

# **IN THE HIGH COURT OF SINDH AT KARACHI**

Present: Mr. Justice Muhammad Junaid Ghaffar  
Mr. Justice Zulfiqar Ahmad Khan.

1.	C. P. No. D- 4972 of 2023	Shamim Ahmed & another Vs. The Federation of Pakistan & others.
2.	C.P. No. D-5173 of 2023	M/s. Ali Containers (Pvt) Ltd. Vs. The Federation of Pakistan & others.
3.	C.P. No. D- 5966 of 2023	M/s. A.N Industries (Pvt.) Limited Vs. The Federation of Pakistan & others.
4.	C.P. No. D- 5626 of 2023	Abdul Wahid Vs. The Federation of Pakistan & others.

**For Petitioners in all Petitions:** M/s. Saad Shafiq Siddiqui, Imran Iqbal Khan, Muhammad Adeel Awan, Aneel Zia, Saima Syed, Asadullah Jan & Rana Sakhawat Ali, Advocates.

**For Respondents in all Petitions:** M/s. Sardar Zafar Hussain, Muhammad Khalil Dogar, Fahim Raza Khuhro, Ghulam Mujtaba Sahito, Alqamah Bin Mehmood and Muhammad Ishaq Pirzada, Advocates.  
Mr. Qazi Ayazuddin Qureshi, Assistant Attorney General.

Mr. Khalid Jawed Khan, Advocate/Amicus Curiae.

Muhammad Nauman Tashfeen, Additional Director (Valuation), Azka Zafar Rana, Deputy Director (Valuation), Tariq Aziz, Assistant Collector (SAPT Collectorate), Amin Haider Shah, Deputy Collector (West Collectorate) and Rahat Naseem, Assistant Collector, (SAPT Collectorate).

**Dates of hearing:** 05.12.2023, 19.12.2023 and 20.12.2023.

**Date of Judgment:** 31.01.2024.

## **J U D G M E N T**

**Muhammad Junaid Ghaffar, J:** In all these petitions, though the prayers sought are differently worded, however, a common legal question is involved as in essence, they seek release of the imported goods by way of an interim order from this Court pending decisions on their challenge to Valuation Rulings issued under Section 25A of the Customs Act, 1969 (“**Act**”), either before the Director General Valuation under Section 25D of the Act, or the Customs Appellate Tribunal under Section 194A *ibid*. The issue has triggered now as previously, on the directions of this Court, the Respondents were granting provisional release in terms of Section

81 of the Act. However, after pronouncement of the Supreme Court in the case of ***Collector of Customs Lahore vs. Wasim Radio Traders, Lahore (2023 SCMR 1716)***, the said orders could no more be passed by this Court. By way of this common judgment we intend to decide all the listed petitions.

2. Learned Counsel for the Petitioners<sup>1</sup> have contended that the Petitioners have impugned various Valuation Rulings issued under Section 25-A of the Customs Act, 1969; and either Revisions under Section 25-D of the Act or further Appeals under Section 194-A of the Act are pending before the DG Valuation or Customs Appellate Tribunal respectively, whereas, during such pendency of these proceedings, fresh consignments of the Petitioners have arrived, but the Customs Department has refused to allow any interim relief by way of deposit of the disputed amount of duties and taxes; hence these petitions. According to them, the Petitioners are not seeking any provisional release under Section 81 of the Act as after passing of the judgment in the case of ***Wasim Radio Traders, (Supra)***, no such relief can be granted; however, it is the case of the Petitioners that this Court while exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, can always grant such a relief of interim nature, notwithstanding the judgment as above. They have further contended that the Petitioners are remediless and are being compelled to pay duties and taxes on the basis of Valuation Rulings, which are already under challenge; hence the relief being sought through these petitions may be granted.

3. On the other hand, Mr. Khalid Jawed Khan, Advocate, appointed as Amicus Curiae<sup>2</sup> has contended that in the light of Section 81 (3<sup>rd</sup> Proviso) of the Act and Judgment of Supreme Court in case of ***Wasim Radio Traders (Supra)***, no application for provisional release of goods can be entertained in presence of Valuation Ruling by any Forum, Authority, Tribunal or Court. He has further submitted that in the light of the provisions of the Act, which provide forum for challenging a Valuation Ruling before DG

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<sup>1</sup> Led by Mr. Saad Shafiq Siddiqui in CP No.5966 of 2023

<sup>2</sup> Vide order dated 05.12.2023

Valuation or Tribunal, the High Court will not entertain any challenge to a Valuation Ruling as recently reaffirmed by Supreme Court in the case of **Mian Azam Waheed**<sup>3</sup>. According to him, the forums below i.e. DG Valuation and the Tribunal while hearing a Revision under Section 25D of the Act and an Appeal under Section 194A of the Act, can grant interim relief of releasing the goods by securing the differential amount with the concerned Collectorate, unless there is compelling reason to refuse such release, as per settled law<sup>4</sup>, where a forum can grant final relief, interim relief can also be granted. He has further submitted that where the forums below before whom the Revision or Appeal is pending, are either dysfunctional or are not exercising jurisdiction expeditiously, including application for interim relief, the High Court in exercise of its jurisdiction under Article 199 may allow the same interim relief as may be granted by those forums<sup>5</sup>. According to him a similar limited relief is granted by the High Courts<sup>6</sup> under Article 199 of the Constitution in cases where Appeal may be pending before Commissioner or Collector (Appeals) and recovery proceedings are initiated by the department. Per learned Amicus, the relief so asked for is not a provisional release under Section 81 of the Act and will be subject to outcome of proceedings pending before the forums below. Therefore, according to him, this Court, though in a limited manner and with restrictions it deems fit, can grant the relief prayed for to the Petitioners, and the judgment of the Supreme Court in the case of **Waseem Radio Traders (Supra)** will not be an impediment in granting such relief.

4. The Department's Counsel as well as learned Assistant Attorney General have opposed these Petitions on the ground that no relief of any provisional assessment can be granted in view of the judgment of the Supreme Court in the case of **M/s Wasim Radio Traders** (supra); whereas, even otherwise the third Proviso to

<sup>3</sup> Mian Azam Waheed and others vs. The Collector of Customs (2023 SCMR 1247)

<sup>4</sup> Syed Imran Raza Zaidi, Vs. Government of the Punjab (1996 SCMR 645), Additional Collector Lahore Vs. Abdullah Sugar Mills Ltd. (2003 SCMR 1026), Pfizer Pakistan (Pvt.) Ltd. Vs. Federation of Pakistan (2019 MLD 1849), Fauji Oil Terminal and Distribution Company Ltd. Vs. Pakistan (2012 PTD 1762)

<sup>5</sup> United Bank Limited v Akbar Agencies PLD 1987 Kar 81, Sarfaraz Saleem v Federation of Pakistan PLD 2014 SC 232.

<sup>6</sup> Z.N Exports (Pvt) Ltd. Vs. Collector of Sales Tax (2003 PTD 1746), Shell Pakistan Limited Vs. Punjab (2020 PTD 1607), Pakistan Oil Fields Ltd. Vs. Federation of Pakistan (2016 PTD 1590), Huawei Technologies Pakistan (Pvt.) Ltd. Vs. Commissioner Inland Revenue (2016 PTD 1799), Muhammad Asim Vs. Federation of Pakistan (2015 PTCL (CL) 667), Touheed Leather Vs. Additional Collector (2010 PTD 453).

Section 81 (ibid) also prohibits any such relief. They have further contended that the jurisdiction under Article 199 of the Constitution cannot be exercised merely to grant an interim relief, as neither any final relief has been sought; nor can it be granted by this Court. It has been further contended that even if any extra duty has been paid on the basis of an assessment made pursuant to a Valuation Ruling, the same can be refunded as and when the Petitioners are finally successful in their challenge to such Valuation Rulings.

5. We have heard all the learned Counsel as well as learned Amicus and learned Assistant Attorney General and have also perused the record. It appears that the Petitioners have imported various consignments and their Goods Declarations are being assessed on the basis of Valuation Rulings issued for such products under Section 25-A of the Act and the Petitioners being aggrieved have sought further remedy in terms of Section 25-D of the Act by way of Revision before the DG (Valuation). In some of the cases, Revisions have been dismissed, against which a further Appeal has been preferred before the Customs Appellate Tribunal in terms of Section 194-A of the Act. It is the case of the Petitioners that before both the forums, no interim relief is being granted pursuant to the judgment of Supreme Court in the case of ***M/s Wasim Radio Traders*** (supra) and so also for the fact that third Proviso to Section 81 of the Act also prohibits any such interim relief. Before proceeding further, it may be of relevance to observe that the judgment in the case of ***M/s Wasim Radio Traders*** (supra) is a case arising out of a judgment by the learned Lahore High Court<sup>7</sup> wherein, the learned Lahore High Court had given directions to the Customs Authorities to allow provisional release of the Petitioners' consignments under Section 81 of the Act as they had challenged or impugned the Valuation Rulings. The relevant finding of the learned Lahore High Court is as under;

9. The bare reading of section 81 of the Customs Act, 1969 read with Rule 125 of the Customs Rules, 2001 clearly shows that in case of dispute with regard to the value of imported goods, or any other dispute which requires further enquiry, the importer has the right to get his goods released under section 81 of the Customs Act, 1969.

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<sup>7</sup> Wasim Radio Traders Vs. Federation of Pakistan 2014 PTD 525.

10. The purpose of these provisions is not only to protect the revenue of the State but also provide smooth flow of trade. If the interpretation given by the learned counsel for the respondents/ department is accepted it will result that the importers will left at the mercy of the Customs Authorities which cannot be the intention of the legislatures.

11. Therefore, whenever there is a dispute between the importer and the appropriate officer of custom with regard to the value of imported goods the importer have a right to get his goods cleared provisionally under section 81 of the Custom Act, 1969.

12. In the present case, there is a dispute between the importer and appropriate officer of customs regarding value, therefore, importer for the release of their goods under section 81 of the Customs Act, 1969, on payment of duty and taxes on the declared value whereas difference between the declared value and the value under Valuation Rulings has to be secured by way of bank guarantee to the satisfaction of the Collector concerned.

6. The above judgment was impugned by the department and Supreme Court in ***Waseem Radio Traders (Supra)*** was pleased to set-aside the same with further observations in the following manner:

“8. The dispute is with reference to whether section 81 of the Act can be invoked where a Valuation Ruling has been issued. Section 81 of the Act is reproduced hereunder:

**"81. Provisional determination of liability.** ---(1) Where it is not possible for an officer of Customs during the checking of the goods declaration to satisfy himself of the correctness of the assessment of the goods made under section 79 or 131, for reasons that the goods require chemical or other test or a further inquiry, an officer, not below the rank of Assistant Collector of Customs, may order that the duty, taxes and other charges payable on such goods, be determined provisionally:

Provided that the importer, save in the case of goods entered for warehousing, pays such additional amount on the basis of provisional assessment or furnishes bank guarantee or pay order of a scheduled bank along with an indemnity bond for the payment thereof as the said officer deems sufficient to meet the likely differential between the final determination of duty, taxes and other charges over the amount determined provisionally:

Provided further that there shall be no provisional assessment under this section if no differential amount of duty and taxes and other charges is paid or secured against bank guarantee or pay order.

(2) Where any goods are allowed to be cleared or delivered on the basis of such provisional determination, the amount of duty, taxes and charges correctly payable on those goods shall be determined within six months of the date of provisional determination:

Provided that the Collector of Customs or, as the case may be, Director of Valuation, may in circumstances of exceptional nature and after recording such circumstances, extend the period for final determination which shall in no case exceed ninety days:

Provided further that any period, during which the proceedings are adjourned on account of a stay order or for want of clarification from the Board or the time taken through adjournment by the importer, shall be excluded for the computation of aforesaid periods.

(3) On completion of final determination, the amount already paid or guaranteed shall be adjusted against the amount payable on the basis of final determination, and the difference between the two amounts shall be paid forthwith to or by the importer, as the case may be.

(4) If the final determination is not made with the period specified in subsection (2), the provisional determination shall, in the absence of any new evidence, be deemed to be the final determination.

(5) On completion of final determination under subsection (3) or (4), the appropriate officer shall issue an order for adjustment, refund or recovery of amount determined, as the case may be.

*Explanation.* ---Provisional assessment means the amount of duties and taxes paid or secured against bank guarantee or pay order."

This Section prescribes the manner in which goods are provisionally assessed so as to ascertain duty and taxes, which have to be paid. This Section is invoked where the officer of Customs, at the time of checking the goods declaration, is unable to satisfy themselves as to the correctness of the assessment of the goods, as the goods require chemical or other testing or further enquiry. Essentially the assessing officer doubts the accuracy of the declared value given by the importer and seeks technical assistance to ascertain the value of the goods. Accordingly, the goods cannot be assessed as per the declared value as some further clarity is needed regarding the goods, in order to assess them. Hence, a provisional determination of the liability is made and the goods are released, subject to payment of security by way of bank guarantee or pay order of the differential amount. The purpose of section 81 of the Act is to make a provisional determination in a situation where an assessment cannot be made. In order to invoke section 81 of the Act, the Custom Officers must first satisfy themselves that it is not possible to assess the correctness of the value because it is necessary to first test the goods for further enquiry. Then and only then can the importer have the goods provisionally released under section 81 of the Act. Therefore, we find that, in the first instance, section 81 of the Act cannot be claimed as of right because the conditions stipulated in section 81 of the Act have to be attracted, which means that the Customs Officer has to find that the goods cannot be assessed and has to conclude that some form of testing or further inquiry is necessary. Accordingly, this Section cannot apply where a Valuation Ruling has been issued as the Valuation Ruling represents the declared value for the assessment of the goods or category of goods, which the importer is required to pay. As the Valuation Ruling is a formal decision providing the assessment value of the goods the requirements of section 81 of the Act per se are not invoked. Consequently, where the goods are pre-assessed or capable of assessment, section 81 of the Act does not apply.

9. The Respondents have relied upon Rule 125(2) of the Rules in response to the issues raised with respect to section 81 of the Act, Rule 125(2) of the Rules provides as follows:

"125(2) Nothing contained in this Chapter shall bar the claim of the importer for provisional release of goods under the section 81 of the Act or claim of the customs to assess the goods under the section 80 of the Act read with section 25 thereof."

As per this Rule, where there is a dispute with respect to the value of the goods, the importer can claim provisional release of the goods

under section 81 of the Act. However, Rule 125 of the Rules does not apply to cases where a Valuation Ruling has been issued because remedy against a Valuation Ruling lies under section 25A(2) or under section 25D in the form of a review petition before the Director General Valuation. This remedy of review specifically allows an aggrieved person to challenge a Valuation Ruling such that the existing Ruling can be either rescinded or a fresh valuation can be ordered. Hence, the scope of the relief against a Valuation Ruling is such that the Ruling is either rescinded or else has to be decided afresh. Accordingly, Rule 125(2) of the Rules is not applicable to cases where there is a Valuation Ruling, as it applies to cases where section 81 of the Act is applicable.

10. Therefore, in view of the aforesaid, we find that the impugned orders are against the mandate of the Act, and are therefore, set aside. Accordingly, these Civil Petitions are converted into Appeals and the same are allowed.”

7. From perusal of the aforesaid findings, it reflects that insofar as any provisional release of consignments under Section 81 of the Act assessed by the department on the basis of a Valuation Ruling issued under Section 25A *ibid* is concerned, the Supreme Court has not approved the findings of the learned Lahore High Court that such a provisional release can be allowed, notwithstanding the fact that against such Valuation Ruling a Revision under Section 25-D (*ibid*) is pending. The Supreme Court has held that a Valuation Ruling is a statutory ruling and in view of such position there cannot be a concept of any provisional release as the same would not fall within the ambit of Section 81 of the Act. It is also relevant to observe that subsequent to Lahore High Court’s judgment a third proviso<sup>8</sup> to Section 81 of the Act has now been added; whereby, the provisional relief is now further prohibited in the given facts and circumstances.

8. Now the moot question before us is that whether in the facts and circumstances as above, this Court while exercising jurisdiction under Article 199 of the Constitution can grant any interim relief by directing to secure or deposit differential amount of duties and taxes and order release of the consignment upon payment of duties and taxes on the declared transactional values. It is not in dispute that under the Act, an alternate remedy of a Revision is provided against a Valuation Ruling in terms of Section 25-D of the Act before DG

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<sup>8</sup> Provided further that no provisional determination of value shall be allowed in those cases where a Valuation Ruling (VR), issued under section 25A, is in field, irrespective of the fact whether any review or revision against such Valuation Ruling is pending in terms of section 25D or relevant rules, as the case may be.

(Valuation), and thereafter by way of an Appeal under Section 194-A of the Act before the Customs Appellate Tribunal and finally before this Court by way of a Reference Application under Section 196 *ibid*. Therefore, invoking any writ jurisdiction against a Valuation Ruling issued under Section 25A of the Act directly, is barred by law. Even if this Court grants any interim relief until such time the forums below decide the matter, it would amount to assuming jurisdiction over the *lis*, for which the petitioners have invoked the alternate remedy and the remedial process has been set in motion. In our considered view, assuming Constitutional jurisdiction in the given facts would amount to frustrate the statutory remedial process. At the same time, even otherwise, such a jurisdiction being discretionary, cannot be exercised in every run of a mill case in the manner as has been contended on behalf of the Petitioner's as well as learned Amicus. It is also of utmost importance to note that an ad-interim relief is only granted by a Court while exercising jurisdiction under Article 199 of the Constitution, when the Court thinks it appropriate that a case for further indulgence for a final relief is made out, whereas, the Petitioner has no other remedy in law. Admittedly, in these matters, the final relief as to the validity and correctness of the Valuation Ruling is not to be granted by this Court while exercising jurisdiction under Article 199 of the Constitution. Merely for the fact that the forums below have either failed to exercise any jurisdiction / discretion in these matters; or are barred in law from exercising any such jurisdiction / discretion, this Court cannot, *ipso facto* grant an ad-interim relief by substituting itself for the said authorities. It may be so in certain peculiar facts and circumstances of a case; however, it is not so in the present facts. Moreover, if this is permitted then this Court while exercising jurisdiction under Article 199 of the Constitution will by itself become an adjudicating authority in entertaining such petitions only for grant of an interim relief. We are afraid this would not be a proper course of action as envisaged in law as well as in the Constitution. It is also not a case wherein the forums below are dysfunctional for any reason; hence, reliance on the cases of ***United Bank Ltd and Sarfaraz Saleem (Supra)*** by the learned Amicus has no relevance.



9. We may also add that it would not be correct to assume that Supreme Court while deciding the case of **Wasim Radio Traders (supra)** was not aware as to the consequences and hardship now being faced by the Petitioners. It is also needless to state that the said judgment was rendered when in fact there was no prohibition in law for such provisional release of the goods in question. As of today, the law by itself is more stringent and bars any such relief of provisional release of the goods. Though, we are mindful of the fact that the said judgment was in relation to Section 81 of the Act; but at the same time, the consequences which flow from the said principle of law is the same, that whether any interim relief of provisional nature can be granted to a Petitioner, who has challenged a Valuation Ruling before the hierarchy; and therefore, following the intention of the Supreme Court and the principle of law so enunciated, it is our considered view that this Court cannot exercise its discretion under Article 199 of the Constitution as prayed for in the given facts and circumstances as above. Lastly, we may observe that even otherwise, an Obiter Dicta<sup>9</sup> of the Supreme Court is binding on the High Court; therefore, after judgment in the case of **Waseem Radio Traders (Supra)**, we do not seem it appropriate to direct any provisional release of the consignment in question, be it under Section 81 of the Act; or for that matter, by asking the department to release it otherwise by way of deposit of the differential amount of duties and taxes pending any such challenge to the Valuation Rulings.

10. The other argument of the Petitioner's Counsel as well as of the learned Amicus that as a matter of routine in several cases when the Commissioner / Collector (Appeals) and even the Appellate Tribunal(s) are not entertaining or deciding the stay applications either way, whereas, recovery proceedings are initiated, this Court has been exercising jurisdiction under Article 199 of the Constitution by entertaining such petitions and also granting restraining orders is concerned, it is to be noted that in such cases, the Court has shown indulgence only for the reason that such Appellate forums had failed

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<sup>9</sup> Dr. IQRAR AHMAD KHAN V Dr. MUHAMMAD ASHRAF 2021 S C M R 1509; Justice Khurshid Anwar Bhinder v. Federation of Pakistan PLD 2010 SC 483 and Muhammad Ali Abbasi and 2 others v. Pakistan Bar Council PLD 2009 Kar. 392; Irshad Ahmed Shaikh v The State (2000 SCMR 814)

to exercise appropriate discretion vested in them by and under the law, and therefore, in the interest of justice, this Court as well as other High Courts have been entertaining such petitions and are also granting interim relief. Insofar as the issue in hand is concerned, the forums below have not been conferred any such powers; rather the power and jurisdiction, available if any, has now been taken away by the judgment of the Supreme Court as above. Moreover, the subsequent addition of the 3<sup>rd</sup> proviso to Section 81 of the Act in fact further prohibits exercising of such jurisdiction; therefore, any reliance placed on the cases cited by the learned Amicus is of no help, at least in the present facts and circumstances of the case in hand.

11. Lastly, if at all the Petitioners are finally successful in their challenge to the Valuation Rulings in question, they will be within their right to seek refund of excess duties and taxes in accordance with law; hence, even otherwise, the relief being sought in these petitions cannot be granted at this stage of the proceedings.

12. In view of hereinabove facts and circumstances, we do not see any reason to exercise our discretion so vested in this Court under Article 199 of the Constitution and as a consequence thereof, all these Petitions are hereby **dismissed**.

Dated: 31.01.2024

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