IN THE HIGH COURT OF SINDH, KARACHI

Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Jawad Akbar Sarwana

1.	Spl. Cus. Ref. App. 431/2011	Collector of Customs Model **VS** M/s Ahsan & Company
2.	Spl. Cus. Ref. App. 432/2011	Collector of Customs Model **VS** M/s Malik Vetro Designing
3.	Spl. Cus. Ref. App. 433/2011	Collector of Customs Model **VS** M/s Toheed Glass House
4.	Spl. Cus. Ref. App. 434/2011	Collector of Customs Model **VS** M/s Kohinoor Glass Corporation
5.	Spl. Cus. Ref. App. 435/2011	Collector of Customs Model **VS** M/s Innovative Marketing Co.
6.	Spl. Cus. Ref. App. 436/2011	Collector of Customs Model **VS** M/s Al-Fatah Toughened Glass Ind
7.	Spl. Cus. Ref. App. 437/2011	Collector of Customs Model **VS** M/s Abbasi Enterprises
8.	Spl. Cus. Ref. App. 438/2011	Collector of Customs Model **VS** M/s Hatim Glass Mart
9.	Spl. Cus. Ref. App. 439/2011	Collector of Customs Model **VS** M/s Tahir Glass House
10.	Spl. Cus. Ref. App. 440/2011	Collector of Customs Model **VS** M/s Moon Glass Traders
11.	Spl. Cus. Ref. App. 441/2011	Collector of Customs Model **VS** M/s M.S. Corporation
12.	Spl. Cus. Ref. App. 442/2011	Collector of Customs Model **VS** M/s Qari Glass House
13.	Spl. Cus. Ref. App. 443/2011	Collector of Customs Model **VS** M/s National Glass House
14.	Spl. Cus. Ref. App. 444/2011	Collector of Customs Model **VS** M/s Z.. H. International
15.	Spl. Cus. Ref. App. 445/2011	Collector of Customs Model **VS** M/s Jamal Enterprises
16.	Spl. Cus. Ref. App. 446/2011	Collector of Customs Model **VS** M/s Hassan & Hussain Associates
17.	Spl. Cus. Ref. App. 447/2011	Collector of Customs Model **VS** M/s Madina Glass House

18.	Spl. Cus. Ref. App. 448/2011	Collector of Customs Model **VS** M/s Khan Glazing Co
19.	Spl. Cus. Ref. App. 449/2011	Collector of Customs Model **VS** M/s Sheesha Pal
20.	Spl. Cus. Ref. App. 450/2011	Collector of Customs Model **VS** M/s Sattar Ali Muhammad
21.	Spl. Cus. Ref. App. 451/2011	Collector of Customs Model **VS** M/s Al-Buraq International
22.	Spl. Cus. Ref. App. 452/2011	Collector of Customs Model **VS** M/s Chaudhry Sons
23.	Spl. Cus. Ref. App. 453/2011	Collector of Customs Model **VS** M/s Zorain Enterprises
24.	Spl. Cus. Ref. App. 454/2011	Collector of Customs Model **VS** M/s Al-Fateh Traders
25.	Spl. Cus. Ref. App. 455/2011	Collector of Customs Model **VS** M/s Sony Glass Corporation
26.	Spl. Cus. Ref. App. 456/2011	Collector of Customs Model **VS** M/s Data Corporation

For the Applicants: Mr. Pervaiz A. Memon, Advocate.

For the Respondents: Mr. Pervaiz Iqbal Kasi, Advocate.

Dates of hearing: **23.04.2024 & 02.05.2024**

Date of Judgment: **10.07.2024.**

JUDGMENT

Muhammad Junaid Ghaffar, J: Through all these Reference Applications, the Applicant Department has impugned Order dated 30.11.2010 passed in Customs Appeal No. 638 of 2010 & other connected matters proposing various questions of law, which according to the Applicant Department are arising out of the Order of the Tribunal; however, perusal of the record reflects that

the Tribunal itself framed the following issues for adjudication of the matter, which read as under:-

i) "Whether Valuation Rulings issued in terms of Section 25-A of the Customs Act, 1969 prior to 1st July 2009 are valid beyond period of (90) days in terms of the provisions of Section 25(1) read with Rule 107 (a) of Customs Rules 2001?

ii) Whether Valuation Ruling can be applied to consignments which were cleared prior to their issuance through acceptance of their transaction values?

iii) Whether the two methods of Valuation as envisaged under Section 25 of the Customs Act, 1969 namely Deductive Method under Section 25(7) and Fall Back Method under Section 25(9) have been lawfully and competently applied by the Directorate General of Customs Valuation for the determination of Customs assessed values in these cases?

iv) Whether the market inquiry has been conducted by the respondents in terms of clause (a) of sub-section (7) of Section 25 of the Customs Act, 1969 while determining the Customs assessed values in review filed by the appellants under Section 25D of the Customs Act, 1969?

v) Whether issuance of notice under sub-sections (2) or (3) of Section 32 of the Customs Act, 1969 for short levied amount of revenue was competent in these cases where assessments were provisionally made under section 81 of the Customs Act, 1969?

vi) Whether the show cause notices issued in these cases are defective and deficient and hence ab initio null and void in material particulars for want of non-mentioning of sub- sections (3) and 3A of Section 32 of the Customs Act, by the adjudicating officer?

vii) Whether show cause notice issued under sub- sections (1) & (2) of Section 32 of the Customs Act, 1969 and 32A ibid. can be adjudicated upon by the adjudicating officer under different sub-sections (3) and 32(3A) ibid. not mentioned in the show cause notice in terms of Section 180 (a) of the Customs Act, 1969 read with the judgment of the Honourable Apex Court in the case of Collector of Customs v. Rahim Din reported as 1987 SCMR 1840?

viii) Whether the issuance of show cause notice, and subsequent adjudication under section 179 of the Customs Act, 1969 in those cases where assessments were completed in terms of Section 80 and 83 ibid. is a violation of law laid down by the Honourable Supreme Court in the case of E.A. Evans reported as PLD 1964 SC 536?

ix) Whether the order-in-original and order-in-appeal are non-speaking, non-judicial and perfunctory orders based on non-reading / misreading of the documents on record?

x) Whether cases in which assessments have been finalized under Section 79 (1) & 80 of the Customs Act, 1969 and goods made out of charge under Section 83 ibid. can be adjudicated upon in terms of Section 179 ibid after issuance of the show cause notices?

xi) Whether the order-in-original No.23/2010 dated 01.2.2010 is barred by limitation in terms of provisions of sub-Section 3 of Section 179 of the Customs Act, 1969 and umpteen numbers of judgments of the superior judicial fora in 22 cases in Appeal Nos.638 to 659/2010?"

2. Learned Counsel for the Applicant has contended that the Tribunal has seriously erred in law and facts while passing the impugned judgment; that the impugned Valuation Ruling was issued after fulfilment of all legal requirements, whereas the same remains valid till such time it is altered and/or modified; that the Tribunal's judgment is contrary in itself and is therefore liable to be set-aside.

3. On the other hand, Respondents Counsel has supported the impugned judgment and has contended that the impugned Valuation Ruling was not relevant and applicable as the goods in question were released provisionally under Section 81 of the Customs Act, 1969, ("Act") on the orders of the Director General Valuation and therefore, no show cause notice could have been issued under Section 32 of the Act. He has further contended that the Orders in Original were time barred as they were passed after the stipulated period of 120 days as provided under Section 179(3) of the Act.

4. Heard learned Counsel for the parties and perused the record. Though the learned Tribunal has itself formulated above legal issues and has given an independent finding on them; however, perusal of the record reflects that insofar as the validity of the Valuation Ruling is concerned, a legal question has to be addressed first, that "*whether while hearing Appeals against the order of Collector of Customs (Appeals) passed under Section 193 of the Customs Act, 1969, the Tribunal was competent to look into the validity of the impugned Valuation Rulings*". In our considered view, if the answer to this question is in the negative;

then other issues with respect to the Valuation Ruling need not be addressed.

5. The perusal of the facts available on record reflects that a Valuation Ruling was issued in respect of the impugned goods on 14.02.2008 under Section 25A of the Customs Act, 1969. It is not in dispute that when the goods in question were imported by the Respondents, the Valuation Ruling existed, and the assessment of these goods ought to have been made based on the said Valuation Ruling. However, for some unexplained reasons, the consignments in question were released without applying the said Valuation Ruling. Thereafter, Show Cause Notices were issued to the Respondents individually, under Section 32(3A) read with Sections 32(1) & (2) of the Act and Orders were passed against the Respondents. Such orders were then impugned by the Respondents before the Collector of Customs (Appeals), who vide common Orders in Appeal No. 3710 to 3731 of 2010 dated 26.04.2010 dismissed all the Appeals. Being aggrieved, Respondents preferred Appeals before the Tribunal and through impugned order, the Appeals have been allowed by setting aside the orders of the forums below. The operative part of the order passed by the Collector of Customs (Appeals), which appears to be more relevant for deciding the present controversy, reads as under: -

> "I have thoroughly examined the entire case record and given due consideration to the arguments advanced before me. Before taking up the law points raised by the appellants' counsel, it would be appropriate to examine whether, in light of the provisions of law, the valuation ruling dated 14.02.2008 was applicable to the goods imported by the appellants. As per the provisions of section 25-A of the Act, all goods imported in the country after issuance of the valuation rulings issued under this section are required to be assessed to duty taxes in terms of the customs value of the goods determined through the same and the provision of section 25 of the Act become non-existent to the extent of the goods in respect of which rulings under section 25-A are issued. It is also abundantly clear that the said valuation rulings are valid until the same are either reviewed by the Director General of Customs Valuation under section 25-D of the Act or revised by the issuing authority itself. Since the impugned goods had been imported after issuance of the ruling dated 14.02.2008, there is no doubt that the same had to be assessed to duty taxes in accordance with the terms of the said ruling and any amount discovered, as a result of post importation scrutiny, to have been short-levied as such is recoverable within the meaning of section 32 (3A) of the Act. Therefore, the arguments, (i) that some of the

> consignments had been imported after 90 days of the issuance of the ruling, (ii) that the ruling could not be applied after clearance of the goods and (iii) that the cases could only be re-opened within the meaning of section 195 of the Act are in contradiction of the clear legal position explained above. The precedents quoted by the learned counsel in this behalf are not strictly relevant to the facts and circumstances of the instant cases. The learned counsel has also pleaded that since the relevant sub-sections of the Act had not been quoted in the show cause notices, the whole adjudicating proceedings became null and void. From perusal of the show cause notices issued in these cases, it is apparent that the same contain complete details of how and under what provisions of law, the amount short-levied in these cases was recoverable from the appellants and in the impugned orders it has been clearly stated that the amount is recoverable under section 32(3A) of the Act, besides other provisions of law quoted therein. Thus, the substantial compliance of law has been made and I do not find any illegality in the impugned orders on this count the Hon'ble Supreme Court of Pakistan has held in the case reported as PTCL 2007 CL 260 that non-mention of specific sub-sections of law would not render an adjudication order invalid if substantial compliance of law has been made. The other plea of the learned counsel is that 10 of the 22 impugned orders (passed by the Assistant Collector) are time barred within the meaning of sub-section (3) of section 179 of the Act by few days because the same had not been dispatched to the appellants on the date mentioned on the said orders. In this respect, I observe that late dispatch of the impugned order by a couple of days would not render the whole proceedings null and void. Therefore, the proceedings would need to be finalized on merit: in its order dated 09.12.2003 in Civil Petition No. 775-K of 2003, the Hon'ble Supreme Court of Pakistan has held that "it is always considered desirable that such matters should be decided on merit, in accordance with law and not on sheer technicalities." I accordingly rule that the above-mentioned plea of the appellant's counsel is not tenable.
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> For the reasons recorded above, I rule that the arguments advanced by the learned counsel do not find any support from the evidence on record and the precedents quoted by him are not relevant to the facts and circumstances of the instant cases. I, therefore, hold that the impugned orders are correct in law and on facts and the do not warrant any interference. The appeals are rejected accordingly.
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> This order consists of (15) pages and each page bears my initials and official seal."

6. From perusal of the aforesaid finding, it is clear that the Collector of Customs (Appeals) has dealt with all legal objections so taken on behalf of the Respondents, including but not limited to that the Valuation Ruling remained valid until it was altered; that it was not a case of reopening the assessment orders under Section 195 of the Act; that the relevant provisions of the Act were mentioned in the Show Cause Notices and so on and so forth. The other objection as to the Order-in-Original being time barred was also dealt with by the learned Collector (Appeals).

7. The position which emerges from the relevant facts on record is that, admittedly, the Valuation Ruling in question was

never challenged by the Respondents under Section 25D of the Act. When confronted, learned Counsel appearing on behalf of the Respondents made an effort to argue that the Director General (Valuation) had passed certain orders for provisional release of the consignments; however, he could not show us or establish from the record that on what basis the said orders were passed when admittedly the Valuation Ruling was not under challenge before him under Section 25D of the Act. This fact of not impugning the Valuation Ruling is not in dispute, whereas, the Respondents, instead of doing so, which they could have done as soon as they were served through Show Cause Notices, contested the matter first before the Adjudicating Authority and thereafter before the Collector (Appeals) in terms of Section 193 of the Act. The Respondents, on their own, chose not to impugn the Valuation Ruling issued under Section 25A of the Act; but instead availed remedy of an Appeal before the Collector of Customs (Appeals) and then before the Customs Appellate Tribunal. In that case, the Tribunal, while hearing the Appeals in question, could not have varied or set-aside the said Valuation Ruling as the Tribunal was not hearing Appeals against an Order-in-Revision passed by the Director General (Valuation) under Section 25D of the Act. In the case of *DG Valuation v A. A. Tyre*[1], the question before this Court was whether the Tribunal, while hearing an Appeal under Section 194-A(f) of the Act, against an Order-in Revision passed under Section 25-D ibid, can pass an order of assessment by accepting the declared value as the true transactional value in terms of Section 25 of the Act, when there was neither any assessment order nor an order of the Collector Appeals was before the Tribunal. The court held as under:-

> 7. Having said that, at the same time, the finding of the Tribunal that the values declared by the Respondents cannot be discarded as they have provided complete data; hence same are directed to be accepted under Section 25(1) of the Act is concerned, we

[1] Judgment dated 4.7.2024 in SCRA No.1923 of 2023 & other connected matters.

do not see any reason to sustain this as it is not supported by any material on record, nor is otherwise permissible in law. The jurisdiction being exercised by the Tribunal in hearing the Appeals in question emanates from Section 194-A(f) of the Act read with Section 194-B ibid. The same reads as under:

> **[194A. Appeals to the Appellate Tribunal. -** (1) Any person [or an officer of Customs] aggrieved by any of the following orders may appeal to the Appellate Tribunal against such orders:-
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> [(a) Omitted.]
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> [(a) a decision or order passed by an officer of Customs not below the rank of Additional Collector under section 179.]
>
> [ab) an order passed by the Collector (Appeals) under section 193;]
>
> [(b) Omitted].
>
> (c) an order passed under section 193, as it stood immediately before the appointed day;
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> (d) [an order passed under section 195 by the Board or an officer of Customs not below the rank of an Additional Collector;] [***]:
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> (e) [omitted]
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> **(f) [an order passed in revision by the Director-General Customs Valuation under section 25D, provided that such appeal shall be heard by a special bench consisting of one technical member and one judicial member.]**
>
> [Omitted]
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> **194B. Orders of Appellate Tribunal. -** (1) The Appellate Tribunal may after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit ***confirming, modifying* or *annulling*** the decision or order appealed against. The Appellate Tribunal may record additional evidence and decide the case but shall not remand the case for recording the additional evidence:
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> Provided that the appeal shall be decided within sixty days of filing the appeal or within such extended period as the Tribunal may, for reasons to be recorded in writing, fix:
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> Provided further that in cases, wherein the provisions of clause (s) of section 2 have been invoked, appeals shall be decided within a period of thirty days;]
>
> Provided further that the Appellate Tribunal may stay recovery of the duty and Sales Tax on filing of appeal which order shall remain operative for thirty days and during which period a notice shall be issued to the respondent and after hearing the parties, order may be confirmed or varied as the Tribunal deems fit but stay order shall in no case remain operative for more than one hundred and eighty days.]

8. From a perusal of the above provision, it reflects that there are various orders passed under different provisions of the Act which can be impugned by way of an Appeal before the Tribunal, including but not limited to, orders passed under Section 179, 193 and

195 of the Act. Similarly, an order passed under Section 25D of the Act can also be appealed, as is the case in hand. At the same time, an assessment order passed under Section 80 of the Act can be impugned before the Collector of Customs (Appeals) under Section 193 of the Act, and such order of the Collector (Appeals) can be further challenged before the Tribunal under Section 194A(ab) of the Act. The order of assessment under Section 80 of the Act can be an order in respect of determination of value in terms of Section 25 of the Act; but at the same time, any order of such valuation assessment based on a Valuation Ruling issued under Section 25A ibid cannot be impugned before the Collector of Customs (Appeals) and even if it is impugned, the very assessment order cannot be altered or modified till such time the Valuation Ruling remains in the field. In exceptional cases, it can be impugned to a very limited extent as to the very applicability of the Valuation Ruling on the imported product. However, for an aggrieved person, it is required that the said Valuation Ruling be challenged as provided in law, and only when such Ruling is affirmed, modified or even set-aside, the said assessment order can be altered or modified accordingly. This is because a valuation ruling is a statutory ruling that has the force of law. The Valuation Rulings issued under section 25A of the Act is a notified ruling, which is applicable and binding until revised or rescinded by the competent authority[2]. This is because once the Director General Valuation issues a Valuation Ruling, it has to be duly notified, as provided under the Customs General Orders, 2002. Subsection (2A) of section 25A categorically provides that where there is a conflict in the customs value, the Director General Valuation shall determine the applicable customs value[3]. Hence, section 25A of the Act itself provides for a dispute resolution mechanism where the Valuation Ruling for the purposes of assessed value is disputed[4].

9. The jurisdiction being exercised by the Tribunal in the instant matter was in respect of Appeals against the orders passed by the Director General Customs (Valuation) under Section 25-D of the Act, which provides a Revision against a Valuation ruling issued in terms of Section 25A of the Act. The Tribunal's jurisdiction in these matters is confined to this extent only and is not in respect of any assessment orders passed by the lower forums under Section 80 of the Act. In fact, the assessments in these matters were never a subject issue as they were statutorily based on the values determined and made applicable by way of a Valuation Ruling issued under Section 25A ibid. The Valuation Rulings can be impugned further under Section 25D of the Act through a Revision and then a further Appeal as above. This difference in conferment of jurisdiction upon the Tribunal is pertinent and vital when dealing with Appeals under this provision of the Act. All Courts and Tribunals constituted under the Constitution and the law, have only such jurisdiction that has been conferred upon them by the Constitution and the law[5]; and, no Court can exercise any jurisdiction in any matter before it unless such

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[2] Collector of Customs v Wasim Radio Traders (2023 SCMR 1716)
[3] --do--
[4] --do--
[5] Habib Bank Limited v Saqib Mahmood [2021 PLC (CS) 1495]

> jurisdiction has been conferred to it by the Constitution or law[6]. Therefore, the Tribunal, while hearing Appeals under this provision of the Act, i.e. Section 194-A(f) ibid, cannot exercise any powers to make an assessment order accepting the declared values as transactional values under Section 25(1) of the Act. Once it is concluded that the Valuation Ruling issued under Section 25-A of the Act read with Order-in-Revision under Section 25-D of the Act cannot be sustained, it can only set-aside the Ruling; but cannot confer upon itself or assume any jurisdiction to exercise any powers under Section 25(1) of the Act and accept the declared values as transactional values. This is so because the Tribunal is not hearing an Appeal against an assessment order passed under Section 80 of the Act, but against an order passed under Section 25-D of the Act.

8. It has been held by the Court that the order of assessment under Section 80 of the Act can be an order in respect of the determination of value in terms of Section 25 of the Act; but at the same time, any order of such valuation assessment based on a Valuation Ruling issued under Section 25A ibid cannot be impugned before the Collector of Customs (Appeals) and even if it is impugned, the very assessment order cannot be altered or modified till such time the Valuation Ruling remains in the field. In exceptional cases, it can be impugned to a very limited extent as to the very applicability of the Valuation Ruling on the imported product. However, for an aggrieved person, it is required that the said Valuation Ruling be challenged as provided in law, and only when such Ruling is affirmed, modified or even set-aside, the said assessment order can be altered or modified accordingly. This is because a valuation ruling is a statutory ruling that has the force of law. The Valuation Rulings issued under section 25A of the Act is a notified ruling, which is applicable and binding until revised or rescinded by the competent authority[7]. This is because once the Director General Valuation issues a Valuation Ruling, it has to be duly notified, as provided under the Customs General Orders, 2002. Subsection (2A) of section 25A categorically provides that where there is a conflict in the customs value, the Director General Valuation shall determine

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[6] Malik Iqbal Hassan v Defence Housing Authority (PLD 2019 Lahore 145)
[7] Collector of Customs v Wasim Radio Traders (2023 SCMR 1716)

the applicable customs value[8]. Hence, section 25A of the Act itself provides for a dispute resolution mechanism where the Valuation Ruling for the purposes of assessed value is disputed[9]. It has been further held that the jurisdiction being exercised by the Tribunal in the instant matter was in respect of Appeals against the orders passed by the Director General Customs (Valuation) under Section 25-D of the Act, which provides a Revision against a Valuation ruling issued in terms of Section 25A of the Act. The Tribunal's jurisdiction in these matters is confined to this extent only and is not in respect of any assessment orders passed by the lower forums under Section 80 of the Act. The Court has further held that this difference in conferment of jurisdiction upon the Tribunal is pertinent and vital when dealing with Appeals under this provision of the Act. All Courts and Tribunals constituted under the Constitution and the law, have only such jurisdiction that has been conferred upon them by the Constitution and the law[10]; and, no Court can exercise any jurisdiction in any matter before it unless such jurisdiction has been conferred to it by the Constitution or law[11]. Therefore, the Tribunal, while hearing Appeals under Section 194A(ab) of the Act against an order of Collector of Customs (Appeals) passed under Section 193 of the Act, cannot alter or modify or even set-aside the Valuation Ruling duly issued under Section 25A of the Act. For that, the aggrieved person has to impugn the same in terms of Section 25D ibid and thereafter, if further aggrieved, before the Tribunal in terms of Section 194-A(f) ibid. In view of this position, in our considered view, the Tribunal has acted in excess of jurisdiction while dealing with all the above questions regarding the merits of the Valuation Ruling [**barring questions Nos. (v), (vi), (vii), (viii), (x) & (xi) which are being decided separately hereinafter**], and therefore, we need not attend to all the

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[8] Collector of Customs v Wasim Radio Traders (2023 SCMR 1716)
[9] Collector of Customs v Wasim Radio Traders (2023 SCMR 1716)
[10] Habib Bank Limited v Saqib Mahmood [2021 PLC (CS) 1495]
[11] Malik Iqbal Hassan v Defence Housing Authority (PLD 2019 Lahore 145)

said issues / questions on their own merits and hold that the Tribunal in the instant matter had no jurisdiction to set-aside the Valuation Ruling in question as it was never challenged by the Respondents as required under the Act. Accordingly, all issues / questions framed by the Tribunal regarding the validity of the impugned Valuation Ruling are answered against the Respondents.

Question / Legal Issue No.(v)

> Whether issuance of notice under sub-sections (2) or (3) of Section 32 of the Customs Act, 1969 for short levied amount of revenue was competent in these cases where assessments were provisionally made under section 81 of the Customs Act, 1969?

9. This issue is with respect to the issuance of a Show Cause Notice under Section 32(2) & (3) of the Act for goods which have been cleared provisionally under Section 81 of the Act. The Tribunal, while deciding this issue in favor of the Respondents, has primarily relied upon *Abdul Aziz Ayoob*[12] and has come to a conclusion that when goods have been provisionally released under Section 81 of the Act; neither subsection (2) nor subsection (3) of Section 32 of the Act would be applicable, and therefore, the notices issued to the Respondents were without jurisdiction and lawful authority. However, subsequently in ***MIA Corporation (Pvt.) Ltd***[13] the Hon'ble Supreme Court has also dealt with this issue and has held otherwise by setting aside a judgment of this Court; whereby, this Court had come to the same conclusion as above. It has been held by the Hon'ble Supreme Court that the finality of the assessment under section 81 makes the provisional assessment final and not the declaration made by the importer under section 79. The assessment made under section 80 does not bar subsequent proceedings in connection with the offence under section 32 of the Act of 1969. It has been

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[12] Abdul Aziz Ayoob Vs. Assistant Collector of Customs (PTCL 1990 CL. 1041)
[13] Collector of Customs Port Muhammad Bin Qasim, MIA Corporation (Pvt.) Ltd (2023 SCMR 2052),

further held that the proceedings would not be barred under section 32 if the provisional assessment becomes final under section 81 of the Act. It has been further held that the finality of provisional assessment in terms of section 81(4) or otherwise would be covered under the expression final assessment used by the legislature in clause (b) of section 32(5) of the Act. Finally, the Supreme Court has held that the finality of assessment, whether under section 80 or section 81, as the case may be, does not preclude invocation of the offence under section 32, nor proceedings for recovery of duty, taxes or charge that has not been levied, short levied or erroneously refunded within the prescribed time from the relevant date. The finality of assessment under section 80 or section 81, as the case may be, is distinct from the offence described under section 32 and does not bar the proceedings thereunder, provided they are within the limitation period explicitly specified in the case of each eventuality separately. Since the law has now been interpreted and settled by the Hon'ble Supreme Court, the earlier view of this Court in the case of *Abdul Aziz Ayoob* (Supra), and followed in a number of cases thereafter, cannot hold field. In view of such a position, the finding of the Tribunal in this regard cannot be sustained and the issue is answered against the Respondents herein.

Questions /Legal issue Nos. (vi) & (vii)

(vi) Whether the show cause notices issued in these cases are defective and deficient and hence ab initio null and void in material particulars for want of non-mentioning of sub- sections (3) and 3A of Section 32 of the Customs Act, by the adjudicating officer?

(vii) Whether show cause notice issued under sub- sections (1) & (2) of Section 32 of the Customs Act, 1969 and 32A ibid. can be adjudicated upon by the adjudicating officer under different sub-sections (3) and 32(3A) ibid. not mentioned in the show cause notice in terms of Section 180 (a) of the Customs Act, 1969 read with the judgment of the Honourable Apex Court in the case of Collector of Customs v. Rahim Din reported as 1987 SCMR 1840?

10. Both these questions are interlinked, whereby, it has been held by the Tribunal that the Show Cause Notices were not properly issued as certain Sections / Sub-sections of the relevant provisions were not mentioned therein. However, a perusal of the Show Cause Notice dated 29.09.2009[14] clearly reflects that substantial compliance was made and in addition to Sections 32(1) & (2), 32A of the Act has also been invoked independently; and therefore, the finding of the Tribunal in this context is also flawed and based on a wrong appreciation of law. Not only this, the entire facts that have been narrated in the Show Cause Notices including the short levied amount; and therefore, we do not see any illegality in the contents of the Show Cause Notices, including the alleged non-mentioning of the relevant provision of Section 32 of the Act. In our considered view, the Tribunal has seriously erred in law while arriving at such conclusion and was not assisted properly in this regard inasmuch as the Hon'ble Supreme Court in somewhat identical facts in ***Zamindara Paper & Board Mills***[15] has already dealt with this issue, whereby, a judgment[16] of the learned Lahore High Court which had held that since the show cause notice did not contain specific provision of law and the rules, was ineffective and void, has been set-aside. The Hon'ble Supreme Court has held that that mere non-mentioning of sub-sections or sub-rules in the body of the show cause, wherein, otherwise, substantial compliance has been made by making reference of the rules to identify the period of time during which tax has been allegedly evaded, would not by itself render the show cause notice as illegal. It has been further held that that instead of taking into consideration technicalities, the Court looks into the matter with different angles, namely as to whether substantial compliance has been made or if any of the sub-rule has been omitted, then what prejudice is likely to cause

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[14] available in SCRA No. 431/2011
[15] (Collector of Sales Tax & CE, Vs. Zamindara Paper & Board Mills PTCL 2007 CL. 260)
[16] (Reported as 2003 PTD 1257)

to the party to whom the show-cause notice is given. In conclusion the judgment of the learned Lahore High Court was set-aside on the ground that no prejudice shall be caused to the respondents because the substantial compliance of the relevant rules has been made. Accordingly, both these legal issues are answered against the Respondents in the above terms.

Questions /Legal issue Nos. (viii) & (x)

(viii) Whether the issuance of show cause notice, and subsequent adjudication under section 179 of the Customs Act, 1969 in those cases where assessments were completed in terms of Section 80 and 83 ibid. is a violation of law laid down by the Honourable Supreme Court in the case of E.A. Evans reported as PLD 1964 SC 536?

(x) Whether cases in which assessments have been finalized under Section 79 (1) & 80 of the Customs Act, 1969 and goods made out of charge under Section 83 ibid. can be adjudicated upon in terms of Section 179 ibid after issuance of the show cause notices?

11. Both the above issues are also linked with each other and are being addressed jointly. Again the Tribunal has come to a conclusion that once assessments have been finalized under Section 80 of the Act and goods have been out of charge under Section 83 (ibid), no Adjudication proceedings can be initiated under Section 32 read with Section 179 of the Act, and instead, the only recourse available to the department for any further action is under Section 195 of the Act by way of reopening such assessment. This finding of the Tribunal is also incorrect and based on mis-appreciation of law as Section 195 of the Act is an independent Section and is not to be invoked in all such situations, including a situation; where goods have been released after passing of an assessment order under Section 80 read with Section 83 of the Act. The provisions of Section 32 of the Act can always be invoked within the limitation period provided therein, if the situation so demands. In fact, the provision of Section 195 ibid has to be exercised sparingly and only in exceptional circumstances, and it is not mandatory that, in each case, such

jurisdiction be exercised by the department. If the limitation period has not expired, and a case is made out by the department to invoke Section 32 of the Act, for recovery of any duty and taxes not levied or short levied, then the department cannot be asked for or compelled to invoke the provisions of Section 195 ibid necessarily. This approach of the Tribunal is not in consonance with the Act in question and the conclusion so drawn by the Tribunal on such a basis is not appreciable. Accordingly, both these issues are also answered against the Respondents.

Question / Legal Issue No.(xi)

(xi) Whether the order-in-original No.23/2010 dated 01.2.2010 is barred by limitation in terms of provisions of sub-Section 3 of Section 179 of the Customs Act, 1969 and umpteen numbers of judgments of the superior judicial fora in 22 cases in Appeal Nos.638 to 659/2010?"

12. This brings us to the last issue that whether the Orders-in-Original were time barred. The Tribunal has held that ONO's were passed beyond the stipulated period provided under Section 179(3) of the Act. It would be advantageous to refer to the finding of the Tribunal in this regard, which reads as under:-

> "27. As regards issue No. (xi), the show cause notice in this case was issued on 08.10.2009, the date shown on the title page of order in original is 01.02.2010. The booking date as per courier certificate is 17.02.2010 and the order was delivered to appellant on 18.2.2010. The provisions of Section 179(3) of the Customs Act, 1969 required that the case should be adjudicated within a period of 120 days from the date of the show cause notice. The said period of 120 days expired on 05.02.2010 and the order in original is therefore, barred by (12) days. Neither the order in original No. 23/2010 dated 01.02.2010 speaks of any approval or any extension by the Collector during this adjudication period nor the departmental representative who possessed the relevant adjudication file at the time of hearing could show any such extension by the Collector. The order in original has been dated 1.2.2010 to mislead the concerned authorities regarding the expiry of the stipulated period of 120 days from the date of the show cause notice and which expired on 5.2.2010. The time period in such cases is to be calculated from the booking date of the documents with the courier. The impugned order in original has been issued beyond the stipulated limit of 120 days and is therefore, manifestly time barred with reference to the date of show cause notice which is 08.10.2009 as no reasoned valid and lawful extension in terms of the proviso to Section 179(3) of the Customs Act has been produced by the respondent. The limitation period for adjudication in terms of Section 179(3) ibid. is mandatory in nature and not a directory one and that "once limitation has started to run and had come to at end the assesse has acquired a vested right of escapement of assessment by lapse of time". This view is also supported by the judgments of the superior judicial fora reported as 2002 MLD 180, 2003 PTD 1354, 2003 PTD 1797, 2008 PTD 60, 2008 PTD 578, 2009 PTD 762, wherein the adjudication decision has

> been observed to be barred by limitation period since it becomes unlawful and void on the ground of time bar. As such issue No. (xi) is answered in the affirmative.
>
> 28. As regards the rest of the (4) appeals, the limitation period expired on 12.1.2010. The case record does not show whether the extension in these (4) cases was procured from the Collector with the initial period of (9) months as envisaged by the judgment of the Honorable Supreme Court reported as 1995 SCMR 1881. The departmental representative when confronted with the production of the relevant extension from the Collector failed to produce the same before this forum."

13. From perusal of the above finding of the Tribunal, it appears that the Tribunal has seriously erred in observing "the time period in such cases is to be calculated from ***the booking date of the documents with the courier***. The impugned order in original has been issued beyond the stipulated limit of 120 days and is therefore, manifestly time barred with reference to the date of show cause notice which is 08.10.2009…". We are unable to comprehend that as to from where the Tribunal has come to this conclusion that notwithstanding the date of the orders, it is the date of dispatch, which is relevant for the purposes of calculating the stipulated period provided under Section 179(ibid). The law provides that *"cases shall be decided within 120 days*[17] *of the issuance of show cause notice.."*; however, the Tribunal has read into this provision that the date of dispatch of an order is the actual date on which the ONO has been passed. This finding is not only erroneous; but also against the law. The Orders-in-Original are dated 01.02.2010; whereas, as per Tribunal's own finding, the period of 120 days expired on 05.02.2010; but since the orders were dispatched subsequently, it has been held that the Orders-in-Original are time barred. We are afraid this finding of the Tribunal is incorrect and is not supported by the relevant provisions of law inasmuch as, in that case, the concerned Collector was competent to extend the said period by another 30 days. Once it has come on record that the orders were passed before the expiry of the limitation period, then placing reliance on some courier receipts produced by the Respondents is of no help on the ground that orders were dispatched belatedly and the date of dispatch is the date of the ONO. In view of such

[17] Applicable at the relevant time in the year 2009-2010

position, it is held that the ONO's in question were passed within the time line provided under Section 179(3) of the Act; and therefore, the finding of the Tribunal to this extent is hereby set-aside and the issue is answered accordingly.

14. In view of hereinabove facts and circumstances the order of the Tribunal cannot be sustained and is liable to be set-aside; however, the proposed issues / questions are rephrased as follows.

> **1. Whether in the facts and circumstances of the case, the Tribunal while hearing Appeals against orders of the Collector (Appeals) passed under Section 193 of the Act, was justified in setting aside a Valuation Ruling issued under Section 25-A of the Act, against which no Revision was preferred under Section 25D (ibid)?**
>
> **2. Whether in the facts and circumstances of the cases, the Tribunal was justified in holding that Orders-in-Original were time barred in terms of Section 179 of the Act?**
>
> **3. Whether in the facts and circumstances of the case, the Tribunal was justified in holding that when a consignment has been released provisionally under Section 81 of the Act, the provisions of Section 32(ibid) cannot be invoked?**
>
> **4. Whether in the facts and circumstances of the case, the Tribunal was justified in holding that the Show Cause Notices in these matters were not issued in accordance with law?**
>
> **5. Whether in the facts and circumstances of the case, the Tribunal was justified in holding that once the assessment has been made under Section 80 & 83 of the Act, no proceedings can be initiated in terms of Section 32 read with Section 179 of the Act?**

15. All the above questions are answered in the ***negative***; in favour of the Applicant and against the Respondents. As a consequence, thereof, all these Reference Applications are ***allowed*** and the impugned Judgment of the Tribunal dated 30.11.2010 is set-aside. Office is directed to sent copy of this order to Customs Appellate Tribunal, Karachi, in terms of sub-section (5) of Section 196 of Customs Act, 1969. Office shall also place copy of this order in all connected Reference Applications.

Dated: 10.07.2024

J U D G E

J U D G E

Ayaz