IN THE HIGH COURT OF SINDH, KARACHI

Present
Mr. Justice Irfan Saadat Khan
Mr. Justice Zulfiqar Ahmad Khan

Special Customs Reference Application Nos.34-63 of 2020

The Collector of Customs, MCC (East)	……	Applicant
v.		
M/s. Forte Marketing Services (in SCRA Nos.34 to 42 of 2020) and M/s. Rak Trading Company (in SCRA Nos.43 to 63 of 2020)	……	Respondents

Applicants	:	Through Mr. Ghulam Murtaza, Advocate alongwith Mr. M. Ishaque Pirzada, Advocate
Respondents	:	Through M/s. Shafqat Mehmood Chohan and Ghulam Nabi Shar, Advocates Ms. Falak Naz Fatima, Advocate
Date of hearing	:	07.11.2022
Date of order	:	16.11.2022

JUDGMENT

Zulfiqar Ahmad Khan, J:- In this bunch of 30 Special Customs Reference Applications (SCRAs), a singular question being question No.1 (reproduced hereunder) was adopted as question of law, whilst the remaining questions being derivation of this question were not pressed, hence this sole question would be answered here, which question being common to all connected 30 SCRAs arose out of the common judgment dated 05.09.2019 passed in Customs Appeal No.K-264/2017 (and others).

> **Question**: *Whether in the facts and circumstances of the case and in the presence of Section 25A(3) and 25D of the Act, the Appellate Tribunal has erred in law to hold that the Valuation Rulings are valid for 90 days only?*

2. Learned counsel for the applicants by way of background submits that since facts are common in all of these Reference Applications, therefore facts of SCRA No.34 of 2020 may be taken into consideration

to answer the posed question, which are that the respondents are importers of sanitary items being subjected (by the department) to valuation ruling No.874/2016 dated 22.06.2016, and when respective goods of the importers arrived at the port, importers filed GDs by declaring value of the imported goods in accordance with section 25(1) of the Customs Act, 1969 at actual price paid by the importer, however, the above quoted valuation ruling 874/2016 was corrosively applied by the department, resultantly goods were assessed under the valuation ruling 874/2016. Counsel adds that the importers, who had already challenged an earlier valuation ruling 758/2015, which was identical with the valuation ruling 874/2016, on the ground that the former valuation ruling was set aside by the Tribunal vide order dated 12.05.2016, chose to file an appeal against such determination, which appeal was however decided against the importers as the Appellate Authority held that such valuation ruling was issued in exercise of powers conferred under section 25A of the Customs Act, 1969, which begins with a *non-obstante* clause overriding customs values determined under section 25 of the Customs Act, 1969. The importers therefore chose to file an appeal before the Tribunal, which upset the order-in-appeal by holding that since the importers had filed all relevant import documents including letter of credits and the purchase contracts therefore (and by placing reliance on the case of *Sadia Jabbar v. Federation of Pakistan* (2018 PTD 1746)) goods had to be accessed on the transactional value under section 25(1) instead. Counsel for the applicants submitted that the impugned order has misinterpreted section 25A of the Customs Act, 1969, which admittedly begins with a *non-obstante* clause that has overriding effect on the provisions of section 25, hence the reference.

3. Learned counsel for the respondents on the other hand submitted that the case has checkered history where *in fact* there were 90 of such

appeals decided in the similar manner where Tribunal directed that those goods be assessed under section 25(1) of the Customs Act, 1969 wherein the department did not choose to file any reference. This is only the present Collectorate which chose to dishonor importers' assessment per directions of the Tribunal and filed these references in respect of 30 appeals, per learned counsel. By way of background, the Court was informed that originally similar consignments of ceramic and porcelain goods were valued under the valuation ruling 538/2013, which ruling was challenged and through order-in-revision dated 23.11.2014 D.G (Valuations) held that the valuation of the goods having Middle Eastern origin were (wrongly) placed at higher side and directed that these must be reduced by 20%, whereafter, an appropriate addendum to valuation ruling 538/2013 was issued reducing valuation for ceramic, porcelain, polished and porcelain matt/glazed products originating from UAE in table E, F and G to 20%. Thereafter, per learned counsel, valuation ruling 758/2015 was issued, where the earlier granted 20% decrease was withdrawn, that resulted in filing of appeals before the Customs Appellate Tribunal, where importers of ceramic porcelain tiles etc. from UAE stated that withdrawal of such reduction of 20% was illegal and the said concession ought to be maintained in the latest valuation ruling too. The Tribunal per learned counsel *set aside* the order-in-original and so the valuation ruling 758/2015 to the extent of imports from UAE and the department was directed to assess imports from UAE under section 25(1) of the Customs Act, 1969 i.e., based on the price actually paid (at the transactional value). Per learned counsel, the transactional values were *in fact* higher than the values determined in the valuation ruling 758/2015 hence the department did not file any appeal against the above findings of the Tribunal. Thereafter, per learned counsel, valuation ruling 874/2016 was introduced on 22.06.2016, where the Department made fractional changes in respect of the goods imported from Far East and Middle East however, removed

the earlier established 20% reduction on the goods imported from Far East and Middle East countries/states. The said valuation ruling (874/2016) was therefore independently challenged through order-in-revision that was decided against the importers, against which the importers reached to the Customs Appellate Tribunal, which through judgment dated 15.03.2018 *set aside* the Order-in-Revision No.225/2016 and later on directed to assess the values of the goods under section 25(1) of the Customs Act, 1969 at declared transactional value. Counsel reiterated that the learned Customs Appellate Tribunal vide judgment dated 12.04.2018 also decided 81 appeals challenging Orders-in-Appeal Nos.566 to 655 of 2017 along with several other customs appeals filed by the present respondent alongside another appellant, which judgment of the Tribunal was never challenged through any SCRAs, whereas only the present Collectorate chose to impugn the said judgment. Counsel concluded by submitting that in this complex valuation ruling scenario, the case of the respondent remain unfettered that imports from Far Eastern and Middle Eastern countries were directed to be assessed at the transactional value rather than under section 25A through any valuation rulings. As the valuation ruling 874/2016 per learned counsel has mischievously withdrawn 20% discounted values, and as far as 90 days life term of valuation rulings relying on the cases of Sadia Jabbar (supra) and Sky Overseas v. Federation of Pakistan through Secretary, Revenue Division and 4 others (2019 PTD 1964) where courts have repudiated this 90 days' life to valuation rulings, it was prayed that the question be answered in favor of the importer and against the department

4. Heard the counsel and perused the material available on record.

5. The controversy at hand is once again about the interpretation of the words "at or about the same time" which Rule 107(a) prescribes as 90 days in particular. The practice of the department on placing reliance on valuation ruling instead transactional values has been the subject

matter of many judgments over the years. These being Sadia Jabbar v. Federation of Pakistan (supra), Danish Jehangir v. Federation of Pakistan through Secretary/Chairman and 2 others (2016 PTD 702), Messrs Central Insurance Company and others v. the Central Board of Revenue Islamabad and others (1993 SCMR 1232). This Court again passed a detailed judgment in the case of Messrs Sky Overseas (supra), which judgment discusses the valuation issue from the very inception i.e. from the creation of GATT Agreement which through its Article VII deals with the issue of determination of values for customs purposes and the Court went at length to discuss the term “at or about the same time” and held that in fact the concept of valuation rulings is a misnomer existing probably only in Pakistan for totally misconstrued reasons, where the time of transaction taken at 90 days, 180 days or till the date that valuation ruling was rescinded, modified or replaced have been laid to rest. This court in supra judgment has held that “time is currency of trade”. May be at the cost of repetition, paragraphs 22-24 of the above judgment are being relevant are reproduced hereunder: -

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

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

23. The issue before the Court was whether the words "at" or "about" included in the "at or about the time of exportation" phrase are to be applied in a hierarchical or collective fashion, and in what manner the language is to be interpreted when the law provided that the transaction value of identical or similar merchandise was the transaction value, accepted as the appraised value of merchandise identical or similar to the merchandise currently being appraised which was exported to the country at or about the time that the merchandise being appraised was exported into the country. With regards the phrase "at or about the time" it was held that the said phrase was clearly meant to cover a period of time, as close to the date of exportation as possible, within which commercial practices and market conditions which affect the price remain the same, since it was recognized that such determinations will vary as between different kinds of goods and the attendant factors and circumstances unique to the merchandise and industry. For instance, factors influencing supply and demand, such as fluctuations in the quality, availability, and desirability of a product are to be taken to have a profound impact on the price a buyer will pay for a merchandise from one occasion to the next. It was held to be appropriate to consider such factors in any reasonable interpretation of the "at" or "about" language. However, in the case of perishable produce where prices fluctuate seasonally, weekly, or even daily, it was held that a time period of one week, i.e., seven calendar days, before or after the date of exportation of the merchandise being appraised, was more than enough to represent a time period "about" the time of exportation. Insofar as other merchandises are concerned, this time period was to reasonably represent a period of time as close to the date of exportation as possible within which commercial practices and market conditions that affect the price generally remained the same. The court was of the opinion that the terms "at" or "about" included in the "at or about the time" phrase are to be applied in a hierarchical fashion, with resort to values "at" first and then "about" later on. Hence, in selecting a transaction value of identical or similar merchandise, it was found appropriate to consider transaction values for produce that has been exported "at" the same time as the imported good, i.e., by using transaction values for goods exported on the exact date as the imported good being appraised. If no transaction value was available for the good exported on the exact date, it then was held to be appropriate to consider transaction values for produce exported "about" the same time as the goods imported, that is, by using transaction

> values for produce exported on the date closest to the date of export of the imported goods being appraised, followed by the next closest date to the date of exportation of the goods being appraised, and so forth. In either case, if several transaction values were provided for the same goods on the exact or closest date of exportation, the lowest to be utilized, and once a transaction value is found, only the value or values on the date closest (before and after) to the date of exportation were to be considered. Resorting to values at a further date within even fourteen day total time period as used by customs authorities was held to be inappropriate.
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> 24. This ruling was still challenged by the importer in the US Courts of International Trade in the case known as Four Seasons Produce, Inc. where the Plaintiff argued that that the phrase "at or about the time of exportation" should be interpreted so as to give equal value to the words "at" and "about" and that Customs' interpretation which gives a hierarchal preference to the word "at" is contrary to legislative intent. Thus, in determining the "lower or lowest" values applicable to the goods, customs must consider values of merchandise exported throughout the entire fifteen day period around and on the date of exportation of Plaintiff's merchandise. Essentially, Plaintiff wanted the Court to read "at or about" to mean "at and about", which the court declined observing that there is no indication that legislature intended "or" to be read as "and" and while judicial decisions can be found in which 'or' has been interpreted in a manner other than common grammatical rules would suggest, such interpretations are not the norm and general purpose dictionaries, as well as numerous other judicial decisions define and employ 'or' as a disjunctive and giving "or" its plain meaning where, in the context of the statute at issue, a disjunctive construction neither produced an anomaly nor was contrary to the intent of the legislature. Thus, the Supreme Court concluded that the phrase "at or about" is not ambiguous and that legislature intended it be read as having its plain meaning such that "at" values are preferred over the "about" values. Therefore, legislature intended authorities to value merchandise, which does not have a transaction value at the time of exportation by using values of identical or similar merchandise on the date the appraised merchandise is exported, without referring to a longer period of values "about" the date of export of such merchandise. With regards 'about' it was held that while it is clear that legislature intended a hierarchical distinction as between "at" values and "about" values, but it is less clear that legislature intended that a hierarchical distinction be applied to exportation dates solely "about" the time Plaintiff's merchandise was exported.

6. This Court more recently also had to reiterate these findings while answering Customs Reference Application No.340 of 2018 (and others), where the department was placing reliance on London Metal Bulletin (LMB) to assess import of steel products. The fact is that all of these judgments are still holding the field alongside the celebrated judgment rendered in the case of Sadia Jabbar *(supra)*, which forms foundation of the impugned judgment rendered by the learned Tribunal leaving no doubt in our minds that reliance cannot be placed on a valuation ruling,

if unchallengeable transactional value is posed by the importer supported by irrefutable trail of documents.

7. Now coming to the issue of Section 25A being a non-obstante clause, rest of this judgment will deal with this part of the question alone. Collins Dictionary by way of background informs us that non-obstante clause was originally used in medieval times *permitting to the King certain actions notwithstanding statutes to the contrary*. In recent times it is a phrase used in documents and legal instruments to preclude any interpretation contrary to the stated object or purpose. It is common knowledge that a non-obstante clause is added to position its enforceability viz-a-viz another provision it aims to surround. This clause is often used to clarify the intention of the legislature in the case where two provisions are to be given eclipsed interpretation. We are fortunate that in one of the recent judgments, the Hon'ble Supreme Court in the case titled Syed Mushahid Shah and others v. Federal Investigation Agency and others (2017 SCMR 1218) has discussed the non-obstante clause at length, in order to aid the current discussion, relevant paragraph 9 from the said judgement is reproduced hereunder: -

> 9. According to section 4 of the Ordinance, 2001 reproduced above, its provisions "shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force." This is essentially a non obstante clause which is defined as "A phrase used in documents to preclude any interpretation contrary to the stated object or purpose." 'Notwithstanding' means despite, in spite of or regardless of something. In this respect Justice G.P. Singh has aptly explained:-
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> > "A clause beginning with 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment."

In the judgment reported as Packages Limited through its General Manager and others v. Muhammad Maqbool and others (PLD 1991 SC 258) this Court observed: -

> "In our opinion a 'non obstante' clause operates as an ouster of the earlier provisions only where there is a conflict and inconsistency between the earlier provisions and those contained in the later provision and, therefore, must be read in the context in which it is operating. Accordingly, a non obstante clause will operate as ouster only if an inconsistency between the two is found to exist."

In the judgment reported as Muhammad Mohsin Ghuman and others v. Government of Punjab through Home Secretary, Lahore and others (2013 SCMR 85), this Court cited with approval a passage from Interpretation of Statutes by N. S. Bindra which reads as under: -

> "It has to be read in the context of what the legislature conveys in the enacting part of the provision. It should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistent with the new enactment. The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously, for even apart from such clause a later law abrogates earlier laws clearly inconsistent with it.

8. The apex court observed that "*the proper way to construe a non obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to be taken as overriding anything inconsistent to that meaning in the provisions mentioned in the non obstante clause. A non obstante clause is usually used in a provision to indicate that that provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another provision one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clauses. It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. The principle underlying non obstante clause may be invoked only in the case of 'irreconcilable conflict*". This view supports the legal dictum that a non-obstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment, and if

the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words, the non-obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant of caution[1].

9. Also of relevance is the case of Muhammad Iltaf Khan v. Basheer and others (2022 SCMR 356) where the Hon'ble Supreme Court has held that *a non-obstante clause in a Statute is a potent legislative tool often employed, essentially to achieve a limited/specific statutory purpose, nonetheless, the concomitant overriding effect is a purpose specific without impinging upon the structural integrity of the Statute; it merely presents a restricted deviation or departure without disturbing the overall functionality of the Statute* [Underlining is ours].

10. Courts while dilating on the non-obstante clause across the globe have also taken the view that non-obstante clauses do not have a repealing effect and they do not completely supersede the other provisions of law as such a clause simply performs the function of removing impediments created by the other provisions from affecting the enforcement of the enacting part of the concerned section it is attached to[2]. As the Apex court in the case of Mushahid Shah and others (supra) has held a non-obstante clause to mean "*in spite of*" *or* "*regardless of something*", question hence arises as to the amplitudes of non-obstante(ness). As stated earlier the Notwithstanding mechanism commonly known as NM has been in place since medieval times, however the dearth of literature on it is glaring. In recent times, the NM clause drew exceptional attention in the year 1982 when Canadian government

[1] 1992 AIR 81 - 1991 SCR Supl. (1) 387
[2] Bipathumma and Ors. v. Mariam Bibi - Mysore Law Journal page 162, at page 165

used it in Section 33 of the Canadian Charter of Rights and Freedoms (that protected a number of rights and freedoms, including freedom of expression and the right to equality as part of the Constitution) giving parliaments the power to override certain portions of the Charter (dealing with fundamental freedoms, legal rights and equality rights) for five-year terms when passing any legislation[3]. This NM was viewed as a nuclear option[4]. By placing reliance on Ronald Dworkin's "fit" test detailed in his book titled Law Empire[5] one does not fail to conclude that NM is to be used only if the legislature or courts have no other choice and that too, in exceptional circumstances. The lesser it is used, the more it is conceived as exceptional ensuring that no irreparable damage is inflicted by its use, which it is inherently designed for. This view finds support from the very concept of NM that it was used by Kings to perform acts in exceptional circumstances.

11. Courts have held that NM measures must be used by way of abundant caution[6]. To gauge how minimalistically NM measures are to be used, inspirations could be taken from the case of Pronschinske Trust v. Kaw Valley Co.[7] [8] where a landowner signed a Mining Lease Agreement with a mining company, allowing but not requiring it to extract sand, stone, and rock products. The mining company agreed to pay option fees and key money but did not obligate itself to do any mining at all, but it could freely abandon the property. In a paragraph of the agreement dealing with payment, the mining company agreed to pay production royalties based on the amount of materials it extracted. The paragraph that covered production royalties stated that "Notwithstanding anything to the contrary contained herein, Lessee shall pay to Lessor an annual

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3 Understanding the Notwithstanding Mechanism by Tsvi Kahana - The University of Toronto Law Journal Vol. 52, No. 2

[4] https://www.nationalmagazine.ca/en-ca/articles/law/rule-of-law/2022/the-lure-of-the-override-clause

5 Harvard University Press - 1986

[6] Dr. Malik Mehdi Kabir and others Vs. Rabit-Al-Alam-Al-Islami and others (39 CLC-AD 5505)

[7] 899 F.2d 470 (7th Cir. 2018)

[8] https://casetext.com/case/pronschinske-trust-dated-march-21-1995-v-kaw-valley-cos

minimum Production Royalty" The paragraph went on to say that if production royalties in a particular year fell short of the minimum amount, then the mining company would make a catch-up payment at the end of the year. In 2016, the mining company exercised its right to abandon the property and the agreement. The landowner sued for minimum production royalties for the short life of the agreement. The landowner argued that the "notwithstanding" language in the middle of the production royalties paragraph required the mining company to pay at least the minimum royalty per year whether or not it mined the land and if no mining occurred it would still owe the minimum royalty amount per year. The mining company disagreed. It argued the paragraph on production royalties stood on its own and activated only if the mining company started to mine. Until then, the minimum production royalty was never applied. The dispute boiled down to the sentence that started with the NM being "*Notwithstanding anything to the contrary contained herein*" dropped into the middle of the paragraph on production royalties. Question was raised as to what did "herein" mean, as if it referred to the entire agreement, then the mining company owed the minimum royalty a year no matter what. But if "herein" referred only to the paragraph on production royalties, in the absence of mining no liability for production royalties ever arose, and thus the mining company had no obligation to pay the minimum production royalty. The court ruled for the mining company, concluding that "herein" referred in the Notwithstanding clause only applied to the paragraph on production royalties and not to the entire agreement[9] [10].

12. With this background now if we consider the language of Section 25A(1) titled "Power to determine the customs value" which provides

[9] Notwithstanding anything to the contrary contained herein - By Joshua Stein PLLC - https://www.lexology.com/library

[10] https://www.casebriefs.com/blog/law/commercial-law/commercial-law-keyed-to-warren/negotiability-and-holders-in-due-course/kaw-valley-state-bank-trust-co-v-riddle/

that *Notwithstanding the provisions contained in section 25, the Collector of Customs on his own motion, or the Director of Customs Valuation on his own motion or on a reference made to him by any person or an officer of Customs, may determine the customs value of any goods or category of goods imported into or exported out of Pakistan, after following the methods laid down in section 25, whichever is applicable*, while it is admitted that the said section begins with non-obstante clause, but application of the Ronald Dworkin's "fit" test suggests that in the presence of Section 25, this non-obstante clause of Section 25A should be used minimalistically, only in exceptional circumstances that too, ensuring that no irreparable damage is inflicted by its use. Hence the argument that section 25A or any of its subsections including 25A(3) could be used customarily and for long stretch of time (e.g. 90 days) rather than exceptionally, does not hold water, coupled with the fact that in Sky Overseas (supra) case while expounding on the phrase "at or about the same time" court has hold that even 90 days lifetime of valuation rulings is contrary to the spirit of the currency of trade (i.e., 'time') hence in our mind there is not option that the question posed could be answered in any manner other than in the **Negative**, i.e., against the department and in favor of the importers.

13. Let a copy of this judgment be sent to the Customs Tribunal in terms of 196(5) of the Customs Act, 1969 and be also placed by the office in all connected matters.

Judge

Judge

B-K Soomro