JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR.

JUDICIAL DEPARTMENT

Customs Reference No: 49-P of 2013

JUDGMENT

Date of hearing……15.07.2015……..….

Petitioner (s)(Al-Khair traders) By Mr. Zahid Idrees Mufti, Advt.

Respondent (s)(Collector Customs) By Qazi Jawad Ehsanullah, Advt

YAHYA AFRIDI :-J: M/s Al-Khair Traders, Shengus Market, Khar Bazar, Bajaur Agency through its sole Proprietor Haji Khairullah son of Haji Muhammadullah, the present petitioner, has filed the present Customs Reference under Section 196 of the Customs Act, 1969 (**"Act")**, seeking opinion on ten legal issues, has challenged the judgment dated 19.9.2013 passed by the Customs Appellate Tribunal, Peshawar Bench, whereby the appeal filed by the petitioner was dismissed and maintained the order of the Collector Customs Peshawar passed in Order-in-Original No.345 of 2012.

2. Before this Court proceeds to render its opinion on the legal questions of law raised by the petitioner in the instant Reference, it would be appropriate to state, in chronological order, the events as they unfolded and finally led the petitioner to file the instant Reference. The same are as follows:-

1st July till 30th July, 2010.

> The present petitioner, imported 50 consignments of Polyester Fabrics. Based on Valuation Ruling No.259 dated 3.6.2010, the imported goods were cleared on payment of Rs.88.303 million as taxes and duties.

14th October, 2010.

> An audit team was constituted, which after its examination reported that, *"the declared weight and systems were available in each case and the same weight was required to have been made basis for the purpose of appraisement of assessable value and assessment of duty/tax."* It was also pointed therein that, the unit for weighing the Polyester fabric was Kg but the same was not followed, thus action led to under weighment of imported fabric and thus the short payment of duties and taxes.

9th December, 2010.

Demand cum Show Cause Notice **("First Notice")** was served upon the petitioner and Messrs Al-Salco the Customs Agency, under subsection 1,2, 3 and 3-A of Section 32 read with Section 156 (14) of the Act, by the Deputy Collector, for recovery of duties and taxes totaling Rs.21.101 Million.

10th October, 2011.

The Assistant Collector passed the Order-In-Original No.8 of 2011 **("Order-In-Original N0-8 of 2011")** holding that:

> ***"Keeping in view the facts of the case, it is clear that the respondents have evaded sufficient amount of Government revenue knowingly, I, therefore, order the respondent to pay the short paid amount of Customs duty Rs.15,417,259/- and Advance Income Tax Rs.1,144,291/- , whereas an amount of Rs.4,586,586/- has erroneously been deposited by the importer as Special Excise duty, which is exempted in terms of the said SRO. Therefore the said amount is adjusted in the short levied amount thus, the remaining total short paid amount of Rs. 11,975,664/- is recoverable from the importer and he is directed to produce treasury challans forthwith. M/S Al-Salco Customs Agency Peshawar stayed behind during the entire proceedings and did not attend any hearing or submitted a single word in their defense and remained totally aloof during the entire proceedings. For the reason of non-fulfillment of their responsibilities under relevant Custom House Licensing Agent Rules 2001, a penalty of Rs.10,000/- is hereby imposed upon M/S Al-Salco Customs Agency Peshawar."***

The decision was impugned in appeal by the present petitioner before Collector (Appeals) under Section 193 of the Act.

26th October, 2011.

The record of the First Notice and the Order-In-Original No.08 of 2011 was called for and examined by the Collector of Customs; and in consequence thereof, *"four infirmities"* were found, which further led the Collector of Customs to seek from the petitioner vide Show Cause Notice, the payment of the evaded/ short paid amount of duty/taxes to the tune of Rs.21.101 Million for violation of subsection 3-A of Section 32 read with Section 156 (14) of the Act **("Final Notice")**. The said *four infirmities* were as follows:

i. ***Certain irrelevant Sections of the Customs Act, 1969 were invoked in the demand-cum-show notice.***

ii. ***In Para 6 of the Order-In-Original it is mentioned that Special Excise Duty amounting to Rs.1,205,301/- has erroneously been made from the importer contrary to S.No.2 of SRO 655(1)/2007 dated 29.6.2007. The said amount was thus termed adjustable/refundable. In Para 9 of the Order-In-Original adjustment of a sum of Rs.4,586,586/-, collected on account of special excise duty, has been allowed against the recoverable amount of other duties/taxes. The adjustment/refund so allowed was found contrary to the provisions of Section 11 of the Federal Excise Act, 2005.***

iii. ***In Para 8-9 of the Order-In-Original the charges of evasion of huge amount of duty/taxes, were established, however,***

the importer was not penalized for the offence committed by him.

iv. In Para-2 of the Order-In-Original the adjudicating authority has penalized the Customs Clearing Agent for not discharging his responsibilities as envisaged under the Customs Agents Licensing Rules, 2001. The case of the said clearing agency should have been referred to the Licensing Authority in terms of Rule 90(1) of the Customs Rules, 2001 for appropriate action."

14th December, 2012.

Order-In-Original No.345 of 2012 was passed holding and finally directing that:

i. M/s Al-Khair Traders (Importer) should deposit Rs.15,374,344/- as customs duty, Rs.1165498/- as A.I.T, aggregating to a total of Rs.16,539,842/- (Rupees Sixteen Million, Five hundred Thirty Nine Thousand, Eight Hundred Forty Two only) in terms of Section 32(3A) of the Customs Act, 1969.

ii. No action against the Customs Clearing Agency is warranted as no charge of mis-declaration as per documents furnished by them exists on the case file

iii. Refund of FED is also hereby disallowed as elaborated in preceding paras.

iv. The Incharge Post Clearance Audit MCC Peshawar is directed to conduct audit of imported consignments of Polyester Fabric for the remaining period as permissible under the law and frame contravention cases, if identical discrepancies are observed, within thirty days of this order."

19th September, 2013.

The appeal of present petitioner was dismissed by the worthy Customs Appellate Tribunal, Peshawar Bench.

3. Now moving on to the questions of law raised in the instant Reference.

Question of law No.I

> ***"Whether under the facts and circumstances of the case, the impugned proceedings are nullity in the eyes of law for being coram non judice as the learned Assistant/Deputy Collector adjudicated the cause of alleged short levy (Rs.18,455,657) on 6.10.2011, beyond their pecuniary limits (Rs.800,000) prescribed u/s 179 of the Customs Act, 1969.***

The worthy counsel for petitioner vehemently argued that the First Notice issued by the Deputy Collector of Customs and the Order-In-Original No.8/2011, passed in consequence thereof, by the Assistant Collector of Customs, are *coram non judice,* as the *maker* thereof did not have the pecuniary jurisdiction to pass the same, as per the provisions of Section 179 (1) of the Act.

In rebuttal, the worthy counsel for the Revenue contended that the instant issue was not relevant since the Collector of Customs, Peshawar had, vide Final Notice dated 26.10.2011, initiated proceedings under Section 195 of the Act, and in pursuance thereof, Order-in-Original No.345/2012 was passed on 14.12.2012, whereby the proceedings initiated by the First Notice and Order-In-Original

No.8 of 2011 passed by Assistant Collector were *quashed*. In this regard, the worthy counsel pointed out the findings recorded in the Order-In-Original No.345/2012 (Paragraph 10 of the order 4th line from the top). It was in this context that, the learned counsel for Revenue asserted that the issue raised in Question No.1 has became irrelevant and redundant, as the Order-In-Original No.8 of 2011passed by Assistant Collector did not exist after being *quashed* by the Collector of Customs under Section 195 of the Act.

OPINION.

Let us first consider the contention of the worthy counsel for the Revenue that the First Notice and the Order-In-Original No.8 of 2011 were inconsequential, as the same had been *quashed* by the Collector of Customs vide Order-In-Original No. 234 of 2011 under Section 195 of the Act.

Canvassing the provisions of the Act, it becomes very evident that the legislature had envisaged three distinct *regimes* for regulating and carrying out the essential aims embodied in the Act. The same can generally be categorized as follows:

i. **Administrative or Executive Authority**.

ii. Quasi Judicial adjudicating Authority.

iii. **Judicial Authority trying penal provisions**.

The issue in hand relates to the first two categories mentioned above. The stark distinction between the said two regimes has been extensively discussed in ***Khan Trading Company's case*** **(PTCL 2001 CL 615)** in terms that:

> ***"In the adjudicatory scheme, which has been incorporated in the Customs Act by the Finance Ordinance of 2000, an hierarchy has been established for adjudication of disputes between the Customs department and persons dealing with it such as importers. Such hierarchy is separate and distinct from the Collectorate of Customs exercising the function of administering the Customs Act and effecting recoveries thereunder, on the executive side. The Collectorate on the executive side, entrusted with the collection of revenue has been deliberately and consciously removed from the adjudicatory process.***
>
> ***Section 195 of the Customs Act, which has been relied upon by learned counsel for the respondents to oppose the present petition and to provide justification for the issuance of the impugned show cause notice, has to be read in the context of the adjudicatory scheme which now forms part of the judicial process under the Customs Act. The revisional power set out in Section 195 also needs to be examined and circumscribed in the light of various statutory provisions including Section 179 of the Customs Act and the Notification No.SRO 448(I)/2000 issued thereunder by the CBR. It is clear from the aforesaid Notification read in the context of Section 179 and Section 5 of the Customs Act that adjudication authorities have been created to deal with matters of contention between the customs department and those having dealing with it such as the petitioner.***
>
> ***The distinction between the two species of Collector which are envisaged by the various provisions of the Customs Act and in particular Section 194-A, Section 179, Section 5 and Section thereof. The aforesaid distinction between the two is now very much and essential feature of the Customs department.***
>
> ***In the light of the segregation of functions between collection and***

> ***adjudication which now forms an integral part of the Customs Act, the officers of Customs designated as adjudication authorities have to remain conscious of the fact that they are no longer collectors of revenue but are meant to be impartial adjudicators whose decisions are subject only to the appellate jurisdiction of the Appellate Tribunal and of this Court as provided for in the Customs Act.***
>
> ***The power of revision in general terms, which has been provided for in Section 195 of the Customs Act, has to be read in the context of the Customs Act as amended by the Finance Ordinance, 2000. In this respect, as noted above, the distinction between an adjudicating authority on the one has and a Collector or other Customs functionaries has been well recognized in the legal provisions referred to above and in particular."***

This Court is in accord with the general principle laid down in the above cited case that the Administrative/Executive and Adjudicatory Authorities, are not only distinct and independent of each other but have been assigned separate role in the Act.

Surely, like all other authorities, the two authorities presently under review, have to remain within their assigned legal jurisdictions; the Adjudicatory Authority is to decide impartially, the disputes which arise between persons and the Executive Authority, while the latter is carrying on its functions, as the *collecting arm* of the Revenue; the Executive/Administrative Authority, on the other hand, apart from passing administrative decisions, relating to

matters concerning export, import, preventive or anti smuggling operations has to also decide, whether the decisions so made by the Adjudicatory Authorities, require any correction for it to be assailed before the appellate forums provided in the Act. In this regard, the intent of the legislature is very clear, as is witnessed in the express provisions assigning the dominant decision making role to the Collector of Customs, under sub-section (5) of Section 193, sub-sections (4) and (5) of Section 194-A and sub-sections (2) and (3) of Section 194-B of the Act. In addition, it is also noted in the said provisions of the Act that the period of limitation to file an appeal commences, *inter alia,* from the date, the impugned decision is received by the Collector of Customs, so as to provide him with adequate opportunity to seek appropriate appellate remedy.

In this general background, when we review the role of Collector of Customs envisaged under Section 195 of the Act, it is but clear that initially, he exercises *Executive Authority,* and only if the conditions precedent stated therein are fulfilled, he assumes the role of an *Adjudicatory Authority.* For ease of Reference, let us review the provision of Section 195 of the Act, which reads as under:

> ***"Powers of Board or Collector, to pass certain orders.***
>
> ***(1) The Board or the Collector of Customs may, within his jurisdiction, call for and examine the records of any proceedings under this Act for the purpose of satisfying itself or, as the case may be, himself as to the legality or propriety of any decision or order passed by a subordinate officer and may pass such order as it or he may think fit.***
>
> ***Provided that no 0rder confiscating goods of greater value or enhancing any fine in lieu of confiscation, or imposing or enhancing any penalty, or requiring payment of any duty not levied or short-levied shall be passed unless the person affected thereby has been given an opportunity of showing cause against it and of being heard in person or through a counsel or other person duly authorized by him.***
>
> ***(2) No record of any proceedings relating to any decision or order passed by an officer of customs shall be called for or examined under subsection (1) after the expiry of two years from the date of such decision or order."***
>
> ***(emphasis provided)***

The careful reading of the aforementioned section, reveals that the intent of the legislature was to provide a "*corrective mechanism*" to ensure proper and fair administration of taxation, at every rung of the executive/administrative authority of FBR. The most crucial aspect of this power of '***reopening***' of cases vested in the FBR and the Collector of Customs under section 195 of the Act, is that it is not to be viewed as a ***coercive tool,*** rather it is a ***corrective tool*** to ensure proper administration of taxation; preventing loss of duties and taxes on the one hand, and to avoid harm of

excess recovery of duties and taxes by the Revenue from the taxpayers, on the other hand.

Thus, a closer review of the provisions provided under section 195 of the Act, clearly brings to light the distinct **stages** and the well defined **conditions precedent**, for FBR or a Collector of Customs to finally invoke his authority for passing any order affecting the decision or order passed by a subordinate Customs Officer. As the issue in hand relates to the decision of the Collector of Customs, or opinion shall mainly emphasize on his powers to adjudge the legality of the decisions impugned and the opinion so sought in the instant Reference.

Now to the various **stages**, which can be summarized are as follows:

STAGE-I: To call and examine record.

The Collector of Customs, who is at the pinnacle of the Executive Authority of the Customs Collectorate, may call and examine the record of any order or decision passed by his subordinate officer in his Collectorate.

STAGE-II: Reviewing decision/orders of subordinate officers.

The Collector of Customs on receipt of the record of the decision or orders passed by a subordinate Custom Officer has to adjudge the same on the touchstone of

its ***propriety*** *and* ***legality***. The said terms have not been defined in the Act, hence, reliance has to be made to the general dictionary meaning of the said terms. In this regard, some of the definitions rendered are as follows:

LEGALITY.

Oxford English Dictionary.

1. *The quality or state of being legal.*
2. *obligations imposed by law.*

Legal person n. Law an individual, company, or other entity which has legal rights and is subject to obligation.

Black's Law Dictionary.

1. *Strict adherence to law, prescription, or doctrine, the quality of being legal.*
2. *The principle that a person may not be prosecuted under a criminal law that has not been previously published. Also termed (in sense 2) principle of legality.*

21st Century Dictionary.

1. *The state of being legal; lawfulness.*
2. *A legal obligation.*

Webster's New Explorer Encyclopedic Dictionary.

1. *attachment to or observance of law.*
2. *the quality or state of being legal; lawfulness.*

PROPRIETY.

Oxford English Dictionary.

Correctness concerning standards of behaviour or morals. The details or rules of conventionally accepted behaviour. Appropriateness; rightness.

21st Century Dictionary.

1. *conformity to socially acceptable behaviour especially between the sexes, modesty or decorum.*
2. *correctness; moral acceptability.*
3. ***(proprieties)*** *the details of correct behaviour, accepted standards of conduct,*

from French propriete, from latin proprietas , from proprius own.

Webster's New Explorer Encyclopedic Dictionary

1. *obsolete: true nature.*
2. *obsolete: a special characteristic; peculiarity.*
3. *the quality or state of being proper; appropriateness.*
4. ***a.** conformity to what is socially acceptable in conduct or speech. **b.** fear of offending against conventional rules of behavior especially between the sexes. **c.** plural: the customs and manners of polite society.*

STAGE-III: Orders passed by the Collector of Customs.

It would be appropriate to reiterate the conditions precedent for the Collector of Customs to assume jurisdiction and pass orders, as envisaged under Section 195 of the Act. The same are as follows:-

i. ***There should be a decision of a subordinate Custom Officer.***

ii. ***The said decision of the subordinate Customs Officer should lack legality or propriety,***

iii. ***The decision of the subordinate Customs Officer should have been passed within two years of it being examined by the Collector of Customs, and***

iv. ***In cases, where confiscation of goods or increase in duties and taxes from the taxpayer is to be sought, the Collector of Custom should serve a notice upon the person, who is to be affected by the proposed decision.***

Thus, reviewing the role of the Collector of Customs in the three stages, stated hereinabove, it is noted that, the Collector of Customs in the STAGES-I & II acts as the *Executive Authority* being the head of the Customs Collectorate, supervises the activities of his subordinate Customs Officers. It is only in

STAGE-III and that too, if the conditions precedent as provided in Section 195 of the Act, and explained hereinabove, are fulfilled that he would assume the role of an Adjudicating Authority to decide the matter, as mandated under the law.

In the present case, it is noted that all four conditions precedent were fulfilled and thus the Collector of Customs had the jurisdiction to exercise the revisional authority vested in him under Section 195 of the Act; the decision under revision was passed by a subordinate Customs Officer, the decision lacked ***legality*** and ***not propriety*** of the subordinate Custom Officers, the decision of the subordinate officer was examined by the Collector within statutory period of two years, and that the Final Notice was served upon the present petitioner, as the Collector of Customs found that duties and taxes required to be paid.

Moving on to other limb of the argument asserted by the learned counsel for the Revenue that, the Collector of Customs *"quashed"* the Order-In-Original No.8 of 2011, vide Order-In-Original No.234 of 2012, while exercising his powers vested under section 195 of the Act.

In this regard, the worthy counsel for the Revenue, vehemently contended that subsection-1 of

Section 195 clearly authorized the Collector of Customs to pass such order ***as he may think fit.*** Thus, the Final Notice and the Order-In-Original No.345 of 2012, was *intra vires*.

This Court is not in consonance with this assertion of the worthy counsel for the Revenue.

Firstly, there can be no absolute or unbridled power vested in any authority; may it be Executive or Quasi Judicial or Judicial. The discretion has to be subject to *reason* and the *law.* In this regard, this Court in ***Danish's case (Writ Petition No.2713 of 2009 decided on 10.6.2010)*** has elaborated the mode, manner and the *pitfalls* of the exercise of discretion by an authority under a law in terms that:

> ***"Discretion vested in any authority is a sacred trust, which is never to be betrayed for extraneous reasons. Arbitrariness would always creep in when authority and discretion are un-guided or un-structured.***

The august Supreme Court has in **Amanullah Khan and others Vs. The Federal Government of Pakistan (PLD 1990 SC 1092)** has held that:-

> ***"whenever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularizing it, organizing it, producing order in it so that decision***

> ***will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary per are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, in our context, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalize it and regulate it by Rules, or Policy statements or precedents, the Courts have to intervene more often, than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times".***

This principle has been consistently followed by the Hon'ble Supreme Court in Chairman RTA Vs. Pakistan Mutual Insurance Company Ltd. (PLD 1991 SC 14), Director Food N.W.F.P. Vs. Madina Flour Mills (PLD 2001 SC 1), Chief Secretary Punjab Vs. Abdul Raoof Dasti (2006 SCMR 1876) and Abdul Wahab Vs. Secretary Govt: of Baluchistan (2009 SCMR 1354).

In a more recent judgment, the august Supreme Court has in Tariq Azizuddin's case (HRC No.8340, 9504-G, 13936-G, 13635-P and 14306-G to 14309-G of 2009) reaffirmed the principle of structuring of discretion by stating that:-

> ***"The above principle of structuring of discretion has been derived from the concept of rule of law which inter alia, emphasizes that action must be based on fair, open and just consideration to decide the matters more particularly when such powers are to be exercised on discretion. In other words, arbitrariness in any manner is to be avoided to***

> ***ensure that the action based on discretion is fair and transparent…..***
>
> ***"…Expression 'merit' includes limitation prescribed under the law. Discretion is to be exercised according to rational reasons which means that (a) there be finding of primary facts based on goods evidence and (b) decision about facts be made for reasons which serve the purpose of statutes in an intelligible and reasonable manner. Actions which do not need these threshold requirements are considered arbitrary and misuse of power…….***
>
> ***"…..All judicial, quasi judicial and administrative authorities must exercise power in reasonable manner and also must ensure justice as per spirit of law and seven instruments which have already been referred to above regarding exercise of discretion. The obligation to act fairly on the part of the administrative authority has been evolved to ensure the rule of law and to prevent failure of justice [Mansukhlal Vithaldas Chauhan vs. State of Gujrat (1997 (7) 622)…"***

Secondly, the words, *"as he deems fit*" cannot be viewed myopically and thereby be exaggerated in isolation. The intent of the legislature, is for the same to be exercised fairly, reasonably, and in furtherance of the general aim of the Act. Surely, the discretion so vested by the legislature was not to render absolute powers to the Collector of Customs to pass orders based entirely on his whims, and that too without considering his position and function assigned in the Act. It appears that this latitude in words, *as he deems fit*, was provided for the Collector of Customs to deal with various situations that may arise. The authority of '*reopening cases'*, so vested in the Collector of

Customs, is to be based on the objective legal criteria, which is to be *germane* to the functions, scope and limits of his authority provided under the Act.

A leading judgment on exercise of judicial discretion is ***R.V. Boteler (1864),*** wherein Cock-burn, C.J, while commenting on the powers vested upon Justices to issue a distress warrant **"*if they shall think fit*"** *observed:*

> ***They went upon the ground that the introduction of this extra parochial place into the union was a thing unjust in itself; in other words, that the operation of the act of a Parliament was unjust… I think therefore it amount virtually to saying,--- We know that we ought upon all other grounds to issue the warrant, but we will take upon ourselves to say that the law is unjust, and we will not carry out the law. That is not such an exercise of discretion as this Court will hold, in accordance with the authorities cited to be one upon which it will act. The Justices must not omit or decline to discharge a duty according to law."***

In similar circumstances, the august Supreme Court of India followed the *ratio decidendi* of ***Boteler's case*** in ***Raja Ram Mahadev Paranjype's case*** ***(*AIR 1962 SC 753)** wherein exercise of Quasi Judicial discretion of "*Mamlatdar*" under a statute was discussed in terms that:

> "***We think, therefore, that s.29(3) only confers power to make an order in terms of the statute, an order which would give effect to a right which the Act has elsewhere conferred. The words "as he deems fit" do not bestow a power to make any order on considerations dehors the stature which the authorities consider best according to their notions of justice. Obviously, the provision has been framed in general terms because it covers a variety of cases, namely,***

> ***applications by landlords and tenants in different circumstances, each of which circumstances may call for a different order under the Act."***

In another case, ***V.C. Rangadurai's case*** **(AIR 1979 SC 281)** the august Supreme Court of India further expounding the said principle of exercise of discretion vested in a *Qausi-Judicial* authority dealing with licenses of lawyers has explained that:

> ***"Wide as the power may be, the order must be germane to the Act and its purposes, and latitude cannot transcend those limits, Judicial 'Legisputation' to borrow a telling phrase of J.Cohen, is not legislation but application of a given legislation to new or unforeseen needs and situations broadly falling within the statutory provision. In that sense, 'interpretation is inescapably a kind of legislation'. This is not legislation strict sensu but application, and is within the court's province."***

The *ratio decidendi* of the aforementioned cases has been consistently followed in India as well as in our jurisdictions. Some of the leading cases in this regard are ***Muhammad Farooq Imam's case (PLD 1964 SC 585), Tufail Muhammad's case (PLD 1965 S.C 269),*** and ***Aagra Electric Supply Company's case*** **(AIR 1970 SC 806).**

Thirdly, when we analyze the scope of the powers vested in the Collector of Customs under the Act, it is noted that he has the authority of *reopening cases* decided by his subordinate Customs Officers, as is evident from the provisions of Section 195 of the Act.

As mentioned earlier, this Authority of the Collector of Customs vested in him under Section 195 of the Act, is clearly distinct from the powers vested in the Collector (Appeals), who as a statutory forum of appeal under section 193 of the Act hears appeals against decision of subordinate Custom Officers. Interestingly, appeals against Order-In-Originals passed by Customs Officers before the Collector (Appeals) are filed by the Collectorate, on the directions of the Collector of Customs. Similarly, the decisions of Collector (Appeals) are impugned by the Revenue before the Tribunal on the directions of Collector of Customs. Likewise, the decisions of the worthy Tribunal can also be agitated before this Court, as a Reference moved by the Collector of Customs. Thus, it would be safe to state that the legislature has maintained a general theme in the Act to keep the adjudicating hierarchy completely separate, independent and distinct from the Executive/Administrative side of the Collectorate.

Fourthly, another important aspect of the power so vested in FBR and the Collector of Customs under section 195 of the Act, is that there is no express bar provided in the said section, curtailing the authority so vested therein. This Court is alive to the legal

proposition relating to interpretation of statutes that in absence of an express bar, the authority vested with discretion may exercise the same. However, the said discretion is not absolute and the limitation thereto can be inferred from the other provisions in the statute. This would take us to section 223 of the Act, which reads:

> ***"Officers of Customs to follow Board's orders, etc. All officers of customs and other persons employed in the execution of this Act shall observe and follow the orders instructions and directions of the Board:***
>
> ***Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the appropriate officer of customs in the exercise of their quasi-judicial functions."***

The bare reading of the aforementioned provision clearly expresses the intention of the legislature regarding the segregation of FBR's Administrative and Executive Authority from the quasi-judicial adjudicatory authority provided under the Act. The directions of the FBR under this provision of law are the administrative policy decisions, which are generally expressed as Customs General Orders (**"CGOs").** The CGOs are binding on all Customs Officers, while acting in their Executive/ Administrative capacity under the Act. However, the CGOs would have no binding force before the adjudicatory authorities exercising *Qausi Judicial*

functions under the Act. Act best the CGOs would have persuasive evidentiary value representing the view of the Revenue before the said adjudicating authorities. The Apex Court in ***M.A. Rahman's case (1988 SCMR-691),*** while commenting on this aspect of the matter, has very aptly discussed the same in terms that:

> "***The scheme underlying this provision of law clearly contemplates a division of functions ordinarily to be discharged by officers of the Customs in execution of duties cast upon them by the various provisions of the Act. The division comprises of quasi-judicial functions; and other functions and duties. The enacting part of the provisions of section 223 makes it obligatory upon the offices of Customs to observe and follow the orders, instructions and directions issued by the Board of Revenue. However, the proviso restricts the powers of Board of Revenue so that no such orders, instructions or directions can be given which in any way interfere with the discretion of the appropriate officers of Customs in the exercise of their quasi-judicial functions. Undoubtedly adjudication proceedings under the Customs Act empowering the appropriate Customs Officers to impose penalties or orders of confiscation of goods, the exercise of appellate power and revisional jurisdiction against orders of adjudicating officers are quasi-judicial functions involving the exercise of discretion. Clearly, therefore, while exercising these functions the appropriate officers of Customs are not subject to the administrative control of the Board of Revenue by means of orders, instructions or directions. Such officers while so acting are controlled by the statute under which the relevant power or function is exercised and this function is further subject to control of the same quasi-judicial nature under chapter XIX by means of appeal and revision. In this Chapter sections 193, 195 and 196 establish a hierarchy of authorities for correction of errors, illegalities, irregularities or improprieties occurring in the orders passed by the subordinate officers or authorities."***
>
> ***(emphasis provided)***

The principles so laid down in the above cited case has been followed consistently by the superior Courts of our jurisdiction. Some of the leading cases in this regard are ***Commercial Pipe (Pvt) Limited's case*** **(PTCL 1989 C.L 119),** ***Muhammad Munir Hussain's case*** **(PTCL 1998 C.L 275),** ***M/s. United Refrigeration Industries (Pvt) Ltd's case*** **(PTCL 2001 C.L 423),** ***Muhammad Tasleem's case*** **(PTCL 2002 C.L 80),** ***M/s. Civil Aviation Authority's case*** **(PTCL 2005 C.L 15),** ***B.P. Industries (Pvt) Limited's case*** **(PTCL 2008 C.L 255),** and ***Filters Pakistan (Private) Limited's case*** **(PTCL 2011 C.L 68).**

Finally, in such circumstances, this Court is of the firm view that though the Collector of Customs has wide powers in passing any order *as he deems fit,* keeping in view the peculiar circumstances of the case, but these revisional powers cannot transgress or encroach upon the jurisdiction of the Collector (Appeals) adjudicating appeals under Section 193 of the Act.

In the present case, the petitioner had challenged the Order- in-Original No.8 of 2011 before the Collector (Appeals) and during the pendency of said appeal, the Collector of Customs invoked his

powers under Section 195 of the Act, which is blatantly illegal, as he has transgressed his authority by *quashing* the impugned order of the Assistant Collector, while the same was pending adjudication before the Collector (Appeals).

Had there been no appeal pending before the Collector (Appeals), and that the Collector of Customs, while serving a Final Notice under Section 195 of the Act, had questioned the legality or propriety of the decision of a subordinate Custom Officer, within the two years statutory period, it could surely proceed with a matter.

But the impugned action of the Collector of Customs to *quash* the entire proceedings, when the *lis* was pending adjudication in appeal before the Collector (Appeals), a separate statutory forum of appeal, as in the present case, was clearly illegal, void and surely without lawful authority.

In the circumstances, Order-In-Original No.8 of 2011 cannot be termed "*inconsequential"*, as asserted by the worthy counsel for the Revenue. However, in view of the legal discourse above, it would **not** be appropriate for this Court and that too at this stage, to render any opinion on the Question of Law No.I, as framed by the petitioner, lest the same

prejudice the respective claims of the parties in the appeal filed by the petitioner impugning the Order-In-Original No.8 of 2011, which is to be deemed pending before the Collector (Appeals).

Question of law No.II.

> ***Whether under the facts and circumstances of the case, the impugned Order-in-Original dated 6.10.2011 (against the show cause notice dated 9.12.2010) is also coram non judice in terms of sub section (3) of Section 179 for having been passed beyond the stipulated period of 120 days.***

The worthy counsel for the petitioner contended that the provisions of Section 179(3) of the Act are mandatory in nature and the time period prescribed therein, has to be followed in cases before the Collector (Appeals) and the Collector of Customs under the provisions of Sections 193 and 195 of the Act, respectively. Seeks Reliance on the ***M/s POF Wah Cantt's case*** **(CP No.952 of 2012)**, ***M/s Pak Suzuki Motor's case*** **(PTCL 2007 CL 78),** ***M/s Shah Taj Sugar Mills' case*** **(PTD 2009 1544 SC),** ***M/s Abbasi Enterprises' case*** **(PTCL 2009 CL 35),** ***M/s Frontier Ceramics' case*** **(PTCL 200 CL 356),** ***M/s Kapron Overseas' case*** **(2010 PTD 465), and** ***M/s Super Asia's case*** **(PTCL 2008 CL 1).**

In rebuttal, the worthy counsel for the Revenue contended that both, Order-In-Original and

even the show-cause notice alluded to in Question No.II have already been quashed by the Collector of Custom, while exercising his supervisory jurisdiction vested in it under Section 195 of the Act. Therefore, Order-In-Original No.8 of 2011(against First Notice) being passed after the stipulated 120 days, again becomes irrelevant and out of place. This is simply on the score that the Order-In-Original No.8 of 2011 and First Notice issued by Deputy Collector Customs did not exist at that point of time. The worthy counsel sought reliance upon the judgment of the apex Court in ***M/s Tripple M's case*** **(PLD 2006 SC 209).**

OPINION.

As this Court has opined in response to Question of Law No.1, hereinabove, that the very *quashment* of the Order-In-Original No.8 of 2011, by the Collector of Customs by invoking Section 195 of the Act, was illegal and the appeal of the petitioner before the Collector (Appeals) had to be decided by the said appellate forum, it would not be appropriate for this Court to pass any findings on this question of law, lest the same may prejudice the case of the parties before the appellate forum.

Question of law No.III and IV.

Whether under the facts and circumstances of the case, reopening of the Order-in-Original passed by the learned Deputy Collector u/s 195 ibid by the learned Collector Customs was void ab initio for malafide and lack of justifiable cause.

Whether under the facts and circumstances of the case, the very show cause notices and proceedings there under were malafide, misconceived, discriminatory and without lawful authority as amongst all importers who have cleared their imports during July-Sept/2010 in accordance of valuation Ruling No.259 dated 3.6.2010 only the appellant has been singled out for recovery of the alleged short levy.

The very thrust of learned counsel for petitioner was that the Collector of Customs exercised his jurisdiction with malafide as others who had cleared Polyester Fabric during the subject period in accordance with the Valuation Ruling No.259 of 3.6.2010, were not proceeded against, hence, the entire proceedings were based on discrimination.

In rebuttal, the worthy counsel for Revenue vehemently opposed the aforesaid contention and submitted that the actions of the Collector Customs were in complete accord with a provision of Section 195 of the Act. In this regard, the worthy counsel stated that the record of the proceedings leading to Order-In-Original No.8 of 2011, was called and considered by the worthy Collector of Customs within the stipulated time of two years from the date of

the said order and that the petitioner was duly served a notice prior to passing any findings imposing any liability. On merits too, the worthy counsel contended that the petitioner concerned was proceeded for under weighment by not observing the prevailing unit for weighment. He further contended that the issue of under weighment and short payment of duties and taxes raised by the worthy Collector have never been denied by the petitioner during the entire proceedings. Hence, malafide or lack of justifiable cause for initiation of the proceedings by the worthy Collector Customs under Section 195 of the Act, could not be taken at this stage.

OPINION.

As far as the submission of the learned counsel for the petitioner regarding *`mala fide'* and *discrimination* on the part of the respondents is concerned, it is noted that this issue being a mixed question of law and fact cannot be dealt with at this stage, especially when no concrete evidence has been brought on record, so as to render a definite opinion thereon. More importantly, the allegation of *`mala fide'* asserted by the present petitioner has not been narrated with particularity, expressly specifying the *maker*, the mode and manner of the alleged tainted action. The

essential requirements for rendering any opinion on a question of *malafide,* as already explained by this Court in ***Associated Industries'case*** **(2014 PTD 552)** are as follows:-

(i) ***"The person who has acted with `mala fide' against the interest of the petitioner has to be impleaded in person as a party to the petition; Muhammad Umar Khan's case (1992 SCMR 4554);***

(ii) ***The `mala fide' act has to be Expressly stated with particulars; Subedar Muhammad Ashraf's case (PLD 2002 SC 706) and Lanvin Traders' case (2013 SCMR 1419);***

(iii) ***The onus of proof lies on the person who makes the said assertion of being aggrieved person; Qazi Hussain Ahmed's case (PLD 2002 SC 583);***

(iv) ***The said `mala fide' actions have to be born out from the record and which does not require any detail examination or is admitted by the other side; Israrul Haq's case (2005 SCMR 558) and Mst.Qaisra Elahi's case (2005 SCMR 678).***

In a more recent case, the apex Court in its judgment rendered in the case of Dr. Akhtar Hussain Khan and others v. Federation of Pakistan and others (2012 SCMR 455), relying Saeed Ahmad Khan's case (PLD 1974 SC 151) and Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14) has observed:- "Mala fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mala fides. As has been pointed out by this Court in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14), mala fides must be pleaded with particularity, and once one kind of mala fides is alleged, no one should be allowed to adduce proof of any other kind of mala fides nor should any enquiry be launched upon merely on the basis of vague and indefinite allegations, nor should the person alleging mala fides be allowed a roving enquiry into the files of the Government for the purposes of fishing out some kind of a case. "Mala fides" literally means "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say, in

which the person taking the action does so out of personal motives". Keeping in view the 'ratio decedenti' of the aforementioned judgments as our guiding principle, it can safely be stated that the present petition cannot be maintained on the ground that the petitioner has not only an alternative efficacious remedy available under the Act but also that the assertion of 'mala fide' alleged by the petitioner lacks essential attributes, which are required under the law for the Constitutional court to take cognizance thereof.

Keeping in view the aforementioned principles for adjudging *malafide*, this Court on the available record before it, cannot arrive at a conclusive opinion, regarding the allegations of *malafide* or *discrimination* imputed by the petitioner upon the respondents.

Question of law No.V, VI and VII.

Whether under the facts and circumstances of the case, Section 25-A has a superceding effect upon section 25 of the Customs Act, 1969 which provides that once value determined under section 25-A by the Director General Customs Valuation its enforcement is mandatory upon the Customs Officer throughout the country unless and until reviewed by the Director General under Section 25-D ibid.

Whether under the facts and circumstances of the case, the impugned show cause notice dated 9.12.2010 and subsequent proceedings are coram non judice for having the effect of ignoring and reviewing the valuation determined u/s 25-A which provides that once value determined under section 25-A, no other Customs Officer except Director General's valuation ruling shall be applicable.

Whether the impugned cause for demand was justified where the appellant goods were assessed as per departmental practice ensuing for more than five years and has the sanction of law under section 25-A ibid.

The counsel for the petitioner vehemently argued that the Revenue was undermining and disputing its own approved valuation by the competent forum namely the Director General Customs Valuation and thus vitiated the entire impugned proceedings.

In rebuttal, worthy counsel for the Revenue contended that this is not a case where parties are at variance on the issue of applying one Custom Valuation or another. This is rather a case where dispute has arisen out of the improper and under-weighment of imported goods resulting in short payment of duties and taxes. Therefore, Sections 25, 25-A, 25-D and even Section 29 are not at all attracted.

OPINION.

This is purely a factual dispute, which is beyond the mandate of the jurisdiction vested in this Court under Section 196 of the Act. No exceptional document was brought to the attention of the Court so as to pass any definite finding therein. In this regard, the Apex Court in ***Messrs Zarghoon Zarai Corporation*** **(2006 PTD 534)** has clearly laid down the principle, which has been consistently followed. The Apex Court opined that:

> ***"we are firmly of the view that the vital question of fact as to whether the goods were of Iranian origin or local made has been***

concluded by the Tribunal as well as the Additional Collector of Customs, which does not raise any question of law for determination by the High Court in terms of section 196 of the Customs Act, 1969. High Court was, therefore, perfectly justified to decline exercise of its jurisdiction as under the relevant law only a question of law can be raised before it in such appeal"

Questions of Law No.VIII, IX & X.

Whether under the facts and circumstances of the case, in view of Section 29 of the Customs Act, 1969, post clearance dispute is permissible specially when clearance have been made in accordance with law.

Whether the entire proceedings against the Appellant is void ab initio for being based on Audit carried out by officers without lawful authority for having been non-notified as Appropriate Officer in terms of Clause (b) of Section 2 of the Act read with SRO 371(i)/2002 dated 15.6.2002?

Whether under the facts and circumstances of the case, the order of the learned Tribunal is erred for not attending all the grounds raised before it?

The worthy counsel for petitioner vehemently argued that after the clearance of the goods under Section 83 of the Act, the Collectorate of Customs, Peshawar, had become *functus officio*, as the clearance had rendered the same to be a *past and closed transaction*. The worthy counsel sought reliance upon judgments in ***M/s S.T. Enterprises' case*** **(PTCL 2009 CL 330),** ***M/s Sikandar Enterprises' case*** **(PTCL 2009 CL 11),** ***Sunny Trader's case*** **(PTCL 2009 CL 470).**

OPINION.

As this Court has opined in response to Question of Law No.1, hereinabove, that the very *quashment* of the Order-In-Original No.8 of 2011, by the Collector of Customs by invoking Section 195 of the Act, was illegal and the appeal of the petitioner before the Collector (Appeals) had to be decided by the said appellate forum, it would not be appropriate for this Court to pass any findings on this question of law, lest the same may prejudice the case of the parties before the appellate forum.

CONCLUSION.

I. There are three distinct *regimes* for regulating and carrying out the aims embodied in the Act. The same can generally be categorized as follows:

- ***Administrative or Executive Authority.***
- ***Quasi Judicial adjudicating Authority.***
- ***Judicial Authority trying penal provisions***.

II. There can be no absolute or unbridled power vested in any authority; may it be Executive or Quasi Judicial or Judicial. The discretion has to be subject to *reason* and the *law*.

III. The words, *"as he deems fit*" cannot be viewed myopically and thereby be exaggerated in isolation. The intent of legislature was surely not to render absolute powers to the Collector of Customs under Section 195 of the Act to pass orders based entirely on his whims.

IV. The authority so vested in the Collector of Customs under Section 195 of the Act, is to be based on the objective legal criteria, which is to be *germane* to the functions, scope and limit of his authority provided under the Act.

V. Executive Authority of the Collector of Customs vested in him under Section 195 of the Act, is clearly distinct from the powers vested in the Collector (Appeals), who as a statutory forum of appeal under section 193 of the Act hears appeals against decision of subordinate Custom Officers.

VI. The powers of the Collector of Customs under Section 195 of the Act, to reopen cases decided by subordinate Customs Officers cannot transgress and encroach upon the jurisdiction of the Collector (Appeals), adjudicating appeals against the said decisions under Section 193 of the Act.

VII. Impugned action of the Collector of Customs to *quash* the Order-In-Original No.8 of 2011, when the same was pending adjudication in appeal before the Collector (Appeals), a separate statutory forum of appeal, was clearly illegal, void and surely without lawful authority.

VIII. The authority of the Collector of Customs as provided under Section 195 of the Act, are revisional powers, vested to supervise actions of subordinate Custom Officers, which could be invoked in cases where the following conditions precedent are fulfilled;

- ***There should be a decision of a subordinate Custom Officer,***
- ***The said decision of the subordinate Customs Officer should lack legality or propriety,***
- ***The decision of the subordinate Customs Officer should have been passed within two years of it being examined by the Collector of Customs, and***
- ***In cases where confiscation of goods or increase in duties and taxes from taxpayer is to be sought, the Collector of Custom should serve a notice upon the person, who is to be affected by the proposed decision.***

IX. The authority of FBR and the Collector of Customs to '***reopen***' cases decided by subordinate Customs Officers under section 195 of the Act, is not a ***coercive tool,*** rather it is a

corrective tool to ensure proper administration of taxation; preventing loss of duties and taxes on the one hand, and to avoid harm of excess recovery of duties and taxes by the Revenue from the taxpayers, on the other hand.

X. The Collector of Customs can invoke his authority under section 195 of the Act, in cases where the four conditions precedent are fulfilled. The only exception to this rule is in cases, where the matter is pending adjudication before any appellate forum provided under the Act.

XI. The allegation of *`mala fide'* asserted by the present petitioner has not been narrated with particularity, expressly specifying the name of the *maker*, the mode and manner of the alleged tainted action.

XII. A purely factual dispute is beyond the jurisdiction of this Court vested under Section 196 of the Act.

In view of the above, the Order-In-Original No.345 of 2012 and the decision of the worthy Tribunal dated 19.9.2013 are set aside and this Customs reference is answered in terms stated above.

Office is directed to send a copy of this judgment under seal of the Court to the Appellate Tribunal Inland Revenue, Peshawar Bench, Peshawar.

Announced:
15.07.2015. **J U D G E**

J U D G E

"A.Qayum"