JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Customs Reference No.13 of 2016

M/s Sun Diplomatic Bonded Warehouse (Pvt.) Ltd.

Versus

Customs Appellate Tribunal, and others

Applicant by	**:**	**Mr. Sikandar Naeem Qazi, Advocate.**
Respondents by	**:**	**Mr. Riffat Hussain Malik, Advocate.**
Date of hearing	**:**	**14-09-2022.**

SAMAN RAFAT IMTIAZ, J. The present Custom Reference Application has been filed by the Applicant [M/s Sun Diplomatic Bonded Warehouse (Pvt.) Ltd.] against the Judgment dated 14-03-2016 ("**Impugned Judgement**") passed in Appeal No. 107/CUS-/IB/2015 by the Respondent No. 1/the learned Customs Appellate Tribunal ("**the Tribunal"**).

2. Brief facts as per the Memo of Reference are that the Applicant is a private limited company incorporated under the Companies Ordinance, 1984 that is running and operating a Diplomatic Bonded Warehouse duly licensed by the Respondent No. 2 [Collector of Customs, Model Customs Collectorate, Islamabad] vide license No. 02/2005 dated 06-03-2005. The Applicant imported consignments of diplomatic goods consisting of various qualities of liquor and beer as per details mentioned in the respective invoices. On the grant of the import permission the Applicant filed the following Goods Declarations: GD Nos.IDRY-IB-56 dated 16-12-2013, IDRY-IB-59 dated 20-12-2013, IDRY-IB-60 dated 20-12-2013, IDRY-IB-8 dated 26-02-2014, IDRY-IB-84 dated 27-02-2014 and IDRY-IB-119 dated 17-06-2014 ("**Subject GDs**") claiming assessment on the basis of transaction value in terms of Section 25(1) of the Customs Act 1969 ("**the Act**") read with Rule 113 of the Customs Rules 2001 ("**the Rules**"). The transactional value of goods was disputed by the Respondents and the goods were released in terms of Section 81 of the Act.

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3. The following table as per the Memo of Reference shows the dates of filing of each of the Subject GDs, the dates on which provisional determination was made in respect thereto and the dates on which the statutory period of six months expired in each case which according to the Applicant is when the provisional determination attained finality in terms of sub-clauses (2) & (4) of Section 81 of the Act.

GD No.	Date of filing	Date of provisional assessment	Date on which provisional assessment attained finality
IDRY-IB-56	16-12-2013	07-01-2014	07-07-2014
IDRY-IB-59	20-12-2013	22-01-2014	22-07-2014
IDRY-IB-60	20-12-2013	10-01-2014	10-07-2014
IDRY-IB-80	26-02-2014	19-03-2014	17-09-2014
IDRY-IB-84	27-02-2014	05-04-2014	05-10-2014
IDRY-IB-119	17-06-2014	08-07-2014	08-01-2015

4. Despite passage of the statutory time frame mentioned in sub-clauses (2) & (4) of Section 81 of the Act in respect of half of the Subject GDs, the Respondent No.3 [Deputy Collector of Customs] failed to make the final determination. The Applicant filed Writ Petition No. 3692/2014 in the Honorable Islamabad High Court, Islamabad seeking declaration that disputing the value declared by the Applicant was malafide and contrary to the Section 25 of the Act and the said petition was disposed of vide order dated 11-08-2014 whereby the Respondent No.2 [Collector of Customs, MCC] was directed to treat the petition as a representation. However, neither the declared value was accepted nor provisional determination that had attained finality in terms of Section 81 (4) of the Act accepted nor was the provisional determination of the remaining GDs finalized

5. Instead a committee consisting of Additional Collector (AF), Additional Collector (HQ) and Deputy Collector (Import AFU) (the "**Committee**") was constituted to give its recommendations/findings with regard to the valuation of the liquor, which were the subject matter of the

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aforesaid GDs. The Committee, ultimately formulated its Inquiry Report dated 19-12-2014 and submitted the same to Respondent No. 3 who provided a copy thereof to the Applicant for submission of comments thereon. According to the Applicant, although the report of the Committee had no validity in the eyes of the law yet the Applicant submitted comments vide letter dated 19-01-2015. On receipt of report from the Committee and comments of the Applicant, Respondent No.2 passed the Order No. 12 of 2015 dated 08-07-2015 directing Respondent No. 3 to finalize all the aforesaid provisionally assessed cases of imported liquor in light of evidential data of identical goods in term of Section 25 (5) of the Act and value of similar goods in terms of Section 25 (6) of the Act duly recommended by the Committee in its report. An appeal was filed by the Applicant against the order passed by Respondent No.2 before the learned Tribunal who upheld the decision, hence the instant reference petition, which raises the following questions of law:

a. ***Whether under the facts and circumstances of the case the learned Customs Appellate Tribunal was justified in confirming the order passed by respondent No.2?***

b. ***Whether provisional determination made under sub section (1) of Section 81 of the Customs Act, 1969 attains finality upon expiry of period specified under sub section (2) of Section 81 of the Customs Act, 1969 by operation of law in terms of sub-section (4) of Section 81 of the Customs Act, 1969 as held in Collector of Customs Lahore v M/s Fazal Illahi and sons (2015 S C M R 1488)?***

c. ***Whether respondent No.2 has the necessary jurisdiction or authority to order for re-finalization of provisional determination which has already attained finality in terms of sub-sections (2) & (4) of Section 81?***

d. ***Whether the impugned order is violative of the mandatory provisions contained in Section 81 of the Customs Act, 1969?***

e. ***Whether transactional value of the customs value of goods under sub-section (1) of Section 25 can be rejected in utter disregard of the mandatory provisions contained in sub-section (4) of Section 25 of the Customs Act, 1969?***

f. ***Whether the respondents were duly bound to pass an order in writing before rejecting the transactional value under sub-section (1) of Section 25 and communicate the same to the***

applicant in terms of sub-rule (3) of Rule 109 of the Custom Rules of 2001?

g. Whether the respondents are under a legal obligation while determining value under section 25 to exhaust the entire procedure prescribed under sub-sections (1) to (4) of Section 25 before resorting to secondary methods of valuation under sub-sections (5) & (6) of Section 25?

h. Whether the so called determination of value in terms of sub-sections (5) & (6) of Section 25 is illegal and violative of the mandatory provisions of Section 25 as held in "Messrs Rehan Umar v. Collector of Customs and 2 other (2006 PTD 909) and Sadia Jabbar vs. Federation of Pakistan and another (PTCL 2014 CL 557)?

i. Whether setting minimum values is prohibited both under the valuation Agreement (GATT) and Rule 110 of Chapter IX of the Custom Rules 2001?

j. Whether assessment can be made on the basis of working of a committee constituted for the purpose of determining the valuation under sub-sections (5) & (6) of Section 25 without associating importer or his representative?

k. Whether there is any provision for constitution of committee contained in sub-section (1) through to (4) of 25 of the Customs Act, 1969 or the same can only be constituted when resort is made to methods of valuations under sub-sections (7) & (8) of Section 25?

l. Whether the illegal and void order was passed by the Collector of Customs and the entire superstructure constructed on the said order is maintainable in the eyes of law and learned Customs Appellate Tribunal was justified in confirming the same?

m. Whether the impugned judgment has rendered the provisions of Section 81 read with Section 25 further read with Chapter IX of the Customs Rules 2001 redundant and superfluous?

n. Whether the impugned order is a summary judgment which is violative of Section 194 of the Customs Act read with the General Clauses Act?

6. The learned counsel for the Applicant submitted that it is a settled proposition of law that if any assessment is not completed within the period specified in Section 81(2) of the Act the provisional determination shall be treated as final pursuant to Section 81(4) of the Act; that therefore, the acts of the Respondents after expiry of the statutory period are in violation of

Section 81; that there was no stay order passed by this Court in W.P. No.3692/2014 restraining the Respondents from finalizing the determination nor was any extension passed and as such the benefit of the proviso contained in Section 81(2) of the Act is not available to the Respondents. He submitted that the learned Tribunal concluded that by virtue of Section 25(10) of the Act, method of sequence is not mandatory, which conclusion is in violation of *Sadia Jabbar Vs. Federation of Pakistan*, 2012 SCMR 617. He further submitted that the Applicant opted for transactional value but the mandatory Rule 109 was not applied in rejecting it. He submitted that the invoices submitted by the Applicant were attested by the High Commission of Pakistan. The Inquiry Report shows that out of 51 invoices 32 invoices were verified by the supplier while 21 were not, whereas, the Applicant only provided 32 invoices to begin with. This contention of the Applicant was not addressed by the learned Tribunal. Furthermore, the seller and importer are not related in this case and as such Section 25 (3) of the Act was not attracted; that the Committee constituted was not under the framework of the law; that Section 25(5) of the Act was violated by the Respondents as the value used for comparison was beyond the time period provided therein; that under Section 25(a) of the Act the commercial level must be the same but in this case quantity was 2000% more; that no exercise as prescribed in Section 25(c) of the Act was carried out and fictitious value was used under Section 25(6) of the Act.

7. On the other hand the Respondents submitted that the inquiry Committee was formed with the consent of the Petitioner and that the Collector has wide powers under Section 179 of the Act and that while the market survey may not be covered by the law but there is case law to such effect.

8. We have heard the arguments of the learned counsel for the parties and perused the record.

Effect of failure to make final determination within the statutory period provided under sub-section (2) of Section 81 of the Act

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9. Section 81(1) of the Act deals with release of goods on the basis of a "provisional determination" where it is not possible for the customs officer to satisfy himself of the correctness of the assessment of such goods under Section 79 of the Act. In case of such release, according to the proviso to Section 81(1) of the Act such additional amount is to be paid or secured through a bank guarantee or pay order which represents the likely differential between the final determination of duty over the amount determined provisionally on the basis of a "provisional assessment". The Explanation in sub-section 4 of Section 81 provides that "provisional assessment" means the amount of duties and taxes paid or secured against bank guarantee or post-dated cheque. Sub-section (2) of Section 81 of the Act provides that in case of release on the basis of a 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. The provisos to the said sub-section allow for an extension for a maximum period of ninety days and exclusion from the computation of limitation the period during which the proceedings are adjourned on account of, *inter alia*, a stay order. Sub-section (4) of Section 81of the Act further provides that where the final determination is not made within the time period specified in sub-section (2), the "provisional determination" shall be deemed to be the "final determination" except in the case of new evidence.

10. The effect of failure to make the final determination within the statutory period as stipulated in Section 81(4) of the Act has been settled by various pronouncements of the Honourable Supreme Court and other High Courts of the country. Reference may be made to *The Collector of Customs Vs. Messrs Faco Industries,* 2017 PTD 2474 wherein the Honourable Sindh High Court at Karachi held that *"Admittedly, in the instant case, the provisional assessment made by the department has not been finalized, which reflects that in terms of subsection (4) of section 81 of the Customs Act, 1969, the provisional determination as per goods declaration stood finalized"*. Similarly in the case of *Sus Motors (Pvt.) Ltd., Karachi Vs. Federation of Pakistan*, 2011 PTD 235, the Honorable Sindh High Court at Karachi held that since there was no final determination within the stipulated

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period and the same was not extended in terms of the proviso to subsection (2) the provisional determination became final. In a more recent case reported as *Messrs Faiz Chemical Industries (Pvt.) Ltd. Vs. Collector of Customs, Model Customs Collectorate of Appraisement*, 2022 PTD 1183, the Honorable Sindh High Court at Karachi was pleased to hold as follows:

> *"6. It is clear that we need to determine import and scope of section 81 of the Act and its impact on controversy in hand. We may remind that this court in an order dated 02.02.2021 in C.P. No.D-5674/2020 discussed the said provision of law, in a background albeit slightly different from the one in hand, and rejected the case of the department objecting to release of securities furnished by the importer at the time of provisional release of his goods under section 81 of the Act to meet differential amounts of duties, etc. if any, at the time of final assessment. We, keeping in view peculiar background of these cases, may further add that section 81 stipulates, in the main, that where it is not possible for an officer of the Customs, checking GD under section 80, to satisfy himself of correctness of assessment of the goods made by the importer in terms of section 79. Then, an officer not below the rank of Assistant Collector of Customs may determine such goods for the duty, taxes and other charges provisionally and release them against the bank guarantee, etc. to be furnished by the importer to meet a likely disparity at the time of final determination of duty, etc. In terms of section 81 (2), then, final determination, within 6 months of such provisional release of the goods, is required to be made. That period, for the reasons exceptional in nature, can be extended for further 3 months by the Collector of Customs or the Director of Valuation.* ***But, irrespective of whether such course has been followed or not, when final determination is not made within specified period, the framework under subsection (4) of the said provision irrepressibly rolls out requiring provisional determination to be deemed, an inevitable effect, as final determination. It is settled that failure to finalize provisional determination of value of the goods within specified time shall translate into clearing of the goods on the value declared by the assesse, and, therefore the provisional assessment as final.*** *It is not disputed either that the department has the power to take up necessary investigation to find out true value of the goods to finalize assessment after provisional assessment thereof for duty, etc. But this authority, it is to be understood, is subject to the framework provided under section 81(2) of the Act, and which unambiguously lays down, for this purpose, a period of 9 months, maximally. For favour of this view, the case law reported in 2007 PTD 1519, 2008 PTD 1950, 2010 PTD 343, and 2010 PTD 900 can be relied upon.*
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> …….
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> *8. For what has been stated above, the question is replied in affirmative in favour of the applicant and against the department.* ***It is held that the provisional determination of duty, tax, etc. made under section 81 (1) of the Act for release of the goods shall attain finality, and has attained finality in these cases, if final determination is not made by the department within stipulated time of 9 months maximally, in the circumstances as explained above, under section 81 (2) of the Act.*** *The applications in hand are allowed in the terms as above and disposed of accordingly. A copy of this decision may be sent under the seal of this court and signature of the Registrar to the learned Custom Appellate Tribunal as required under section 196(5) of the Custom Act, 1969."* [Emphasis added].

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11. In the case of *Collector of Customs, Lahore Vs. Messrs S. Fazal Ilahi and sons* reported as 2015 SCMR 1488, the Honorable Supreme Court held that where there was no final determination within the stipulated period of time and no extension thereof, the provisional assessment could not be treated as final assessment. The relevant portion of the said judgment is reproduced as follows:

> *"Admittedly, in this case no final assessment has been made by the Customs department and the matter is lingering on for quite some time without there being any adjudication or final assessment even after a lapse of one year and neither the appellants have been able to place on record any notice or demand being made by them to the respondent in seeking corroboration or clarification with regard to the same nor they have been confronted with any material to substantiate the higher value claimed by the Customs Department as propounded under subsection (4) of section 25 of the Act. It is being further observed that the Customs department has also failed to pass an appropriate order to reinforce the same as required under the provisions of rule-109 of the Customs Rules, 2001.*
>
> *7. Subsection (4) of section 81 of the Act provides that if the final assessment is not completed within the period specified therein, then the provisional assessment shall become final. The same has been provided as a safeguard to the benefit of the assessee/importer/exporter to save them from unnecessary harassment by Customs authorities by unnecessarily delaying their cases for an indefinite period on the pretext of, making a final assessment.* ***But in the instant case, the Customs authorities after making a provisional assessment did not proceed in the matter for the determination of final assessment*** *which is apparent from the fact that neither a notice of demand to prove any document from the respondent has been sought nor any corroboration or clarification had been sought, which were to be made under section 25(4) of the Act nor any order under rule-109 of the Customs Rules, 2001 has been passed to determine the custom value of the imported goods,* ***in the absence whereof the appellant could not be afforded a clean chit to use section 81(4) as a tool to delay the making of final assessment upon proper assessment of the value by affording the assessee proper opportunity of contesting the same, thus, depriving him of fair trial, therefore, in the above facts and circumstances of the case to consider the provisional assessment as a final assessment cannot be justified.****"* [Emphasis added].

12. What emerges from the above pronouncements is that the "provisional determination" is the declared value of the goods under Section 79 of the Act whereas the "provisional assessment" pursuant to the proviso to sub-section (1) of Section 81 of the Act is the likely differential between the "provisional determination" and the "final determination" which is either paid or secured through a bank guarantee or pay order. In case of failure to make the "final determination" within the stipulated period of time and in the absence of an extension or stay order or any other circumstance on account of which time may be excluded from the computation of the

stipulated period, the "provisional determination" shall be deemed to be the "final determination", which would result in refund of the amount secured in terms of sub-section (5) of Section 81 of the Act. In the wake of *Collector of Customs, Lahore (Supra)* there is no room for argument that a final determination can be made beyond the statutory period of six months without the availability of the stipulated exceptions.

13. In the instant case there was admittedly no stay order in the field. The reason given by the Respondent No. 1 in the Impugned Judgment that the matter was *subjudice* provides no defense to the Respondents in the absence of a stay order preventing them from final determination. Nor was the stipulated period extended but even if it is assumed to have been extended for the sake of argument, the proviso to Section 81(2) of the Act makes it clear that such extension cannot exceed 90 days. Therefore, even if the stipulated period had been extended as per law, such extended period in respect of the last GD out of the six Subject GDs would have expired on 08-04-2015 whereas the direction to finalize the subject cases in light of evidential data of identical/similar goods was given on 08-07-2015. Therefore, even if the period had been extended such extension would have already expired in respect of all the Subject GDs prior to the finalization order passed by Respondent No.2.

Sequential order of the method of valuation.

14. The next important question that arises in the instant reference is whether the sequential order of the method of valuation is mandatory under Section 25(10) of the Act. This too has been settled by past case law. The Honorable Sindh High Court at Karachi opined in the case of *Sadia Jabbar Vs. Federation of Pakistan,* 2018 PTD 1746 as follows:

> *"Three points may be noted.* ***Firstly, the primary method of determining the customs value is the transaction value, i.e., the price actually paid or payable for the imported goods.*** *(The price actually paid or payable may be subject to certain adjustments, but this aspect of the matter need not be considered in detail.) This is duly recognized in terms of both Article 1 of the Valuation Agreement, and subsection (1) of section 25.* ***Secondly, if the transaction value cannot be determined, then the subsequent methods are to be applied sequentially****, in the order set forth in the Valuation Agreement. As is clear from the table above, the relevant subsections of section 25 are arranged in the same*

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sequence. ***Thirdly, and this is of crucial importance for present purposes, the exercise must stop at the first method which is found applicable. It is neither permissible nor necessary to go on to, or to consider, any of the succeeding methods.*** *In this context, it will be noted that the opening words of each of subsections (5), (6), (7), (8) and (9) expressly provide that the subsection is to apply only if "the customs value of the imported goods cannot be determined under" the preceding applicable subsection.* ***In other words, it is not permissible to resort to a particular subsection unless it is first concluded that the previous subsection referred to does not apply, and it is not permissible to apply the latter unless it is first concluded that the subsection preceding it does not apply, and so on.*** *Thus, all the elements of the principle of sequential application are clearly embedded in section 25.*

...

The primary method of determining this value is the transaction value, i.e., the price actually paid or payable for the goods in question. Such a price can arise only in relation to goods actually imported. Section 25A(1), on the other hand, spoke of "goods imported into... Pakistan". As pointed out by learned counsel for the Respondents, section 18 of the Act, which is the charging section, levies customs duty on "goods imported into Pakistan". It is a well-settled principle of interpretation that words or expressions used in the same statute in different sections should be given the same meaning unless the context otherwise requires. Obviously, as used in section 18, the expression relates to goods to be imported into Pakistan. The same meaning was, in our view, intended in section 25A(1). Therefore, as used therein, this expression applied to goods that could be, or were to be, imported into Pakistan at any time or from time to time. In other words, section 25A permitted a predetermination of the customs value of goods to be imported into Pakistan. It is also pertinent to note that subsection (2) of section 25A specifically provided that the value determined in terms of subsection (1) was to be the customs value of the "relevant imported… goods". This is the reason why subsection (1) opened with a non-obstante clause. If only section 25 was applicable, or there were no non-obstante clause, there could be no predetermination of the customs value. The determination of the customs value would have to start with the primary method, the transaction value, i.e., the price actually paid or payable, which could only arise in the context of goods actually imported. Furthermore, if section 25A were intended only to apply to goods actually imported into Pakistan, then there would essentially be no point to it, since the exercise therein contemplated would in any case be carried out under section 25. Section 25A therefore had to apply to goods yet to be imported into Pakistan.

16. By the Finance Act, 2007 (i.e., in the very next year after the introduction of section 25A), certain amendments were made to section 25, and section 25A was substituted in its entirety. We first take up the changes made to section 25, where subsection (10) was amended as follows (the deletions being shown in square brackets, and the additions by way of emphasis):

> *"(10) Subsections (1), (5), (6), (7), (8) and (9) define how the customs value of imported goods is to be determined [under this Act]. The methods of customs valuation may or may not [are required to] be applied in a sequential order except reversal of the order of subsections (7) and (8), at the importer's request, if so agreed by Collector of the Customs."*

For present purposes, it is the second change, whereby the words "are required to" were substituted with the words "may or may not", that is relevant. On the face of it, this appears to confer discretion on the appropriate customs officer: he may or may not, but is no longer required to, apply the sequential order laid down in subsections (1), (5), (6), (7), (8) and (9). Two points need to be made.

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> *Firstly, for the reasons stated in para 10 supra, the proper interpretation of subsection (10) must be to regard the scope of the discretion, if any, now conferred by it as limited. The difference between the Valuation Agreement and section 25 must be minimized.* ***Therefore, on its proper interpretation, the change made to subsection (10) has only a limited ambit. It is only on rare occasions, and in exceptional circumstances and/or for compelling reasons, that the appropriate customs officer may deviate from the principle of sequential application. Otherwise, the invariable practice must be to adhere to the said principle in the strict sense described in para 12 supra. Secondly, and perhaps more importantly, even if the customs officer is now to be regarded as having some discretion in the matter, it is difficult to see how he would be able to exercise it. The reason is that, as noted above, each of subsections (5), (6), (7), (8) and (9) expressly opens with words that make it applicable only if "the customs value of the imported goods cannot be determined under" the preceding applicable subsection. These words lock-in the principle of sequential application into the very structure of section 25. If, for example, in a particular case, the customs officer seeks to jump straight to (say) the computed value method (subsection (8)), he would be able to apply it only if he can first show (as required by the subsection itself) that subsection (7) cannot be applied. If he cannot do this, the matter goes back to subsection (7), but that subsection itself applies only if it can be shown that subsection (6) does not apply, and so on.*** *As will be seen, the matter would (or could) thus go back to subsection (1) itself, the transaction value method. In our view therefore, the changes made to subsection (10) have made no substantive change, and the principle of sequential application continues, as before, to apply to section 25 in its full rigour."* [Emphasis added].

15. The above ruling was upheld by the Honourable Supreme Court in the judgment reported as *Sadia Jabbar Vs. Federation of Pakistan,* 2012 SCMR 617 which makes it clear that the sequential method of valuation is to be followed on mandatory basis. In view of the foregoing, the Impugned Judgment whereby it was held that it is not mandatory to follow sequential order as provided in Section 25(10) of the Act is clearly incorrect being against the judgment of the apex court hence not sustainable.

Pre-requisites of and Conditions stipulated in Section 25(5) and (6) of the Act.

16. According to Rule 113 contained in Sub-Chapter III of the Customs Rules, 2001, the primary method of valuation is the price actually paid or payable. As held by the Honorable Sindh High Court at Karachi in *Sadia Jabbar (Supra)* upheld by the Honourable Supreme Court, the primary method of valuation i.e., the transactional value cannot be rejected unless it is first concluded that it does not apply. This is reflected in Rule 109 of the Customs Rules, 2001, which is reproduced hereunder:

> *109. Burden of proof.—(1) Where the appropriate officer has reason to doubt the truth or accuracy of the particulars or of documents produced in support of*

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the declaration, such officer may ask the importer to provide further explanation, including documents or other evidence.

(2) If, after receiving information referred to in sub-rule (1) or in the absence of a response, the appropriate officer still has reasonable doubts about the truth of accuracy of the declared value, it may be deemed that the customs value of the imported goods cannot be determined under the provisions of sub-section (1) of section 25 of the Act.

(3) When a final decision is made, the appropriate officer shall communicate to the importer in writing his decision and the grounds therefor.

17. In the instant case, the Respondents have not placed on record any notice or demand made by them asking the Applicant to provide further explanation in terms of Rule 109(1) of the Customs Rules, 2001 nor is there any order passed under Rule 109(3) of the Customs Rules, 2001 whereby the appropriate officer is required to communicate to the importer the final decision in writing and the grounds therefor.

18. In any event, the Inquiry Report dated 19.12.2014 confirms that 32 invoices were verified. According to the Applicant the verified invoices have been rejected on the erroneous ground that only 32 invoices were verified out of 51 when in fact only 32 invoices were submitted to begin with whereas the Applicant had nothing to do with the 21 unverified invoices. This issue has not been dealt with by the Tribunal in its Impugned Judgment.

19. Be that as it may, the Inquiry Report straightaway goes to the value of similar goods determined by the DG Valuation in a similar case and uses such values to conclude that the commercial invoice values declared for whisky by the Applicant are grossly undervalued even though none of the Subject GDs is for whiskey. In the case of *Rehan Umar Vs. Collector of Customs, Karachi*, 2006 PTD 909 the Honorable High Court of Sindh at Karachi held that the transactional value cannot be rejected simply because there are some contemporaneous imports at higher price. It has to be shown that the invoice price was not genuine and does not show the real price paid by the importer. The Respondents have failed to show there was any such evidence to establish that the invoices submitted by the Applicant were not genuine in the absence of which the transactional value could not have been rejected and the valuation methods succeeding Section 25(1) of the Act

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could not have been resorted to. Moreover, there is no provision of law which allows constitution of the Committee for purposes of determining the transactional value.

20. Even otherwise it may be seen that according to Section 25(5) of the Act the customs value would be the transactional value of *identical goods sold for export in Pakistan and exported at or about the same time as the goods being valued*. Firstly comparing the transactional value with the price at which a manufacturer in Spain has sold goods to the Applicant's Seller in Dubai as was done by the Committee in its Inquiry Report does not meet the requirement of Section 25(5) of the Act as the purported identical goods were admittedly not sold for export in Pakistan.

21. Secondly, the words *"at or about the same time"* have been defined in Rule 107 of the Custom Rules 2001 as follows:

> *107(a) "at or about the same time"* ***means within ninety days prior to the importation or within ninety days after the importation of goods being valued*** *except in cases where Valuation Rulings issued under section 25-A exist, the Valuation Ruling shall remain in field unless rescinded, modified or replaced with a new Valuation Ruling.* [Emphasis added].

The period of 90 days after the importation of goods being valued as provided in the said definition for the last of the Subject GDs expired on 08.10.2014 whereas the Inquiry Report was submitted by the Committee on 19.12.2014 and no date has been mentioned therein for the transaction value of the so called "identical goods". Therefore, it cannot be ascertained whether the transaction value relied upon by the Inquiry Report submitted by the Committee constitutes transaction value of identical goods sold for export to Pakistan and exported at or about the same time as the goods being valued within the meaning ascribed to the words as per the definition given in 107(a).

22. Thirdly, it has to be borne in mind that sub-section (a) of Section 25(5) provides that in applying the said provisions the transaction value of the identical goods in a sale at the same commercial level and substantially the same quantity as the goods being valued shall be used to determine the

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customs value of imported goods. The term *"commercial level"* has been defined in Rule 107 of the Custom Rules, 2001 as follows:

> *(c) "commercial level" means the level of the transaction at which a sale is concluded and includes the sales before and after importation of the goods for example, sales conducted between a manufacturer and a wholeseller, or between a wholeseller and a retailor, or between a retailer and a customer.*

In this case the Inquiry Report itself states that invoices obtained from various embassies in Islamabad have been made the basis for valuation which does not qualify as same "commercial level". Moreover, it is expressly stated that the quantity in which subject goods are being imported by such embassies are lesser in quantity than imported by the Applicant vide subject GDs yet the Committee concluded that since the price quoted by the Spanish manufacturer was the same irrespective of the quantity the difference in quantity has no bearing on the invoice value. Rule 117 of the Customs Rules, 2001 does provide for relaxation of the requirement contained in sub-section (5)(a) of Section 25 of the Act but not without caveat. Rule 117 is reproduced hereunder:

> *117. Transaction value of identical goods.-(I) In applying sub-section. (5) of section 25 of the Act, the appropriate officer shall, wherever possible use a sale of identical goods all the same commercial level and in substantially the same quantities as the goods being valued.* ***Where no such sale is found, a sale of identical goods that takes place under any one of the following conditions may be used. namely:--***
>
> *(i) a sale at the same commercial level but in different quantities;*
>
> *(ii) a sale at different commercial level but in substantially the same quantities: or*
>
> ***(iii) a sale at a different commercial level and in different quantities***
>
> ***(2) Having found a sale under any one of the conditions referred to in sub rule (I), adjustments shall then be made, as the case may be, for the following, namely:-***
>
> ***(i) quantity factors only***
>
> ***(ii) commercial level factors only: or***
>
> ***(iii) both commercial level and quantity factors.***
>
> *(3) For the purposes of sub-section (5) of section 25 of the Act, the transaction-value of identical imported goods means a value, adjusted as provided for in clauses (a), (b) and (c) of sub-section (5) of that section, which has already been accepted under sub-section (I) of the said section 25.*

> *(4) A condition for adjustment because of different commercial levels or different quantities shall be that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustment, e.g., valid price lists containing prices referring to different levels or different quantities. As an example of this, if the imported goods being valued consist of a shipment of ten units and the only identical goods for which a transaction value exists involved a sale of five hundred units, and it is recognized that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's price list and using that price applicable to a sale of ten units. This does not require that a sale had to have been made in quantities of ten as long as the price list has been established as being bona fide through sales at other quantities.* [Emphasis added]

23. As may be seen from the above reproduction, where sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued is not found, sale of identical goods at a different commercial level and in different quantities can indeed be used under sub-rule (iii) of Rule 117(1), however, in such case adjustments shall then be made as provided in Rule 117(2). Perusal of the Inquiry Report and the Impugned Judgment shows that no such adjustment has been made. In view of the foregoing shortcomings, we are not convinced that the method of valuation provided for under Section 25(5) of the Act was applied correctly apart from the fact that the burden of proof as per Rule 107 to reject the valuation under Section 25(1) of the Act was not met.

24. The Impugned Order further states that in certain cases the value has been determined based on similar imported goods as laid down in Section 25(6) of the Act as there was no direct evidential data available. Perusal of the Inquiry Report shows that the Committee has concluded that the value of similar goods has been found under invoiced to the tune of 150% as compared to the import made by the diplomatic missions and therefore, the declared value of items is proposed to be enhanced by 150 % provided that such value does not happen to be less than the value on which provisional assessment was made. However, no basis to support the finding of under-invoicing by 150 % has been provided. Examination of the Section 25(6) of the Act shows that the customs value shall be the transaction value "*similar goods sold for export to Pakistan and exported at or about the same time as goods being valued and the provisions of clauses (a), (b) and (c) of sub-section 5 shall, mutatis mutandis also apply in respect of similar goods".* In

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this regard our discussion contained in paragraphs 20 to 23 herein above pertaining to the definitions of *"at or about the same time"* and *"commercial level"* as provided in Rule 107 (a) & (c) and regarding Rule 117 which is to apply *mutatis mutandis* to similar goods by virtue of Rule 118(2) may be referred to as the same deficiencies are also applicable in case of the exercise undertaken under Section 25(6) of the Act. None of these aspects have been addressed by the Tribunal in the Impugned Order and the matter has been discussed in a cursory and hasty manner due to which the Impugned Judgment constitutes a non-speaking order.

25. In view of the above discussion, we find that:

(a) by the time the order dated 08.07.2015 was passed by the Respondent No. 2 to finalize the provisionally assessed cases of imported liquor by the Applicant in terms of Section 25(5) and 25(6) of the Act, the limitation period provided under Section 81(2) of the Act had already expired with the effect that the provisional determination made in respect of the Subject GDs was to be deemed to be the final determination by virtue of Section 81(4) of the Act; and

(b) even otherwise the valuation purportedly conducted under Sections 25(5) and 25(6) of the Act was without satisfying the pre-requisites and conditions stipulated therein nor was it in accordance with the applicable Customs Rules, 2001.

26. Resultantly, the instant reference is **allowed** in favor of the Applicant and against the Respondent Department as such the Impugned Judgment dated 14-03-2016 and Order dated 08-07-2015 are hereby set-aside. It is held that the provisional determination have attained finality in the case of the Subject GDs due to expiry of stipulated time and therefore any security lying with the Respondents shall be released to the Applicant forthwith.

(BABAR SATTAR)
JUDGE

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in open Court on _____.

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