IN THE HIGH COURT OF SINDH, KARACHI

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Agha Faisal

1.	SCRA No. 426 /2019	United Refrigeration Industries Ltd. Vs. Director D I&I FBR
2.	SCRA No. 394 /2019	M/s. Yasir Chemicals, Karachi Vs. Customs Appellate Tribunal Bench-II & Others
3.	SCRA No. 395 /2019	M/s. Yasir Chemicals, Karachi Vs. Customs Appellate Tribunal Bench-II & Others
4.	SCRA No. 396 /2019	M/s. Kaghan Chemicals Co. Karachi Vs. Customs Appellate Tribunal Bench-II & Others
5.	SCRA No. 397/2019	M/s. Adil Polumers Vs. Customs Appellate Tribunal Bench-II & Others
6.	SCRA No. 398/2019	M/s. Shouibee Industries & Others Vs. Customs Appellate Tribunal Bench-II & Others
7.	SCRA No. 399/2019	M/s. Full Brite Plastic Industries Vs. Customs Appellate Tribunal Bench-II & Others
8.	SCRA No. 400/2019	M/s. Atee & Company Vs. Customs Appellate Tribunal Bench-II & Others
9.	SCRA No. 401/2019	M/s. Atee & Company Vs. Customs Appellate Tribunal Bench-II & Others
10.	SCRA No. 427/2019	United Refrigeration Industries Ltd. Vs. Director D I&I FBR
11.	SCRA No. 428/2019	United Refrigeration Industries Ltd. Vs. Director D I&I FBR
12.	SCRA No. 429/2019	United Refrigeration Industries Ltd. Vs. Director D I&I FBR
13.	SCRA No. 430/2019	United Refrigeration Industries Ltd. Vs. Director D I&I FBR
14.	SCRA No. 431/2019	Dawlance (Pvt)Ltd. Vs. Director D I&I FBR
15.	SCRA No. 432/2019	Dawlance (Pvt)Ltd. Vs. Director D I&I FBR
16.	SCRA No. 433/2019	Dawlance (Pvt)Ltd. Vs. Director D I&I FBR
17.	SCRA No. 441/2019	M/s. Waves Singer Pakistan Limited Vs.

		Collector of Customs & Others
18.	SCRA No. 442/2019	M/s. Waves Singer Pakistan Limited Vs. Collector of Customs & Others
19.	SCRA No. 477/2019	M/s. Master Offisys (Pvt) Ltd. Vs. Addl. Collector of Customs & Others
20.	SCRA No. 478/2019	M/s. Master Offisys (Pvt) Ltd. Vs. Addl. Collector of Customs & Others
21.	SCRA No. 479/2019	M/s. Master Chemicals Ltd. Vs. Addl. Collector of Customs & Others
22.	SCRA No. 574/2019	M/s. Crescent Corporation Vs. Director D I&I FBR
23.	SCRA No. 601/2019	M/s. Pak Elektron Ltd. Vs. Director DG I&I FBR & Others
24.	SCRA No. 602/2019	M/s. Pak Elektron Ltd. Vs. Director DG I&I FBR & Others
25.	SCRA No. 603/2019	M/s. Shaikh Chemical Co. Vs. Director DG I&I FBR & anther
26.	SCRA No. 604/2019	M/s. Abbas Enterprises Vs. Director DG I&I FBR & anther
27.	SCRA No. 605/2019	M/s. Abbas Enterprises Vs. Director DG I&I FBR & anther
28.	SCRA No. 606/2019	M/s. AZA International Vs. Director DG I&I FBR & anther
29.	SCRA No. 607/2019	M/s. Faith Meal Industries (Pvt) Ltd. Vs. Director DG I&I FBR & anther
30.	SCRA No. 635/2019	M/s. Shaffi Industries (Pvt) Ltd. Vs. Customs Appellate Tribunal & others
31.	SCRA No. 682/2019	M/s. M/s Varioline Intercool Pakistan Vs. Director DG I&I Customs Enforcement & anther

For the Applicants:

Mr. Abdul Ghaffar Khan, Advocate
in SCRA Nos.426 to 433 of 2019.

Mr. Sardar M. Ishaque, Advocate
in SCRA Nos.394 to 401 of 2019.

Dr. Muhammad Khalid a/w
Mr. Muhammad Arshad, Advocates
in SCRA Nos. 441 & 442 of 2019.

Mr. Rasheed Ashraf, Advocate
in SCRA Nos. 477, 478 & 479 of 2019.

Mr. Sh. Riaz Ahmed, Advocate
in SCRA No.574/2019.

Mr. Obaidullah Nadeem, Advocate
in SCRA Nos. 601 & 602 of 2019.

Mr. Madan Lal, Advocate
in SCRA Nos. 603 to 607 of 2019.

Mr. Rana Sakhawat Ali, Advocate
in SCRA No.682/2019.

Mr. Shamshad Younus, Advocate
in SCRA No. 635/2019.

For the Respondents: **Mr. Khalid Mahmood Rajpar, Advocate a/w Mr. Saud Hassan Khan, Supdt: MCC East / I.O.**

Mr. Khalid Mehmood Siddiqui, Advocate
in SCRA Nos. 603, 604 & 607 of 2019.

Dr. Shahab Imam, Advocate
in SCRA Nos.603 to 607 of 2019.

Date of hearing: **15.02.2021, 16.02.2021 17.02.2021.**

Date of Order: **08.04.2021.**

JUDGMENT

Muhammad Junaid Ghaffar, J: Through these Reference Applications, the Applicants have impugned a common Judgment dated 14.05.2019 passed by the Customs Appellate Tribunal, Karachi, in Customs Appeal No. K-257 of 2017 and other connected matters. The leading Reference Application is SCRA No. 426 of 2019 wherein, on 29.08.2019 while issuing Notice to the Respondents the following Questions of Law were settled by the Court:-

> "G. Whether during the disputed period of July, 2013 to March, 2016 the department was bound to apply PCT Heading 3824.9091 on the imported goods, in presence of Ruling dated 27.10.2014, Board Letter dated 18.11.2016 & PCT Committee Letter dated 02.12.2016?
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> H. Whether the National PCT heading 3824.9091 mentioned in the Frist Schedule to the Custom Act, 1969 passed by the Parliament, for the disputed period July, 2013 to March, 2016 can be overruled

retrospectively by applying ECO Determination, which was admittedly adopted by Pakistan through Finance Act, 2017-18?

I. Whether the Municipal Law will prevail over International Law if the conflict exists between Pakistan Rule (I) & (II) of General Rules of Interpretation in the light of judgment reported as 2014 PTCL CL 437?

K. Whether the respondent department had power to exercise the provision of section 19, 32(1), (2) and 79 of the Customs Act, 1969 in presence of SRO No. 486(I)2007 dated 09.06.2007?"

2. Learned Counsel[1] for the Applicants have contended that the product(s) in question (Wannate PM-2010, Wannate PM-8221, Cosmonate M-200, Millionate MR-200 and Lupranate M20S), being polymethylene polyphenylene isocyanates commonly referred to as Polymeric MDIs (generically) was regularly being classified by the Department under HS Code 3824.9091 over a considerable period of time; that time and again issue of its Classification was raised by various Departments including the Directorate of Intelligence & Investigation and thereafter, the matter was referred to the Classification Committee of the Appraisement Collectorate at Karachi who vide its decision dated 27.12.2014 held that the goods in question are to be classified under HS Code 3824.9091; that despite this Classification decision, the Directorate of Intelligence was of the view that the goods in question are correctly classifiable HS Code 3909.3000 and once again various Collectorates, pursuant to such view of the Directorate of Intelligence & Investigation changed the Classification and thereafter importers at Lahore had to approach FBR, who vide letter dated 18.11.2016 took exception to such change of Classification without further referring the matter to the Classification Committee and directed to release the consignments under HS Code 3824.9091; that once again the Classification Committee vide Letter dated 02.12.2016 reiterated its earlier opinion that the goods are to be classified under HS Code 3824.9091; that Intelligence Directorate again approached FBR who vide its letter dated 7.3.2017 withdrew its earlier letter dated 18.11.2016 and once again directed the Classification Committee to re-examine the issue; that thereafter, the Classification Committee has issued a new Classification Ruling vide Public Notice No. 9/2017 dated 12.6.2017 and has now changed its opinion by holding that the goods in question are classifiable under HS Code 3909.3000; that notwithstanding the changed stance of the Classification Committee

[1] Led by Mr. Abdul Ghaffar Khan Advocate.

and FBR, the said Public Notice is only applicable prospectively, whereas, all consignments in question which are subject matter of these Reference Applications, were cleared prior to issuance of this Public Notice; that in terms of Para 74 of CGO 12 of 2002 it could only be applied prospectively; that subsequently, FBR has also amended the Customs Tariff through Finance Act 2017, and has now created a specific local heading of these goods under HS Code 3909.3000 which clearly reflects that insofar as the goods in question are concerned, they cannot be classified under the newly created heading as no retrospective effect can be given to an amendment made in the First Schedule to the Custom Act, 1969 by way of Finance Act, 2017; that as to the prospective Classification under HS code 3909.3000 , the Applicants are not aggrieved; but their case is that the departure from a settled practice which has resulted by way of a Public Notice, can only be applied prospectively, whereas, reliance has been placed on various reported cases[2].

3. On the other hand, Learned Counsel for the Department[3] has argued that since the Classification earlier determined was found to be incorrect, whereas, it was in respect of some other goods; hence, the Tribunal has come to a correct conclusion by holding that this is not a case of any retrospective application of the Public Notice but a case of mis-declaration of Classification by the Applicants and therefore, fine and penalty was also imposed upon the importers and their custom agents; that no exception can be drawn to the conclusion arrived at by the Tribunal; that it is otherwise a factual controversy which has been decided by the Tribunal against the Applicants; that the Explanatory Notes and the amendments to the harmonised coding system was very much in field and the product in question was always required to be classified under HS Code 3909.3000; that in view of the reported cases[4] all these Reference Applications merit dismissal.

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[2] Muhammad Amer Seed and 7 Others V. Model Customs Collectorate of Customs (East) & 7 Others (2016 PTD 2910) and an unreported Judgment of the learned Lahore High Court in Writ Petition No. 90299/2017 dated 15.10.2019 (HNR Company (Pvt,) Limited & Others V. The Federal Board of Revenue & Others).

[3] Led by Mr. Khalid Rajpar

[4] Pakistan State Oil Company Ltd. V. Collector of Custom, East (Adjudication-II) and others (2006 SCMR 425), M/s A-One Feeds V. Deputy Collector Adjudication-I, Karachi and another (2008 PTD 1029), M/s Nayatel (Pvt.) Ltd. V. Appellate Tribunal Customs, Islamabad and Others (2019 PTD 288) and M/s P & G International, Lahore V. Assistant Collector of Customs (Appraisement GR-II), Karachi and 3 others (2010 PTD 870).

4. We have heard all the learned Counsel and perused the record. It appears that over a number of years the Applicants had imported the product in question[5] commonly referred to as "***Polymeric MDI***" though having different brands, origins and suppliers; but all along was continuously being classified under HS Code ***3824.9091*** attracting 5% customs duty, whereas, the claimed Classification by the Respondents under HS Code ***3909.3000*** attracts 20% customs duty. This appears to be an admitted position. In all these Reference Applications some of the consignments were cleared by the customs, and thereafter show cause Notices were issued, whereas, some of them were detained at Port by the Directorate of Intelligence; fresh samples were drawn and they were referred for chemical test to HEJ Research Institute of Chemistry, University of Karachi. Insofar as detained goods were concerned, the Applicants filed Petitions and Civil Suits before this Court, whereupon, the goods were allowed to be released against deposit of differential amount of duty and taxes, pending final adjudication of their cases. It further appears that based on the purported scrutiny of entire import data of the goods in question it was alleged that from "*July, 2013 to March, 2016*" the Applicants imported various consignments of the product in question and got them cleared allegedly in connivance with their customs agents under HS Code 3824.9091 instead of 3909.3000. Contravention reports were generated and matter was referred to Adjudication Collectorate(s) where after various Order-in-Original(s) were passed by the Adjudication Officers (on 09.12.2016 in SCRA No.426-2019) in favour of the Department. Some of the matters were routed through first Appeal(s) before the Collector, whereas, some of them were challenged before the Customs Appellate Tribunal directly who has by way of a consolidated order impugned herein has decided 62 Appeals against the Applicants by confirming the Orders-in-Original. Though different facts and intervals are involved as some of the consignments were already released before issuance of Show Cause Notices, whereas, some of them were detained at Port and were released provisionally pursuant to the above orders; however, in our considered view the following two questions are relevant to decide the controversy in hand. Accordingly, the questions of law are rephrased as under;

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[5] Wannate PM-2010, Wannate PM-8221, Cosmonate M-200, Millionate MR-200 and Lupranate M20S, being polymethylene polyphenylene isocyanates

(a) Whether in the facts and circumstances of the case the goods in question were correctly classifiable under HS code 3824.9091 during July, 2013 to March, 2016 pursuant to Classification Ruling dated 27.10.2014, read with FBR and Classification Committees Letter(s) dated 18.11.2016 & 02.12.2016 respectively?

(b) Whether subsequent determination of Classification of the goods in question by the Classification Committee through Public Notice No. 9/2017 dated 12.6.2017 would apply retrospectively on the goods in question?

5. Though the Tribunal as well as the Authorities below have decided the issue of Classification on its own merits and have held that from day one the Classification of the goods in question ought to have been done under HS Code 3909.3000 and while doing so they have disregarded the earlier decision of the Classification Committee as being based on incorrect and wrong appreciation of facts and law; however, for the present purposes, we do not see it appropriate to determine the Classification by itself as according to us only the above legal questions are relevant to decide these Reference Applications. The relevant HS Codes and the Customs Tariff pre 2017 and thereafter stood as under;

Pre 2017 and under dispute period

3824.9091 ---- ***Diphenylmthane (MDI)***

3824.9092 ---- Preparations of a kind used for water purification

3909.3000---- Other amino- resins

Post 2017 and after amendment in Custom Tariff

3909.3100---- ***Poly (methylene phenyl isocyanate)(crude MDI, polymeric MDI)***

6. As would be clear from the above that prior to 2017 HS Code 3824.9091 provided classification of Diphenylmthane termed as MDI with specific mention in this heading. Though subsequently it has been held in the Order in Original as well in the Classification opinion that this MDI was a different product and the goods of the Applicants were to be classified in HS Code 3909.3000; however, based on this specific mention of MDI in heading 3824.9091, the Classification Committee gave its first opinion and to have a better understanding

of the issue we would refer to such determination by the Classification Committee dated 27.12.2014 which reads as under:-

"GOVERNMENT OF PAKISTAN
MODEL CUSTOMS COLLECTORATE OF APPRAISEMENT (EAST)
CUSTOM HOUSE, KARACHI

C.No. MCC/Misc/493/2014-R&D(East) Dated 27.12.2014

Subject: CLASSIFIFCATION OF GOODS DECLARED WANNATE 8019

Kindly referrer M/S ICI Pakistan's application dated 10.12.2014 on the above subject.

2. The PCT Classification committee held its meeting on 22.12.2014. It was observed that the impugned item i.e. Wannate 8019 as per the Material safety data sheet provided by M/s ICI comprises; Diphenylmethane-diisocynate---50-40%, Polymeric MDI 40-20% and Prepolymer of MDI and Polyether polyol 10-30%. It also indicates that the product, is a mixture of MDI and Prepolymer of MDI and Polyether Polyol meaning thereby that the product does not fall within the domain of PCT Heading 3909.5000 as "Polyurethane". On the contrary the literature provided by M/S ICI indicates that the impugned item is a component of the polyurethane in its application. The HEJ Laboratory test report available on record bearing TR. No. IMAC/TR/4930 dated 20.01.2014, also supports the view of the Collectorate and is reproduced as below:-

> In the light of tests carried out, the given sample "Wannate 8019 (Polyurethane) was analyzed by chromatographic technique and identified by Fourier transform Infrared Spectroscopy (FTIR) and found to be a mixture of Polyol-modified Diphenyl methane Di-isocyanate and polyphenylmethane polyiscoynate. It is also called Modified MDI. The impugned item qualifies PCT heading 3824.9091, which is an indigenous four dash heading specifically created for he item / product i.e. "diphenyl methane Di-isocyanate (MDI)".

3. *It is pertinent to mention that the issue cropped up in the year 2010 and an assessment alert was also circulated vide letter No. MCC PaCCS/Misc/Gr II/4019/09 dated 30.04.2010 by Model custom Collectorate (PaCCS), Karachi about Classification of modified MDI. The issue again came to surface on 26.12.2013 when the Assessment group III took initiative and after detailed deliberations concluded that the product "Wannate 8019" is rightly classifiable under PCT heading 3824.9091 being Polymeric MDI and Prepolymer of MDI. Moreover, perusal of the assessment data as provide during the meeting vividly suggests that Polymeric MDI and Polyurethane Prepolymer are classifiable I PCT heading 3824.9091. It is not understand as to why the dispute over Classification arose and why there was a departure from correct practice.*

4. In view of above mentioned facts, clear Classification in light of relevant chapter / Section Notes read with explanatory Notes and Rule 1 to General Rules for Interpretation, the case does not call for consideration by the Classification Committee.

Sd/-
(Zeba Bashir Ahmed)
Additional Collector I
Chairman Classification Committee

7. Perusal of the aforesaid decision of the Classification Committee[6] reflects that the product in question has been examined by the said Committee and after a threadbare scrutiny, the Classification has been determined under HS Code 3824.9091. It has been further observed that the issue first cropped up in 2010 when some assessment alert was circulated by the assessment

[6] Constituted pursuant to Para 2 of CGO 12 of 2002 by FBR

Collectorates and then once again in 2013 after detailed deliberations it was concluded that Classification of the goods in question is to be done under HS Code 3824.9091. It was further observed that why this dispute over Classification arose once again and why there was a departure from an existing correct practice. The Detecting Agency / Directorate of Intelligence was not satisfied and kept on pursuing the matter. It further appears that some consignments arrived at Lahore Dry Port and were withheld on the complaint of Directorate of Intelligence and once again the Collectorate at Lahore wrote letter dated 27.11.2016 seeking further clarification and the Collectorate of Appraisement (East) once again determined the Classification of the goods in question through its letter dated 02.12.2016 under HS Code 3824.9091 which reads as under:-

"GOVERNMENT OF PAKISTAN
MODEL CUSTOMS COLLECTORATE OF APPRAISEMENT (EAST)
CUSTOM HOUSE, KARACHI

File No.C-30/KAPE/PCT/2016 Dated 02.12.2016

The Collector MCC Department
Mughalpura Dryport,
Lahore.

Subject: CLASSIFICATION OF POLYMERIC DIPHENYMETHANE DIISOCYANATE (mdi) INTERVENTION OF FBR REQUIRED M/S ORIENT ELECTRRONICS (PVT) LIMITED, 26-KM, MULTAN.

Please refer to your letter No. V-Cus/Misc-G-I/22/2016/127 dated 23.11.2016 on the subject cited above.

2. The issue of Classification of "Polymeric diphenyl methane Di-isocyanate (MDI) has been examined in the light of reference received from MCC, Lahore. The Classification under HS 3909,3000 is based on an amendment to the Harmonized System Explanatory Notes approved by WCO Harmonized System Committee in its 52nd Session held in September, 2013.

3. It is observed that the issue of Classification of this particular item had earlier cropped up during the year 2010 and 2014. In 2010, MCC (PaCCS), Karachi issued an Assessment alert for Classification of MDI, under PCT 3824.9091. Later on in 2014, Classification committee declared that "Wannate 8019" being MDI, is correctly classifiable under its specific national subheading 3824.9091 (copy enclosed). Moreover, the amendment approved by the Harmonized system committee in its 52nd Session, held in September, 2013 was circulated by WCO with the following standard advice.

"Parties seeking to import or export merchandise covered by a decision are advised to verify the Implementation of the Decision by the importing or exporting country, as the case may be."

4. The WCO Convention on HS Classification allows the member countries to implement the WCO recommendations and to create further sub-headings at national level (i.e. on 7 or 8 digit level) through their respective legislations. Pakistan has implemented the harmonized system through an Act of Parliament by inserting the same to the Firs schedule to the Customs Act, 1969. The whole system of HS Classification hinges on the Rules of Interpretation of the First Schedule to the Customs Act, 1969. All headings / sub-headings as appearing in the First Schedule in vogue have, therefore, a legal sanctity and are binding. The Classification Committee is therefore, of the opinion that all polymeric MDIs are classifiable under tariff heading 3824.9091 being specified there by name which is still a valid

national sub-heading. The Collector may take up the issue with Board for necessary change in the First Schedule to the Customs Act, 1969, at the time of Budget, in the light of Amendment to the EN during the 52nd Session, issued by World Customs Organization.

Sd/-
(Muhammad Haris Ansari)
Additional Collector II
Chairman Classification Committee

8. Perusal of the aforesaid letter and the decision arrived at reflects that once again it was reiterated that the Classification already determined under HS Code 3824.9091 cannot be altered or changed and the Committee also considered the amendment approved by the Harmonized System Committee of the World Customs Organization in its 52nd Session held in September, 2013, and it was observed that WCO Convention on HS Classification allows the member countries to implement the WCO recommendations and to create further sub-headings at national level (i.e. a 7 or 8 digit level heading)[7]; however, till such time the First Schedule to the Customs Act, 1969 is appropriately amended by creating a separate 8 digit national heading; the goods in question ***including all sorts of polymeric MDIs*** are to be classified under HS heading 3824.9091 being specified by name in the First Schedule to the Customs Act, 1969 (Customs Tariff) which is still a valid national sub-heading. The Lahore Collectorate was further advised to take up the issue with FBR for an appropriate amendment / change in the Customs Tariff, at the time of Budget, in the light of Amendment approved in the 52nd Session, issued by World Customs Organization. It appears that this was not the end of the matter, and once again the issue went to FBR who vide its letter dated 18.11.2016 issued certain directions. The said letter reads as under:-

"GOVERNMENT OF PAKISTAN
(REVENUE DIVISION)
FEDERAL BOARD OF REVENUE.

No. 3(2) Tar-I/2014-pt-I Islamabad dated 18th November, 2016.

The Collector,
Model Collectorate of Customs (Appraisment),
Customs House,
Lahore.

[7] The HS code headings are derived from Harmonized Commodity and Classification System which provides a 6 digit heading (e.g.3824.90), whereas, the member countries can then create its own national level 8 digit headings which in the instant case is 3824.9091

Subject: CLASSIFICATION OF "POLYMERIC DIPHENYLMETHANE DUSOCYANATE (MDI)"-INTERVENTION OF FBR REQUIRED—M/S ORIENT ELECTRONICS (PVT) LIMITED, 26-KM MULTAN ROAD, LAHORE.

The undersigned is directed to refer to Collectorate's letter C.No.V-Cus/Misc-G-1/23/2016/743 dated 25.10.2016 on the subject above and to say that the Collectorate has changed the Classification of Diphenylmethane Di-isocyanate (MDI) from PCT code 3824.9091, a specific national heading in the Pakistan Customs Tariff since 2002-2003, to PCT code 3909.3000 without referring the issue to Classification Committee in terms of Para 2 of CGO 12/2002 dated 15.06.2002. this abrupt departure is in contradiction to the procedure prescribed for change in Classification practices vide Para 74 of CGO *ibid.*

2. The Collectorate, therefore, is directed to refer the matter to the Classification Committee for obtaining fresh Ruling thereon. Meanwhile import consignments of MDI are ot be allowed clearance as per the existing practice under PCT code 3824.9091, if otherwise in order.

Sd/-
(Syed Aftab Haider)
Secretary (Tariff-I)

9. Perusal of the aforesaid letter reflects that in response to letter of the Lahore Collectorate dated 25.10.2016, FBR was of the view that the Collectorate has changed Classification of the goods in question from 3824.9091 which is a specified national heading in Customs Tariff since 2002-2003 to PCT Code 3909.3000, without referring the issue to the Classification Committee in terms of Para 2 of CGO 12 of 2002 dated 15.6.2002 and this abrupt departure is in contravention to the procedure prescribed for change of Classification practices vide Para 74 of the said CGO ibid. The Lahore Collectorate was further directed to refer the matter to the Classification Committee for obtaining fresh Ruling thereon, whereas, in the meantime, consignments of Polymeric MDI be allowed clearance as per existing practice under HS Code 3824.9091, if otherwise in order. It further appears that the Directorate of Intelligence was still not satisfied, and once again approached FBR, who without associating the aggrieved Importers vide its letter dated 07.03.2017 withdrew its earlier letter dated 18.11.2016 ab-initio; and once again directed the Classification Committee to re-examine the issue on merits after giving opportunity of hearing to all the stakeholders including the Directorate of Intelligence. Finally, the Classification Committee has issued Public Notice No. 9/2017 dated 12.06.2017 and has now come to the conclusion that the correct Classification of the goods in question is under HS Code 3903.3000.

10. Now first it has to be seen that whether FBR was empowered to withdraw its letter dated 18.11.2016, which in essence was depicting

the correct proposition of law that the practice of Classifying a particular product under a specific HS Code can only be changed prospectively in terms of Para 74 of CGO 12 of 2002, and that too after referral of the matter to the Classification Committee as constituted vide Para 2 thereof. In our considered view the answer would be a "No". Secondly, it is not a case of any departmental practice being followed on the basis of some personal view or assessments made in routine by the Appraising Officer, as in that case it can be said that it is not a binding practice, if it is patently against the law and can be changed and must not be followed as settled by this Court[8]. However, here, it is the very competent forum of Classification Committee which had determined the Classification not only once, but twice. Therefore, it cannot be accepted that the said practice of Classification was against the law. At best it could be termed as change of opinion based on the facts and circumstances now prevailing. It is not in dispute that earlier the same Classification Committee had determined the Classification of the goods in question under HS Code 3824.9091 and it continued for a number of years till early 2017 when FBR withdrew its earlier letter and referred the matter once again to the Classification Committee. In fact the letter dated 02.12.2016 addressed to the Collector of Customs Lahore and issued by the Classification Committee through its Chairman was done by the same person who has now issued the new Public Notice dated 12.06.2017 as its Chairman. This would only mean that it was a question of interpretation which required much deeper appreciation and the Classification of the goods was not *per-se* that easy to be determined as apparently on a number of occasions it was held that the Classification under HS Code 3824.9091 was correct. In that case, we are surprised to note that not only Show Cause Notices were issued for alleged mis-declaration of the classification code; but so also fine and penalties have been imposed which have been upheld by the learned Tribunal as well. How this could be a case of mis-declaration when all along until 12.06.2017 the earlier Classification Ruling and the communications were in field and it is not that these Rulings were issued by any incompetent authority; rather it was done by the same Classification Committee through its Chairman, having appropriate authority and jurisdiction[9] as well as expertise for doing

[8] Collector of Customs vs. Shaikh Shakeel Ahmed reported as 2011 PTD 495
[9] In terms of Para 2 of CGO 12 of 2002

so. It is settled law that classification of goods is a question based on legal and factual determination and so also of interpretation of the HS Codes and the Customs Tariff; hence, there could always be a difference of opinion in interpreting the same. It is not that it always will be a case of *mens rea* and imposition of penalty if the claimed HS Code is not accepted by the Department. More specifically, in the present case it was the Customs own department as well as FBR who have determined and directed release of goods in the claimed classification code of 3824.9091. How in that case an allegation of mis-delcaration and imposition of fine and penalty can be made out and sustained is beyond comprehension. The law has been settled in this regard on the contrary that in such cases no fine and penalty has to be imposed. Therefore, in our opinion sustaining the imposition of fine and penalty imposed by the Adjudicating authority would not be proper and in accordance with law. A comparison of two PCT Headings, which are in dispute, show that they can be misinterpreted and on the basis of such misinterpretation the goods in question can be declared under any of these PCT Headings and, therefore, we are of the opinion that it has been proved that the alleged mis-declaration was not intentional and deliberate[10]. Therefore the declaration made by the petitioner on the basis of the previous classification cannot be termed to have been made in bad faith or with the intention of evading duties. It is a settled law that in cases where a wrong interpretation of a section is made and tax or duty has been short paid due to misconstruction or misinterpretation of the relevant law in good faith such shortfall cannot be termed as mis-declaration and will therefore not be liable to levy of penalty[11].

11. As to departure from existing practice in respect of Classification of goods; CGO 12/2002 very clearly provides a mechanism as to how and in what manner the change of opinion in Classification has to be applied. Para 74 of CGO 12/2002 is relevant and reads as under:-

> 74.***Departure from existing practice--tariff Rulings--retrospective effect***.--In a certain case the Board's Ruling constituted a change in the existing practice of the Custom House, the Central Board of Revenue also ruled that the change in practice will not have retrospective effect but will be applicable from the date of the Ruling.

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[10] Collector of Customs vs. Power Electronic Pakistan (Pvt.) Limited 2011 PTD 2837
[11] Collector of Customs vs. Shaikh Shakeel Ahmed 2011 PTD 495

2. The C.R.A., however, did not agree with the second part of the CBR's Ruling regarding its prospective effect on the ground that a Tariff Ruling does not alter the Law but merely states what is the view of the authority issuing the Ruling as regards the interpretation of the Tariff. The CRA in support of their views quoted the late Government of India's Ruling No. 53-Cus-1/30, dated 27th February, 1930 as contained at page 2 of the Pakistan Customs Tariff Guide (First Edition).

3. The matter was referred to the Law Division who have ruled as under:-

> "Section 32 of the Customs Act, 1969 refers to untrue statements, cheating, collusion etc. by any person in connection with any Customs. It also speaks of inadvertence, error or misconstruction in levying the duty. For the reasons given therein, the shortage can be recovered. In the same way refund is allowed provided over payment has been made through inadvertence, error, misconstruction. In the instant case, the practice was adopted by the Department on a well-considered view, without in any way bringing into picture the conduct of the person paying the Customs duty. The previous Classification of the goods for purposes of paying the duty shall hold good till the matter is reconsidered. If there is any change, it shall take effect from the date of the change and not retrospectively.

4. The view contained in para 38, I have discussed the matter in the Law Division and they agree with the opinion of the C.B.R.as contained in the Pakistan Tariff Guide Third Edition 1950, which reads as follows:--

> "Departure from existing practice...Where there is a question of departing from existing practice, whether governed by express orders of higher authority, or not, the Collector of Customs should, if the proposed departure is in the direction of an assessment more favourable to the importer, adhere to the existing practice and make a reference to the Central Board of Revenue accepting duty meanwhile from the assessee, under protest if the assesse so requires. Where the Collector contemplates a change to a high assessment then has been the practice, he should not take action upon his view until he has obtained orders, but such orders would not have retrospective effect. Tariff Rulings.—Retrospective effect.-(i)When a Ruling has been issued by the C.B.R. or the Government in the matter of the interpretation of the tariff and when such Ruling shows that the practice of any Custom House in the assessment of goods has been incorrect resulting either in the short levy of duty or the levy of excess duty, it must be held that such short levy or excess levy has been due to error or misconstruction on the pan of the officers of Customs. The Government are, however, pleased to direct that ordinarily no proceedings shall be taken under Section 39 if it appears that duty has been short levied previous to the receipt of the Ruling in the Custom House is perfectly correct. No doubt the law is not altered but the law has been acted upon in a particular manner through tariff Rulings, and in the light of such interpretation, certain duty is charged. The interpretation shall continue till a period it is not altered. As soon as it is altered it shall be effective from the date of its doing so.

Even otherwise, an innocent person paying duty on goods in a bona fide manner to the satisfaction of the rules is protected from being further harassed. This practice may lead to complication, and revision of the tariff rules may effect (*sic*) innumerable people for no fault of theirs.

12. The above directions are though old and pertain to the erstwhile Sea Customs Act, 1878 and section 39 thereof (corresponding to s.32 of the 1969 Act), but still hold field and is part of the CGO 12 of 2002 and has neither been denied nor this Court has been assisted as to the same being rescinded or recalled. In fact FBR's letter dated

18.11.2016 even makes reference of the same[12]. The crux of the above Para is that in cases of change of Tariff Rulings for the purpose of Classification it would always be made applicable from the date of its issuance or prospectively, and would not apply to the past consignments already cleared before issuance of such Ruling as it would be adversely affecting the Importer. The facts of the present case are fully covered by the above directions of FBR which otherwise are binding on the departmental officers while performing functions as assessment officers. We do not see as to how the Public Notice in question by any means can have retrospective effect, merely on the ground that from day one the Classification was wrongly determined under HS Code 3824.9091. It is not a case merely, wherein, some assessments were made by the Department under a wrong Classification and then suddenly it has been changed and perhaps, in that case the principle of past practice would not apply strictly; but insofar as the present facts are concerned, it is an admitted position that not only once; but at least on three occasions, the Classification Committee as well as FBR have reported that the correct Classification of the goods is under HS Code 3824.9091 and therefore, as per settled law in these peculiar facts, the principle of departure from an existing practice being unlawful would apply. It is not a case wherein it could be said that the said practice was wrong or against the law by itself, therefore no shelter can be taken under the doctrine of departmental practice. Apparently in this case it is only a difference of opinion. A divergent view has now been arrived at perhaps after some more detailed investigation, and due to change in Customs Tariff as well; but in any case it would not apply to goods cleared on the basis of earlier determination and Ruling by the same Classification Committee. Even the Public Notice in question does not by itself say that the earlier decision stands withdrawn; or it has to be given retrospective effect. The Tribunal has though taken pain in determining the Classification on its own; however, it needs to be appreciated and notwithstanding the fact that at the time of passing of the Order in Original, the new Public Notice was not in field, the learned Tribunal instead of engaging itself in the determination of Classification on its own, ought to have first dilated upon the legal aspect of the case in the particular facts of this case regarding applicability of the Public Notice in question. The issue was not as to

[12] See Para 7 of this opinion.

whether the Classification subsequently determined was correct or not; rather, it was in respect of such determination's applicability on the past consignments in view of CGO in field. In fact such determination of Classification by the Tribunal had only been relevant if there wasn't any final or reviewed determination by the Classification Committee. Insofar as the Applicants are concerned, their only case was that the new Public Notice shall not apply retrospectively. It is also a matter of fact that now the Customs Tariff also stands amended from 2017 onwards with a specific national heading for the goods in question, setting the controversy at naught.

13. A learned Division Bench of this Court in somewhat similar circumstances, in the case of ***Dada Soap***[13] had the occasion to dilate upon the issue of departmental practice specially in the matter of classification of goods by the Customs Authorities The issue was in respect of Classification of a chemical, as to whether it falls under Heading 29.03 claimed by the Petitioners or 34.02, which was assessed and decided by the department. It was argued by the Petitioners that since the Customs Department had assessed the said chemical under Heading 29.03 for a number of years, the above practice could not have been departed; that even if so it could only be done after approval of the Board and lastly that the authorities were under a statutory duty to apply its own independent mind. The Court on the issue of departmental practice, after examining various judgments and treatise on Interpretation of laws by various authors, was pleased to discuss General Manual of Orders related to Customs Tariff Laws which was exactly worded in the same manner as Para-74 of CGO 12 of 2002 hereinabove. The relevant finding of the learned Division Bench is as under:-

> "7. Mr. Khalid Anwar has referred to a photostat copy from the General Manual of Orders relating to Customs & Tariff Laws (corrected upto 31st December, 1964) in which the following passage as regards to the departure from existing practice is provided for, which reads as follows ;-
>
> > "Departure from *existing practice*.-Where there is a question of departing from existing practice whether governed by express orders of higher. authority or not, the Collector of Customs should, if the proposed departure is in the direction of an assessment more favourable to the importer, adhere to the existing practice and make a reference to the Central Board of Revenue, accepting duty meanwhile from the assessee under protest, if the assessee so requires. Where the Collector contemplates a change to a

[13] PLD 1984 Karachi 302 Dada Soap Factory Ltd. v. Pakistan

> higher assessment than bas been the practice, he should not take action upon his view, until he has obtained orders, but such orders would not have retrospective effect.
>
> Note-The term "Existing practice" has been used with reference to identical entries in the Tariff Schedule. Where there has been an amendment of the Tariff Schedule with an alteration of definitions, all existing practice in respect of the goods affected becomes obsolete."
>
> It may be noticed that in the above-quoted para, it has been clearly provided that the Customs Department cannot depart from the existing practice without making reference to the Central Board of Revenue. In this regard Mr. Khalid Anwar has referred to proviso to section 4 of the Customs Act, 1969, which provides that notwithstanding anything contained in the Act or the rules, the Board may, by general or special order, impose such limitations or conditions on the exercise of such powers and discharge of such duties as it thinks fit. ***We are inclined to hold that if a practice is proved, an aggrieved party can press into service the above-quoted para from the General Manual of orders relating to Custom and Tariff laws if in force at the relevant time***. It will be open to the petitioners to argue this point before the Collector of Customs."

14. The matter was finally remanded to the Collector of Customs and subsequently once again the contention of the Petitioners was discarded and again the matter came up before this Court from departmental proceedings by way of a Customs Appeal under the Customs Act, 1969, and another Learned Division Bench of this Court[14] finally decided the matter in favor of the Petitioners by holding that the chemical in question as covered under Heading 29.03.

15. The Hon'ble Supreme Court in the case of ***Radaka Corporation***[15] was pleased to hold that for the purposes of levy of import duties and export duties as per the schedule to the Customs Act, scrap and waste of iron and steel imported for re-rolling purposes have always been classified under the general classification of waste and scrap metal of iron and steel both for the purposes of Import and Export Control Act, 1950 and the Customs Act and this assertion was supported by longstanding practice of the Customs Department which had always classified iron and steel scrap imported for re-rolling purposes under the heading "waste and scrap metal of iron and steel", but this longstanding practice was suddenly reversed by the Central Board of Revenue Vide Circular Letter No.5(73)-SS (RAR)-II/68, dated 21st March, 1969 wherein it was ruled that the articles

[14] (1999 CLC 762) Dada Soap Factory Vs. Collector of Customs Appraisement
[15] 1989 SCMR 353 Radaka Corporation Vs. Collector of Customs.

imported for re-roiling mentioned in the notification of the Department of Investment, Promotion and Supplies (Iron and Steel control) Karachi, dated 3rd June, 1968, which are not remelted or forged as a whole for the recovery of the metal will not be classifiable under the heading 73.03 of the PCT but will be classified separately in their appropriate headings. The Hon'ble Supreme Court after a very thorough exercise came to the conclusion that the interpretation having been constantly followed by the department and it having been a longstanding practice had almost acquired the force of law and the directive of the C.B.R. in its Circular had the effect of making the purpose for which the goods were imported, rather than the nature of the goods as the basis for classification for the goods. This was not the practice when the goods were imported and therefore the Supreme Court held that no sufficient ground existed for not treating the goods within the heading 73.03 as per the past practice. The Hon'ble Supreme Court held that the past departmental practice cannot be rejected lightly especially as there was no legal basis supporting the directives of the CBR. This was done after examining the process of obtaining waste and scrap of iron and steel and holding that resort to this process can also be utilized for recovery of the metal. The relevant finding of the Hon'ble Supreme Court, again in the case of classification of goods is as under:-

> "7. The above interpretation of the recovery was always acted upon by the Department and Mr. S.K. Rahim Collector of Customs, in his letter described it r-standing practice". Now it is settled law that where the departmental practice has followed a particular course in the implementation of some rule whether right or wrong, it will be extremely unfair to make a departure from it n after a lapse of many years and thereby disturb rights that have been settled by a long and consistent course of practice; see Nazir Ahmad v. Pakistan and others (PLD 1970 SC 453).
>
> It is not denied that the appellants in all these cases had imported the goods under the "Export Bouns Scheme" notified under the Ministry of Commerce, Government of Pakistan Notice No. 326/102/29-EP-III, dated 15th January, 1969. It is also not denied that earlier thereto in consonance with the consistent departmental interpretation of Explanatory Note 6 the same description was given, in the Import Trade Control Schedule to "Scrap and waste metal or iron and steel" in Item No. 73/1 as was contained in the corresponding entry 73.03 of the Pakistan Customs Tariff. This practice was based on the interpretation that `recovery of the metal' was possible not only by the process of melting but also by the process of forging. The process of re-rolling is really one of forging and not of melting. But in so far as forging is also one of the two recognised methods for

> "recovery of the metal", accordingly scrap and iron which was imported for re-rolling purposes was consistently classified under Item No. 73.03 of the P.C.T.
>
> 8. This interpretation having been consistently followed by the department and it having become a long-standing practice had almost acquired the force of law. The practice could not, therefore, be lightly departed from moreso because on its faith the appellants and other manufacturers of the re-rolling material had imported goods under specific licences granted by the Government of Pakistan for that purpose. The directive of the Central Board of Revenue in its Circular letter, dated 21st March, 1969, had the effect of making the purpose for which the goods were imported rather than the nature of goods as the basis for 1 classification for the goods. This was not the practice when the goods were imported. Until then such imported goods came within the heading 73.03. No sufficient grounds existed for not treating the goods which were imported in these cases according to the past practice."

16. A four (4) member Bench of the Hon'ble Supreme Court in the case of ***Asian Foods***[16] again in a dispute of classification of goods has been pleased to observe that a departmental practice consistently followed giving rise to a vested right over the years, could not be lightly interfered with so as to disturb or destroy such rights. For the sake of repetition, it may be observed that this was also a case of classification of goods in respect of the interpretation of the Customs Tariff. The relevant finding of the Hon'ble Supreme Court is as under:-

> "It is true that a departmental practice consistently followed, giving rise to vested rights over the years will not be lightly interfered so as to disturb or destroy the rights. A classic example of it is found in the case decided by this Court and cited by the learned counsel for the appellants viz. Nazir Ahmad v. Pakistan. But in this case it is not so much the language of the statute which is presenting a problem as the report of the technical expert. As long as the report of Mr. S.U. Khan held the field the commodity was classified and treated as "Glucose--chemically pure" when Mr. Patel's report took over the field the same commodity acquired a different chemical composition and was treated differently. So it is the technical expert's report which has brought about the change. All said and done no rule of estoppel controls an expert in bona fide analysing a chemical with a view to determine its constituents, or composition. The argument on estoppel is misconceived in the context. The report presented by Mr. S.U. Khan had the merit of relating the commodity to the P.C.T. classification heading by classifying it as glucose chemically pure. The report of Mr. Patel follows no such pattern."

17. Again The Hon'ble Supreme Court in the case of ***Manzoor Brothers***[17] once again has reiterated the same principle especially in the case of classification of goods and interpretation of the Customs Tariff. The relevant finding in this case reads as under:-

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[16] 1985 SCMR 1753 Asian Food Industries Ltd. Vs. Pakistan.
[17] 1994 SCMR 1953 Government of Pakistan vs. Manzoor Brothers.

“11. We observe that the consistent practice of the Department, right from 1965 to 1983 was to treat individual parts of cycle hubs though not constituting the complete hub unit as covered by Item No. 45 (j) of the Import Policy Order. It was only on 15-8-1983 that the Deputy Collector of Customs became doubtful of this practice and called for ruling from the Controller of Import and Export in this connection. On the same day, the ruling sought for was given by the Controller of Imports and Exports on the following terms:

"2. The item Hub Spindles (axles) is not covered by the import licence issued vide S. No. 452 of the Import Policy Order, 1982. The item, Hub Spindles (Axles) could not, therefore, be imported without the specific permission of the Chief Controller of Imports and Exports."

Now this Court in Nazir Ahmad v. Pakistan (PLD 1970 SC 453) deprecated the practice of deviating from a course consistently followed by a Department for a long period. It was observed that:

"Where the departmental practice has followed a course in the implementation of the relevant rule whether right or wrong, it will be extremely unfair to make a departure from it after a lapse of many years and to disturb rights that have been settled by a long and consistent course by the practice. This, to say the least, is bound to weaken the faith of the employees in the attitude and behaviour of the department. `As regards departmental constructions', that is to say, the construction which is placed in practice on the provisions of a statute or rules by the administrative authorities who are charged with the execution of the statute or the rules Crawford thus observes: `Where the executive construction has been followed for a long time an element of estoppel seems to be involved. Naturally, many rights will grow up in reliance upon the interpretation placed upon a statute by those, whose duty it is to execute it. Often grave injustices would result should the Courts reject the construction adopted by the executive authorities:'

In this case, the respondent Firm had presented the Bills of Entry in one case on 20-2-1983 and in the other on 31-5-1983. The Policy ruling was given on 15th August, 1983. This ruling could not affect goods imported before 15-8-1983. We, therefore, agree with the following observation of the High Court:

"The present goods were imported in March 1983, and if at all the ruling of the Controller of Imports and Exports had to be applied, it should only have been in respect of imports made on or after 15-8-1983 which was the date of the ruling of the Controller. The application of the, Controller's decision retrospectively on the case of the petitioner cannot be permitted, because the goods were imported by the petitioner around March 1983."

No good ground for interference with the orders of the High Court has been made out. Accordingly, these appeals must be dismissed. No costs.”

18. In the case of ***Shakeel Brothers***[18] the Hon'ble Supreme Court was dealing with a matter once again regarding classification of goods and the interpretation of the Customs Tariff, whereas, in that case certain amendments were brought in the Customs Tariff, whereby, a classification was changed or rationalized and the rate of duty was increased. It was observed by the Hon'ble Supreme Court that such amendment in the Customs Tariff could not be applied retrospectively and would not cover the cases, in which bills of entry were filed prior to such amendment. The relevant finding of the Hon'ble Supreme Court reads as under:-

> "10. In the meantime another amendment was made by Finance Ordinance, 1983 which was gazetted on 12th June, 1983,. By this amendment contents of 84.28 A-O1 have been replaced by "machines & appliances for preparing fodder" and made liable to 85% ad val. customs duty and 10% sales-tax. From what is stated above, one thing is crystal clear that after Finance Ordinance, 1983 Central Board of Revenue has achieved what is wanted before and the confusion is also cleared and set at rest. Difference between "Fodder Chopper" and "Fodder Crusher" has now retained academic interest only because now the category is generalized to include all machines and appliances for process employed is of chopping or crushing and made liable to levy of customs duty at 85% ad valorem and 10% sates-tax. However, this amendment in Finance Act, 1983 cannot be applied retrospectively, and would not cover cases, in which bills of entry were filed in 1982 under section 30 (a) or before the coming into force of the amendment of 1983. It is admitted by the Customs department in the letter addressed to Central Board of Revenue dated 3rd September, 1983 mentioned above that payment of customs duty had been disputed by the importer and paid by some of them under protest. In such circumstances on account of dispute whether subject goods were liable to customs duty or not, those goods had to be ware-housed as claimed by the importers. In the circumstances, it can be said that in these cases section 30 (a) would apply and subject goods are not liable to custom duty if bills of entry had been filed before 12th June, 1983 when amendment came into force by Finance Ordinance, 1983."

19. The upshot of the above discussion is that since the Classification of goods in question under HS Code 3824.9091 during the period in dispute was pursuant to a determination by the competent forum in law[19], whereas, it was a consistent practice and has only been changed after reviewing the changed circumstances, including amendment made in the First Schedule to the Customs Act, (i.e. Customs Tariff) by way of Finance Act, 2017, through which a specific local 8 (eight) digit HS code has been created for all sorts of MDI's (**crude MDI, polymeric MDI**); therefore, the subsequent determination

[18] 1998 SCMR 237 Central Board of Revenue Vs. Shakeel Brothers.
[19] The Classification Committee as per Para 2 of CGO 12 of 2002

under HS Code 3909.3000 vide Public Notice 09/2017 dated 12.6.2017 would only be applicable prospectively on consignments for which Goods Declarations were filed on or after 12.6.2017.

20. In view of hereinabove facts and circumstances of the case, question (a) is answered in the affirmative; in favour of the Applicants and against the Respondents; and question (b) is answered in negative; in favour of the Applicants and against the Respondents. All Reference Applications are allowed by setting aside the impugned orders passed by the forums below. Let copy of this judgment be sent to the Customs Tribunal in terms of section 196(5) of the Customs Act, and shall also be placed in all connected files.

21. All Reference Applications are allowed.

Dated: 08.04.2021

J U D G E

J U D G E

Arshad/