangement is to be paid to the concerned department. Nazir to act accordingly.

Dated: 16.04.2020

J U D G E

Arshad