HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Writ Petition No.285 of 2022

M/s Raz Textiles through its Authorized Attorney

Versus

The Federation of Pakistan through the Secretary, Federal Board of Revenue, Islamabad and others

Petitioner by	**:**	**Mr. Asad Raza Khan, Advocate.**
Respondents by	**:**	**Ch. Imtiaz Ahmed, Advocate.** **Mr. Aqeel Akhtar Raja, Assistant Attorney General.**
Date of Hearing	**:**	**31.10.2024**

Babar Sattar, J:- The petitioner is aggrieved by show cause notice **("SCN")** dated 20.01.2022 under Section 168(1) and 157 of the Customs Act, 1969 **("Customs Act")**.

2. Learned counsel for the petitioner submitted that the SCN is without jurisdiction. The goods were imported by the petitioner and a declaration was filed on 22.01.2021 before the Customs Collector in Karachi. On 04.01.2022, the Directorate General, Intelligence and Investigation, Karachi **("DG I&I")** took cognizance of the matter and held that in view of the weight of the consignment, the duty declared by the petitioner was short and asked the Collector of Customs, Karachi to assess the consignment. This was done on 07.01.2022 and the consignment was released after payment of the assessed duty. He submitted that on 11.01.2022 the consignment was seized

by respondent No.2 in Islamabad who had no jurisdiction to do so. The impugned SCN suffers from jurisdictional defect because it is rooted in unlawful seizure under Section 17 of the Customs Act, as respondent No.2 was vested with no authority to seize the consignment. He further submitted that it is now settled law that DG I&I cannot undertake or order reassessment of customs duty on the basis of a valuation ruling. He further submitted that it is also settled law that no collection may be ordered by customs authorities for payments in lieu of withholding tax as recovery of such tax falls within the domain of the Inland Revenue Circle and is to be undertaken once income tax and/or sales tax returns are filed by the taxpayer. He submitted that the seizure itself was without jurisdiction and the impugned SCN, which essentially replicates the seizure report, is also without jurisdiction as respondents have no power or authority to sit in appeal over the assessment already undertaken by Collector of Customs, Karachi. He submitted that the DG I&I was vested with authority pursuant to SRO 486(I)/2007 dated 09.06.2007 **("SRO 486")** and was not vested with any authority pursuant to section 32 of the Customs Act. Further, DG I&I was vested with no authority to reassess customs duties and could only exercise powers to seize and confiscate goods pursuant to section 17 of the Customs Act where such goods fell within the prohibition provided under sections 15 and 16 of the Customs Act being smuggled goods. He relied on ***M/s Meerab Enterprises Vs. The Federation of Pakistan*** ***(2021 PTD 1764),*** ***Saadat Khan Vs. Federation of Pakistan*** ***(2014 PTD 1615)*** and ***Shahzad Ahmed Corporation Vs. Federation of***

Pakistan ***(2005 PTD 23)*** for this proposition. He further submitted that no offence under section 32 of the Customs Act was made out on the basis of non-application of valuation ruling and that valuation ruling was valid only for a period of 90 days and therefore valuation ruling from the year 2020 could not be made applicable to the goods of the petitioner that were imported in 2021 for which the Goods Declaration **("GD")** was filed on 13.12.2021. He submitted that the seizure report dated 14.01.2022 was therefore illegal. He further submitted that the SCN dated 20.01.2022 issued by Additional Collector (Adjudication) was also illegal and liable to be set aside as it sought to reassess goods that had been cleared by the Collector in Karachi and such reassessment could have been undertaken only in terms of section 80(3) of the Customs Act, while the goods were still at the port and not after they had been released and were out of charge. He submitted that the impugned SCN was also illegal and liable to be set aside as the Additional Collector (Adjudication), Islamabad was vested with no authority to assess any short payment of sales tax or income tax that he was seeking pursuant to such SCN.

3. Learned counsel for the customs department assisted by Mr. Nadeem Ahsan, Director I&I at the time when the seizure report was issued, submitted that Director I&I was vested with authority to detain, seize and confiscate goods under section 17 of the Customs Act. The power to detain and seize was in relation to goods that were liable to be confiscated. The petitioner had filed a false declaration in terms of section 32 of the Customs Act by stating that the goods imported were for in-

house consumption, which was not true as the goods were for industrial use and were sold to one Saida Gull of Nowshera and were seized while they were enroute to Nowshera. The offence under section 32(1) attracted a penalty under Clause (14) of the Table provided under section 156(1) of the Customs Act and the penalty prescribed included confiscation of goods. It was in this context that DG I&I authorized the detention and seizure of goods as they were liable to be confiscated. He further submitted that as the intended purpose or use of the goods had been misstated, it had an impact on the amount of sales tax and income tax chargeable in relation to the goods, which could be assessed by custom authorities in terms of section 179(1) read with section 32(2) of the Customs Act. He submitted that the goods had initially been seized as they were liable to be valued on the basis of valuation ruling 1449/2020 dated 04.06.2020, pursuant to which the goods were to be valued at US Dollar 4.90 per kg but had been declared and cleared on the basis of a value of US Dollar 3.90 per kg. It was due to non-application of the relevant valuation ruling that customs duties were underpaid. And it was due to mis-declaration of the intended use of the goods, resulting in sales tax and income tax being short levied, that the goods were seized and the impugned SCN dated 20.01.2022 was issued, which suffered from no infirmity.

4. Three questions that arise for purposes of adjudication of the instant petition are the following:

(i) Was DG I&I vested with authority to seize and detain the goods of the petitioner on the basis that the goods had not been properly valued due to non-

application of a certain valuation ruling and or short payment of sales tax and income tax due to goods being cleared on the basis that they were meant for in house use as opposed to industrial use?

(ii) Can Collector Customs (Adjudication) order confiscation of goods under section 180 read with section 32(1) of the Customs Act, where confiscation is conceived as the punishment for offences under the table provided under section 156(1) of the Customs Act, or whether such adjudication is to be undertaken by the Special Judge appointed in terms of section 185 of the Customs Act?

(iii) Is Collector Customs (Adjudication) vested with authority in terms of section 179 read with section 32(2) to assess sales tax and income tax in relation to the goods that were out of charge on the basis that there had been short payment of such taxes due to mis-declaration of their intended use?

5. The DG I&I was established pursuant to section 3A of the Customs Act and powers conferred on its officials is done in exercise of authority under section 4 of the Customs Act through notifications issued by the Federal Board of Revenue **("FBR")**. The relevant notification for our purposes is SRO 486. Subsequently, SRO 1814(I)/2024 **("SRO 1814")** and SRO 1815(I)/2024 **("SRO 1815")**, both dated 15.11.2024, have been issued, which are illustrative of the approach of FBR to the role conceived for DG I&I, but are not applicable to the case at hand that precedes them. The scope of the powers vested in DG I&I have been enumerated by the courts in a few cases. In ***Shahzad Ahmed Corporation*** the Sindh High Court

considered the powers vested in DG I&I under SRO 388(I)/82 dated 22.04.1982. While the powers vested in DG I&I have to be examined in view of SRO 486, the discussion in ***Shahzad Ahmed Corporation*** remains relevant wherein it was noted that, *"the Directorate General of Intelligence and Investigation, has been established mainly for prevention of smuggling and for preventive operations in this behalf",* and that DG I&I is not empowered, "*to detain or seize or reexamine the goods already examined and assessed by the appropriate officers of the Appraisement Department…Directorate General of Intelligence and Investigation, has been established mainly for the prevention of smuggling and performance of preventive operations relating to smuggling and evasion of Federal taxes through clandestine removal of dutiable goods, mis-declaration, valuation frauds, fraudulent claims of refund and rebate etc. However, such powers conferred on them have no overriding effect on the powers conferred on other officers/officials of the Custom Department. The officers in each category under the Customs Department are required to act within the specified sphere and parameters without encroaching upon the powers of the officers of the other departments such as Appraisement Department and to the determent of the importers whose consignment are out of charge after due process specified in law."* The scope of DG I&I's authority under SRO 486 was delineated by the Sindh High Court in ***Saadat Khan,*** in which the aforementioned comments from ***Shahzad Ahmed Corporation*** were reiterated and it was held that officers of DG I&I were not authorized *"to act as a supervisory body over and*

above the officers of respective Collectorate of Customs." It was held that:

> *"They can only intercept goods upon any credible information in respect of such goods outside the port area and within the domain of their respective jurisdiction. It must be appreciated that they have to act as an intelligence agency, supposed to be fully equipped with the related machinery intelligence network and know how required for such specialized agency. They cannot enter into a roving or fishing expedition. In fact this is what they had attempted to do in* ***Shahzad Corporation*** *supra and was accordingly disapproved by this Court. It should also be noted that such interception could only be done once there is a prima facie material available with the officers of respondent No.2 that the goods which are being intercepted, are such, that they are liable to confiscation and not otherwise. This is so, because the officers of respondent No.2 have been conferred with powers under section 168 of the Customs Act and therefore there is a clear intention that they can seize any such goods which are liable to confiscation and liable to confiscation would only mean that either there is an apparent mis-declaration of description of goods or mis-declaration in respect of quality and quantity of goods, resulting in a definite loss of revenue. It would not mean and include any alternate or contrary interpretation of an exemption notification or an interpretation regarding classification of goods and/or non-application or wrong application of Valuation Ruling, as firstly this is not within their domain and jurisdiction, and for which specialized departments and/or bodies have been established by FBR, and secondly, it is settled proposition of law that an interpretation of a notification as well as the classification of goods does not fall within the definition of mis-declaration."*

6. The scope of powers of DG I&I also came before the Balochistan High Court in ***M/s Meraab Enterprises*** wherein it was held that, *"in pursuance of notification under SRO 486(I)/2007 dated 09.06.2007, the officers of Directorate of Intelligence and Investigation Customs can intercept the goods*

which were liable to confiscation due to mis-declaration of description of goods or mis-declaration in respect of quality or quantity of the goods resulting in loss of revenue but they could not intercept the goods due to non-application or wrong application of a Valuation Ruling as it was not within their domain and jurisdiction."

7. The question of whether non-application of valuation ruling can invite penal action under section 32 of the Customs Act was considered by the Lahore High Court in ***S.T. Enterprises Vs. Federation of Pakistan (PTCL 2009 CL. 330)***. The Lahore High Court held that provisions of section 32 could not be invoked on the basis a valuation ruling. The Lahore High Court held that valuation ruling was issued under section 25 and 25A of the Customs Act and could not be used subsequently after a consignment was out of charge for purposes of section 32 of the Customs Act. It was held that, *"section 32 does not speak of ignorance of the applicable value at all. It is totally in relation to the document furnished by the importer as well as the statement given by him."* It accordingly held that as valuation ruling was not a statement or document furnished by an importer, penal action under section 32 could not be brought against the importer on the basis of a valuation ruling. It concluded that, *"before invoking the provisions of section 32 the prime responsibility of the competent authority is to establish that the document furnished and the statement given by the importer or his representative are wrong and that it was well within his knowledge. The application of section 32 directly without establishing incorrectness of the document*

available on the record with evidence is beyond the scope and power of the concerned authorities."

8. The applicability of a valuation ruling issued in 2020 to an import undertaken a year and a half after the issuance of such ruling is also misconceived as the value estimate in such ruling cannot be deemed current or applicable after the passage of such extended time. It was held by the Sindh High Court in ***Sadia Jabbar Vs Federation of Pakistan*** ***(2018 P T D 1746)*** that, *"valuation ruling issued under section 25A can, in our view, only applies for a certain period and no more. The reason for this lies in the fact that the valuation ruling must be determined using one of the methods of section 25/the Valuation Agreement. Now at least three of those methods, the identical goods method, the similar goods method and the deductive value method, require the value to be determined "at or about the same time" as the goods being valued. This expression has been defined in Chapter IX of the Rules (in Rule 107) as meaning "within ninety days prior to the importation or within ninety days after the importation of goods being valued." In our view, a valuation ruling must therefore ordinarily be regarded as valid for a period of ninety days from the date of issuance."* The law laid down in ***Sadia Jabbar*** was also relied on by the Lahore High Court in ***Messrs Ayesha Impex Vs. Federation of Pakistan*** ***(2012 PTD 1)***.

9. What emerges from the above is that section 32 of the Customs Act is not attracted merely because the customs department finds that certain valuation ruling was not applied while assessing the value of an import, which ought to have

been applied, as the valuation ruling issued under section 25A of the Customs Act is an estimate of the value of goods imported into Pakistan made by Collector of Customs or Directorate of Customs Valuation. Such valuation is neither a document submitted by an importer nor a statement made by such importer in terms of section 32 of the Customs Act. Consequently, non-application of a valuation ruling cannot be made the basis for initiating penal action against the importer. In the facts of the present case the impugned seizure report dated 14.01.2022 states that valuation ruling dated 04.06.2020 ought to have been applied in relation to the goods imported by the petitioner through GD No.KAPW-HC-94309 dated 23.12.2021. This was one of the bases for DG I&I directing that the consignment be seized and detained, as non-application of the valuation ruling purportedly deprived the exchequer of revenue in lieu of custom duties. Other than the fact that non-application of valuation ruling cannot be the basis for initiating penal action under section 32(1) of the Customs Act (in the absence of which the goods could not have been deemed to be liable to confiscation in terms of section 168 of the Customs Act), the valuation ruling dated 04.06.2020 was not otherwise applicable for assessment of value of goods re a GD filed on 23.12.2021 due to the valuation ruling being dated in terms of the law laid down by the Sindh High Court in ***Sadia Jabbar***. Consequently, Director I&I was vested with no authority to seize the goods-in-question for purposes of section 168(1) of the Customs Act on such basis and such seizure was illegal. The seizure report itself reflects that Director I&I sought to invoke

sections 32, 79, 157 and 178 of the Customs Act, punishable under Clauses 14 and 46 of section 156(1) read with sections 3, 6, 33 and 34 of Sales Tax Act, 1990 **("STA")**, and First Schedule Part II of the Income Tax Ordinance, 2001 **("ITO")** read with section 148 of the ITO. In doing so Director I&I should have been cognizant that DG I&I was not vested with authority under section 32 of the Customs Act or any of the other aforementioned sections. As has been held by the Sindh High Court in ***Shahzad Ahmed Corporation*** and ***Saadat Khan***, and by the Balochistan High Court in ***Meraab Enterprises***, DG I&I has been established essentially for purposes of preventing smuggling and has been vested authority to detain, seize and confiscate goods imported in violation of section 15 and 16 of the Customs Act. SRO 486 also reflects that the power of DG I&I includes power pursuant to section 17, which refers to detention, seizure and confiscation of goods that are either prohibited under section 15 of the Customs Act or in relation to which the Federal Government has issued a notification under section 16 of the Customs Act. That it is in the context of section 17 that the power of DG I&I in relation to section 168 of the Customs Act is to be understood has become further evident from SROs 1814 and 1815 dated 15.11.2024. SRO 1815 highlights the responsibility of DG I&I to collect intelligence in relation to smuggling and share the same with FBR and other field formations and provides in Clause 2(e) of SRO 1815 that DG I&I shall *"sparingly carry out targeted operations duly authorized by Member Customs (Operations) and where due to exigencies of time, prior approval by Member Customs*

(Operations) is not possible. The Director General of Intelligence & Investigation (Customs) shall authorize such operations and seek post-facto approval of Member Customs (Operations) within three days". SRO 1815 read together with provisions of the Customs Act as enumerated in the judgments referred to above makes it evident that DG I&I is conceived as an intelligence outfit and not as an enterprise carrying out fishing expeditions or second guessing the manner in which valuation of goods has been undertaken by the appraisement officials. In appreciating the scope of authority to be exercised by DG I&I under section 168 of the Customs Act, it is helpful to take note of the fact that the provision falls within Chapter XVIII of the Customs Act that deals with the prevention of smuggling and the power of search, seizure, arrest and adjudication of offences. In the instant case it is not the case of Director I&I that the goods seized qualify as smuggled goods. The basis of seizure was that the goods had been valued not in accordance with a valuation ruling that the Director I&I deemed relevant for valuing the consignment-in-question, and due to the petitioner claiming reduced rate application of withholding taxes on the ground that the goods were meant for inhouse use. The second ground for confiscation will be dealt with while addressing question No.2 later in this judgment. But in relation to question No.1 framed above, it is evident that Director I&I was vested with no jurisdiction to detain and seize goods on the basis that goods had not been valued in accordance with the valuation ruling dated 04.06.2020. And to the extent that on the basis of such seizure report dated 14.01.2022 a SCN dated 20.01.2022

was issued, the same is also not sustainable in the eyes of law. As has been discussed above, no penal proceedings in terms of section 32(1) of the Customs Act can be undertaken on the basis that goods were assessed and released by custom officials without applying a certain valuation ruling. Consequently, show cause proceedings in terms of section 180 read with section 32 cannot be undertaken on the basis that the value of goods assessed and released in term of section 79 of the Customs Act was not in accordance with the valuation ruling dated 04.06.2020.

10. Let us now consider question No.2 as articulated in para 4 above, as to whether Collector Customs (Adjudication) is vested with authority in terms of section 179 read with section 32(2) to assess sales tax and income tax in relation to goods that were out of charge on the basis that there had been short payment of such taxes due to mis-declaration of their intended use. In the instant case the goods declaration for purposes of section 79 of the Customs Act was filed on 13.12.2021 and the goods were declared to be out of charge on 08.01.2022. In terms of factual background, after valuation of the consignment in terms of section 79 of the Customs Act, DG I&I sought to weigh the consignment and found that on the basis of actual weight an additional customs duty and taxes in the amount of Rs.101,442/- were payable in relation to the said consignment. The amount was accordingly paid by the petitioner. The present case is therefore not one involving lack of scrutiny by appraisement officials or DG I&I's officials in Karachi. To the extent that appraisement officials were of the view that the

consignment was not correctly valued, there was ample opportunity to exercise reassessment powers under section 80 of the Customs Act. This was never done. Consequently, once the goods were out of charge after payment of customs duties and taxes as assessed pursuant to section 79 of the Customs Act, there was no occasion for Director I&I in Islamabad to seize and detain the goods on the basis that there was an underpayment of customs duties and taxes due to non-application of a valuation ruling.

11. The question that arises with regard to the legality of the impugned seizure report and show cause notice is whether actions in terms of section 180 of the Customs Act read together with sections 32(1) and 156(1) of the Customs Act can be undertaken by Additional Collector (Adjudication) Islamabad, without there being prior adjudication of the duty and taxes that have not been levied or have been short levied in terms of section 179 of the Customs Act. It is to be borne in mind that the case of customs authorities is not that the goods in question are liable to confiscation for violation of section 15 and 16 of the Customs Act. Instead, liability is being conceived for breach of section 32(1) of the Customs Act constituting an offence in terms of section 156 of the Customs Act.

12. The case built by Director I&I in the seizure report is that the petitioner did not state the intended purpose of the import as being industrial use and claimed exemption under the First Schedule Part-II of the ITO as well as Serial No. 2(i) of the Twelfth Schedule of the STA. This constituted mis-declaration in terms of section 32 of the Customs Act, as the exemptions were

applicable only where the import was meant for inhouse use as opposed to industrial use or resale in the open market. Sections 32(1) and (2) of the Customs Act are reproduced below for convenience:

> ***32. False statement, error, etc.-*** *(1) If any person, in connection with any matter of customs,-*
>
> *(a) makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or*
> *(b) makes any statement in answer to any question put to him by an officer of customs which he is required by or under this Act to answer, or*
> *(c) submits any false statement or document electronically through automated clearance system regarding any matter of Customs.*
>
> *knowing or having reason to believe that such document or statement is false in any material particular, he shall be guilty of an offence under this section.*
>
> *(2) Where, by reason of any such document or statement as aforesaid or by reason of some collusion, any duty, taxes or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within five years of the relevant date, requiring him to show cause why he should not pay the amount specified in the notice.*

13. Where the charge brought against a person is in terms of section 32(1), goods can only be confiscated to the extent that the person is found to have committed an offence punishable in terms of section 156(1) read together with section 32 of the Customs Act. The allegation against an importer is that he has committed an offence the penalty for which includes confiscation of goods. Such penalty can however not be imposed until after the person is found guilty of the offence and is so convicted by a Special Judge competent to try the offence under provisions of

the Customs Act. Collector Customs (Adjudication) being an executive functionary is clearly vested with no authority to conduct a trial and convict the petitioner for an offence under section 32(1) read together with section 156(1) of the Customs Act. The impugned SCN is therefore misconceived to the extent that it invites the petitioner to show cause in terms of the section 180 of the Customs Act as to why the imported goods ought not be confiscated, without first seeking to adjudicate whether or not there is a recovery of duty and taxes due from the petitioner due to any short levy or non-levy. The impugned SCN does not seek to exercise the powers of adjudication under section 179(1) read together with section 32(2) of the Customs Act. The scheme of the Customs Act seems straightforward. Where the customs authorities allege that an importer is liable for an offence in terms of section 32(1) of the Customs Act, which is punishable in terms of section 156(1) of the Customs Act, the matter is to be placed before a Special Judge who is to try the accused person and determine whether or not the person is guilty of the offence as charged. It is only after such conviction that penalties prescribed in the table under section 156(1) including, *inter-alia,* confiscation of goods, can be imposed. The SCN has been issued by Additional Collector (Adjudication) who has been vested with no authority to try the petitioner in terms of section 32(1) read together with section 156(1) of the Customs Act. And to the extent that such provisions have been invoked, the impugned SCN is not sustainable in the eyes of law. The respondents are vested with no authority to order confiscation of goods without a prior

conviction. To the extent that the petitioner can be held liable for recovery of duty and taxes that have not been levied or have been short levied in terms of section 32(2) of the Customs Act, such power cannot be exercised unless the liability for payment of duty and taxes short levied or not levied is first adjudicated in terms of section 179(1) of the Customs Act. While issuing the impugned SCN the Additional Collector (Adjudication) is not seeking to adjudicate taxes/duties short levied in terms of section 179(1) of the Customs Act, without which no penalty can be imposed for purposes of section 180 of the Customs Act. The SCN is therefore deficient in this sense as well.

14. This brings us to the third question as to whether the Additional Collector (Adjudication) is vested with authority to adjudicate any short levy of sales tax or income tax by virtue of the petitioner claiming exemptions under the said statues, in exercise of his authority under section 179(1) read with section 32(2) of the Customs Act. This question came before the Lahore High Court in ***Gulistan Textile Mills Ltd. Vs. Federation of Pakistan (2019 PTD 353)*** as well as before the Sindh High Court in ***Nestle Pakistan Ltd. Vs. The Federal Board of Revenue (2023 PTD 527)***. The Lahore High Court concluded in ***Gulistan Textile Mills***, that sections 32(2) and 179(1), as amended by the Finance Act, 2012, and the Finance Act, 2014, vested in customs authorities the concurrent power to recover any short levy of income tax and/or sales tax. The Sindh High Court in ***Nestle Pakistan Ltd.***, however, concluded that custom authorities are not vested with the adjudicatory authority to assess the short levy of income tax and/or sales tax

in terms of section 179(1) read with section 32(2) of the Customs Act after release and clearance of consignments. This Court is in agreement with the reasoning and conclusion drawn by the Sindh High Court in ***Nestle Pakistan Ltd.*** and finds that once goods have been assessed and released upon payment of duties and taxes, customs authorities are vested with no power to adjudicate the short levy or non-levy of income tax and/or sales tax alone. The Lahore High Court in ***Gulistan Textile Mills Ltd.*** took into account the amendments made in section 179(1) through Finance Act, 2012, while noting that the power of adjudication had been enhanced by extending it for purposes of recovery of *"other taxes"* in addition to duty. It observed that, *"the words other taxes inserted in section 179 are of paramount significance. They are presumed to have been brought in by a reasoned and deliberate policy making by the legislature and cannot be ignored to make a fetish of that process."* The Lahore High Court then noted that a conforming change was brought in section 32(2) through Finance Act, 2014, where the word *"taxes"* was added after the word *"duty"* to create liability for a person to pay such taxes along with duties that have not been levied or have been short levied in line with the amendment brought about in section 179(1) of the Customs Act through Finance Act, 2012. The Lahore High Court then took into account the amendment made in section 6 of the STA by Finance Act, 2015, whereby the legislature added the words "*including recovery"* within section 6(1) of the STA. Employing principles of interpretation which are well settled the Lahore High Court concluded that, *"not only the Income Tax Ordinance,*

2001, but also the Sales Tax Act, 1990, require the levy and recovery of withholding tax as well as sales tax imposed on the imported goods and for their recovery to be effected at the time of importation by the officers of customs. The officers of customs, therefore, act as the collecting agent for the income tax as well as sales tax authorities from every importer of goods on the value of goods at the rate specified. It was perhaps thought anomalous by the legislature that the recovery, if any, effected or short-levied be recovered by the adjudicative process in the Act, 1990 or the Ordinance, 2001, rather than the one prescribed in the Act, 1969. In my opinion the amendments which have been brought about merely serve to reconcile the powers of the officers of Customs and not only confers the power to recovery at the importation stage but also confers the power of adjudication under section 32 of the Act, 1969."

15. In ***Nestle Pakistan Limited***, in terms of the power of the custom authorities to assess or adjudicate any alleged short levy of income tax, the Sindh High Court held the following:

> *"13. Sub section (6) of section 148 stipulates that the provisions of the Customs Act, 1969, 'in so far as relevant, shall apply to the collection of tax under the said section'. This provision makes it clear that the relevant provisions of the Customs Act would apply only to the extent of collection of tax solely in respect of section 148. Section 148 deals with advance tax at the stage of imports, which is to be collected at the time of import. Respondents' learned counsel have remained unsuccessful to set forth any case for confer any authority upon adjudication to assess, recover or adjudicate any alleged short levy of income tax, post release/clearance of consignments."*

The Sindh High Court took into account the relevant amendments brought about by Finance Acts 2012, 2014 and 2015 within provisions of the Customs Act as well as the Sales Tax Act. In relation to interpretation of provisions of the Sales Tax Act it then concluded that:

> *"21. …the provision for assessment and recovery of sales tax, not levied, short levied or erroneously refunded, remains section 11. To the extent of collection, payment and enforcement including recovery at the time of imports, the Sales Tax Act, 1990, confers parallel jurisdiction upon the customs department, however, no case has been established before us to consider any jurisdiction of the adjudication to assess, adjudicate, and/or recovery any short levy of sales tax once the import/consignment has been assessed and released for sections 79/80 of the Customs Act, 1969."*

The Sindh High Court then went on to consider the amendments brought about in sections 32(2) and 179 of the Customs Act through Finance Act, 2012 and 2014 respectively and came to the following conclusion:

> *"27. It is the considered view of this Court that while the insertion of the word 'taxes' in section 32 and 179 of the Customs Act, 1969, confers parallel jurisdiction upon the customs department to the extent contemplated vide the parent statutes, however, in either instance the ambit is circumscribed to imports and that also at the import stage, being prior to or at the time that the import/consignment has been assessed and released for sections 79/80 of the Customs Act, 1969. Therefore, the notices/constituents thereof, prima facie related to a fiscal right based on a statutory instrument requiring no factual determination, seeking to assess, recover or adjudicate any alleged short levy of income tax/sales tax, post released/clearance of consignments, are determined to be patently without jurisdiction and illegal on the face of the record."*

This Court is in agreement with the analysis and conclusion of the Sindh High Court in ***Nestle Pakistan Ltd.***

16. Section 148 of the ITO designates Collector of Customs as a collection agent obliged to collect advance tax from every importer of goods in the same manner and at the same time as customs duty payable in respect of the imported goods. It is in view of section 148(1) and (5) of the ITO that the Sindh High Court came to the conclusion that as custom duties were payable at the time of import, the power vested in customs authorities to act as a collection agent for advance income tax is limited to the import stage before goods are released after assessment and/or reassessment in terms of section 79 and or 80 of the Customs Act and not thereafter once the goods are out of charge. Similarly, section 6 of the STA vests power in customs authorities to collect sales tax on goods imported into Pakistan as if it were a duty of customs payable under the Customs Act and made provisions of the Customs Act applicable for purposes of charging and collecting sales tax, *"so far as they relate to collection, payment and enforcement including recovery of tax under this Act on such goods where no specific provisions exist in this Act, apply."* The Sindh High Court noted that section 11 dealt with assessment of sales tax and recovery of tax not levied or short levied or erroneously refunded as section 11 was the mechanism for assessment and recovery of sales tax. Section 6(1) of the STA incorporated provisions with regard to collection, payment and enforcement/recovery of tax under the Customs Act only to such extent that no specific provision existed in the STA. Thus in view of section 11 of STA,

section 6(1) of STA was to be read together with provisions of the Customs Act such that the collection, payment and recovery of sales tax under provisions of the Customs Act was limited to the import stage and not thereafter and once goods were released and were out of charge, to the extent that there was any non-levy, short levy or erroneous refund of sales tax, the assessment and recovery of the same was to be undertaken in terms of section 11 of the STA and not section 179(1) of the Customs Act.

17. In the context of income tax, the duty assigned to the Collector of Customs in terms of section 148 of the ITO is to collect advance tax from every importer of goods on the basis of value of the goods. The Collector of Customs has been made a collection agent because the income tax payable is to be determined on the basis of the value of goods to be determined by the Collector of Customs under provisions of the Customs Act. This function entails no assessment as advance income tax is an adjustable tax which requires no assessment. To the extent that there is any allegation of failure to pay advance tax, sections 161 and 162 of the ITO provide for collection of the same. These provisions entail appropriate due process requirements whereby notices are to be issued before assessing advance income tax that has not been made and also provides that in case of non-payment of advance tax surcharge, a default surcharge shall also be payable in terms of section 205 of the ITO. Plain reading of section 179(1) of the Customs Act does not lead one to the conclusion that the legislature intended to vest in customs authorities the power and function of assessing

advance tax payable and the power to affect recovery of such assess amount in terms of section 161 read with sections 148 and 205 of the ITO. Section 148(6) of the ITO provides that for purposes of collection of advance tax from every importer of goods, *"the provisions of Customs Act, 1969, in so far as relevant, shall apply to the collection of tax under the section."* It is well understood that collection of tax cannot be confused with assessment of tax or even with the recovery of tax due. In order to determine the income tax due, even at import stage where there has been a failure to pay such tax, income tax authorities are required to assess the tax payable under section 161 of the ITO. The failure to pay such tax attracts a default surcharge at the rate of 12% from the date of failure to deduct such tax till the date on which it is paid. The powers to make such assessment of tax due and to effect recovery while imposing default surcharge needed to be explicitly vested in customs authorities if such was the intent of the legislature. This could easily have been done under section 148(6) of the ITO, had the legislature so chosen, by stating that the power under section 161 of the ITO would be exercised by Collector of Customs in relation to the advance tax to be collected by such Collector under section 148 of the ITO. This the legislature has not done in its wisdom.

18. In terms of section 179(1) read with section 32(2) of the Customs Act, the duty or tax that has not been levied or has been short levied can be claimed within a period of five years from the time of import. Under the ITO, the tax year is the relevant period for computation of the total tax liability to be

paid for such year. It would create an anomalous situation if adjustable income tax payable in the form of advance tax has been settled through a tax assessment for the relevant tax year, but the customs authorities nevertheless generate an additional demand in terms of section 32(2) of the Customs Act in lieu of short paid or unpaid advance income tax. With no access to information with regard to the income tax affairs of a taxpayer, how would customs authorities determine whether non-payment or short payment of advance tax has resulted in escape of some income being charged, which has caused a loss of revenue to the exchequer? What would such advance tax, which is presumptive in nature, be adjusted against in the event that the total income and the tax liability of a taxpayer for the tax year have been conclusively determined by an assessment order that has attained finality? It can be argued that even where failure to pay advance tax does not require reassessment of the taxpayer's income and the tax payable for the relevant tax year, it would nevertheless attract default surcharge for short payment or non-payment of advance tax. But this would still require additional proceedings under the ITO to square and settle the tax payable by the taxpayer and the default surcharge payable for the relevant tax year. It does not appeal to reason that the legislature would have intended that such disparate actions under two different statutes be undertaken rather than leaving it to the income tax authorities to determine the total tax liability of a taxpayer in relation to income tax payable by a taxpayer in a certain tax year, especially when the question of discharging the liability to pay advance income tax arises in

relation to imported goods that have moved past the import stage and have been released by customs authorities. The assumption that the legislature intended to vest concurrent powers in income tax and customs authorities for purposes of assessing and recovering income tax payable after the release of goods would also raise questions about which appellate forum would hear an appeal against such order. Thus, in the overall scheme of things, the reading of provisions of the ITO together with those of the Customs Act, as undertaken by the Sindh High Court, makes abundant sense.

19. The reasoning applies equally in relation to provisions of the STA when read with provisions of the Customs Act. The sales tax liability to be discharged by an importer is also pegged to the value of goods imported as determined by customs authorities under provisions of the Customs Act. It therefore makes sense to endow customs authorities with the responsibility of collecting sales tax at the time of import of goods. However, when it comes to determining if tax has not been levied or has been short levied and for ordering recovery, there is prior need to assess the tax due. This power of assessment has not been vested in customs authorities. And logically so. While undertaking such assessment for a tax period, there may be other considerations to be taken into account for which provisions have been made, *inter-alia,* under sections 7, 8 and 8(a) of the STA. Likewise any short payment of sales tax attracts penalties and surcharge under sections 33 and 34 of the STA, which power can only be exercised by sales tax authorities. In the event that the legislature intended for

customs authorities to make such assessment and/or affect recovery on such basis after the release of goods, it would have done so in plain language by including appropriate provisions in the STA and the Customs Act. This has not been done as held by the Sindh High Court in ***Nestle Pakistan Ltd.***

20. For the aforementioned reasons, this Court finds that the customs authorities are vested with no power and jurisdiction to undertake any assessment of Income Tax and/or Sales Tax in terms of section 179(1) read with section 32(2) of the Customs Act once the imported goods have been released and are out of charge. This Court also finds that for purposes of section 32(2) of the Customs Act, when read with section 179(1) of the Customs Act, the power of adjudication for purposes of recovery vested in the customs authorities can be exercised only in case of "*recovery of duty **and** other taxes not levied, short levied or erroneously refunded".* In the afore-quoted part of section 179(1), due to the use of the word "and", "duties and taxes" is to be read conjunctively, and the power to demand any taxes not levied, short levied or erroneously refunded only exists where customs authorities are primarily adjudicating the recovery of customs duty due under the Customs Act. As already explained above, this is because the quantum of advance income tax and sales tax payable at the time of import of goods is not to be assessed per se but only computed, as such demand is contingent on the value of goods as determined by customs authorities. It is logical that where there has been a short levy or non-levy of customs duty, the computed advance income tax and/or sales tax would also have been short levied

to the relevant extent. A reading of section 179(1) does not lead this Court to the conclusion that the legislature intended to create an independent power to be vested in customs authorities to assess and adjudicate any short levy or non-levy of advance income tax or sales tax where there was no question of short levy or non-levy of customs duty arising concurrently in the said matter. No such power to assess, demand and recover advance income tax or sales tax remains vested in customs authorities once the goods have been assessed and released from the port after being duly assessed in terms of sections 79 and 80 of the Customs Act.

21. In view of the above, this Court finds that (i) there was no jurisdiction vested in DG I&I to seize the goods imported by the petitioner in Islamabad on the basis that the value of such goods ought to have been ascertained on the basis of some valuation ruling that was not applied while assessing the goods at the port in Karachi, (ii) no penal proceedings in terms of section 32 of the Customs Act can be undertaken against the petitioner on the basis that goods imported by it were assessed and released by custom officials without applying a certain valuation ruling, and (iii) Additional Collector (Adjudication) Islamabad is vested with no authority to undertake adjudication of advance income tax and/or sales tax purportedly short levied in exercise of powers under section 179(1) read with section 32(2) of the Customs Act, where the consignment is out of charge and no demand can be generated for payment of customs duty. Consequently, the assumption of jurisdiction for such purpose is not backed by law and the impugned SCN is

therefore devoid of legal authority. Notwithstanding these determinations, DG I&I is an intelligence outfit and to the extent it believes misdeclaration of the intended purpose of the imported goods may have resulted in short levy of advance income tax and sales tax, there is nothing prohibiting it from sharing the relevant information with the FBR and/or the relevant Commissioners vested with authority to scrutinize the income tax and sales tax affairs of the petitioner.

22. For the aforementioned reasons the petition is ***allowed***, the impugned seizure report, recovery notice and show cause notice are declared to be devoid of legal authority and void *ab-initio* and are accordingly quashed. The security deposited by the petitioner for release of goods shall be released by the respondents forthwith.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 14.01.2025.

JUDGE

Approved for reporting

M.A. Raza