GOVERNMENT OF PAKISTAN
CUSTOMS APPELLATE TRIBUNAL, BENCH-I,
3RD FLOOR, JAMIL CHAMBERS,
SADDAR, KARACHI

Before: Mr. Muhammad Nadeem Qureshi, Member Judicial-I.
Karachi.

01. Customs Appeal Nos.K-467/2015

M/s. Ahsan Traders,
Arkey Square, Ext. 4/33, 4th Floor,
Shahrah e Liaquat,
Karachi.

02. Customs Appeal Nos.K-468/2015

M/s. Nawab Traders & Recycling Shop,
No.3, 1st Floor, G-C. Centre, Chatier Gee Road,
Urdu Bazar,
Lahore.

03. Customs Appeal Nos.K-469/2015

Muhammad Anwar,
S/o Wali Muhammad,
Resident of H.No.163,
Block-3, Memon Colony,
F.B. Area,
Karachi.

04. Customs Appeal Nos.K-470/2015

M/s. MS Enterprises,
IV-A-2/3 Commercial Area,
Nazimabad No.4,
Karachi.

Versus

1. The Additional Collector of Customs,
Collectorate of Customs (Adjudication-I),
Custom House, Karachi.

2. Collector of Customs,
MCC Preventive,
Custom House, Karachi.

ATTESTED

CUSTOMS APPELLATE TRIBUNAL BENCH-I, KARACHI

Date of hearing: 04-07-2015
Date of order: 22-08-2015

Rana Zahid Hussain, Advocate, present for the appellant.
Mr. Khalid Dogar, Advocate, present for the respondents.

JUDGMENT

Muhammad Nadeem Qureshi, Member Judicial-I: By this order, I intend to dispose of the above appeals, filed by the appellants against the Order-in-Original No.277/2014-15 dated 14-01-2015, passed by the Additional Collector of Customs (Adjudication-I) Karachi. Since all these appeals have identical issue of law and facts, therefore, being heard in the light of the Judgment of the Honorable High Court of Sindh, Karachi in Customs Reference No. 157 of 2008 S.M. Naqi S/o Syed Muhammad Hussain, Karachi Vs. Collector of Customs (Adjudication-I) and others.

02. Brief facts of the case are that on 16.5.2014 in pursuance of information the Customs ASO staff searched a godown/premises situated at Plot No.F-2/A-D, S.I.T.E, Karachi under Section 163 of the Customs Act, 1969 wherefrom the following goods were recovered:

1. Printed metalized film (standard quality)
2. Pearl printed sheet foods (standard quality)
3. PVC printed film (standard quality)
4. Printed aluminum foil (standard quality)
5. Plastic printed foods (standard quality)
6. PVC printed film (standard quality)
7. PVC printed foil (standard quality)
8. Printed aluminum foil (standard quality)
9. PVC printed film (standard quality)
10. Poly paper (standard quality)
11. Printed food foil (standard quality)
12. Educational books.
13. Foreign origin recorded DVDs

03. All the above mentioned goods (aluminum foils, PVC printed foil, PVC printed films, Poly paper, Printed food foil etc.) were found in complete roll form without cutting, therefore, the godown was sealed and a notice u/s 168 of the Customs Act, 1969 was served to the occupant/tenant of the godown namely Muhammad Anwar, that the goods lying at the godown may not be removed, part with or otherwise dealt with goods. A notice u/s 26 of the Customs Act,

1969 was also served to concerned persons namely (1) M.S Enterprise (2) Nawab Recycling (3) Irfan Engineering (4) Ahsan Traders (5) MSA Enterprises vide No. AS0-60/2014 dated 17.5.2014 requiring following legal documents:

1. Copies of GDs against which the goods were kept at the said godown.
2. Closing balance as on 16.5.20.14 as per Sales Tax Record.
3. Invoices pertaining to GDs so produced.
4. Inward/ outward registers for the goods in question.
5. Sales tax record for the corresponding transaction /period of goods imported.
6. Sales Tax Return for the months of February, March and April, 2014.
7. Stock position as per Sales Tax Return in the month of April & May 2014 (till16.5.2014).
8. Sales Tax inventory.
9. Sales Tax Registers.
10. Sales invoices.
11. Customer order requests
12. Purchase orders (POs)
13. Goods received note (GRNs)
14. Purchase ledger/register.

04. In response to the notice under section 26 the representative of clearing agents M/s. Ahsan Traders CHAL No. 522 namely Muhammad Hanif (alias Mama) supplied 5 copies of GDs as follows:

i. KPQI-HC-5980 dated 7.5.2014 (importer Irfan Engineering Industry Gujranwala and clearing agent Ahsan Traders), pertaining to aluminum foil with paper backing waste 19,030 kgs net duty/ taxes Rs. 10,80,033/-.

ii. KPQI-HC-5734 dated 24.4.2014 (importer Nawab Trader and Recycling Lahore and clearing agent Ahsan Traders), pertaining to printed/misprinted aluminum foil with poly backing waste 10,410 kgs net duty/taxes Rs.2,71,048/-

iii. KPQI-HC-5794 dated 28.4.2014 (importer Nawab Trader and Recycling Lahore and clearing agent Ahsan Traders), pertaining to plastic film waste 52,140 kgs net duty/ taxes Rs.1,104,666/-.

iv. KPQI-HC-5762 dated 26.4.2014 (importer M.S. Enterprises, Karachi, clearing agent Ahsan Traders), pertaining to printed/misprinted plastic waste 25,990 kgs and corrugated carton board waste duty/taxes Rs.422,285/-

ATTESTED

CUSTOMS APPELLATE TRIBUNAL

v. KAPR-HC-32059 dated 5.5.2014 (importer Muhammad Saleem & Co. Karachi clearing, agent Ahsan Traders), pertaining to old and used educational books assorted titles 47,860 kgs duty/taxes Rs. 104,662/-

05. The respondents have failed to comply with the notice under section 26 as it was required under the law Moreover, the perusal of the GDs so provided, revealed that the description and quantity of goods lying at the godown did not confirm with these GDs which is as under:

1. Printed metalized film (standard quality) 4000 Kgs
2. Pearl printed sheet foods (standard quality) 9,936 Kgs
3. PVC printed film (standard quality) 3,600 Kgs
4. Printed aluminum foil (standard quality) 1,200 Kgs
5. Plastic printed food (standard quality) 1,500 Kgs
6. PVC printed film (standard quality) 2,445 Kgs
7. PVC printed foil (standard quality) 4,130 Kgs
8. Printed aluminum foil (standard quality) 6,435Kgs
9. PVC printed film (standard quality) 600 Kgs
10. Poly paper (standard quality) 14,000 Kgs
11. Printed food foil (standard quality) 20,000 Kgs

Total Weight 67,846 Kgs.

06. However, the Old & used printed education books were found matched with the GD provided as above and Recorded DVDs were said to be part & parcel of these books, therefore these were released. The godown so raided and searched had been acquired on hiring basis and they were not industrial consumers. The clearing agent Muhammad Hanif (alias mama) had produced copies of 5 GDs mentioned above as a cover up while the goods belonged to them, being commercial trader, who were not authorized to import even scrap of above items, except old and used books. However upon interception of the godown the representative of the clearing agents namely Muhammad Hanif appeared and declared that importers M.S. Enterprise were running industrial unit at some other place and claimed that the goods owned belonged to them merely on the ground that they are

ATTESTED

CUSTOMS APPELLATE TRIBUNAL GOVT. OF PAKISTAN KARACHI

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ATTESTED

CUSTOMS APPELLATE TRIBUNAL GOVT. OF PAKISTAN KARACHI

running an industry elsewhere which is not a fact as the existing/ searched godown was hired by some other person namely Muhammad Anwar and the goods lying at these godown were not cut into pieces. The above mentioned importers misused the facility of import of printed/ misprinted plastic rolls, paper waste etc. importable for industrial users and gave their import documents to other parties like Mr. Muhammad Anwar to cover up the impugned goods. The goods cleared under PCT Heading PCT 3915.9000, PCT 4707.9091, PCT 4707.9090 according to which the goods are importable by Industrial consumers only and the import of misprinted plastic/ paper scrap having brand of edible products is importable in completely "cut into pieces" vide Appendix B, Part II, Sr.No.11 of Import Policy Order 2013, while the goods lying at the godown were in complete roll form, without completely cut into pieces. And a good portion of goods lying there was plastic /paper/aluminum foils bearing edible brands. The goods lying at the said premises/godown weighing all 67,846 kilograms were seized under Section 168 of the Customs Act, 1969 for violation of Sections 16, 32, 178 and 187 read with 156(2) of the Customs Act, 1969 and Sr.No.11 of Appendix B, Part II of Import Policy Order 2013 punishable under clauses (9) & (14) of Section 156 (1) ibid read with Section 3 (1) of Imports and Exports (Control) Act, 1950 after completion of legal formalities. The value of seized goods calculated to be Rs.27,05,698/- and duty/taxes (CD: Rs.676,425/-, S. Tax: Rs.676,425/-, Income Tax: Rs.223,220/-) have been determined.

07. The Additional Collector of Customs (Adjudication-I), Karachi passed the impugned Order-in-Original No.277/2014-15. The operative part of the order reproduced as under:

"I have examined the case record and considered written/verbal arguments of the respondent and the department. As per record the seized good were found in complete roll form without cutting (standard quality) bearing edible brands. The import GDs produced by M/s Ahsan Traders indicate that the imported goods were aluminum foil waste, poly paper waste, plastic film waste etc. cleared under PCT headings 3915.9000, 4707.9091 and 4707.9090, which are importable by industrial consumers only. Further, the import of misprinted plastic/ paper scrap having brand of edible products are importable in completely "cut into pieces" under Import Policy Order in vogue. Therefore, the import documents have no relevance with the description and quantity of seized goods being of standard quality. The respondents could not provide any valid documents / evidence to Substantiate Lawful Import / possession of the seized goods. In view of the above it is evident that the goods have been smuggled into the country through unauthorized channel by evading payment of duty and taxes leviable thereon. Hence, the charges levelled In the Show Cause Notice stand established. I, therefore, order for outright confiscation of the seized goods under Section 168 of the Customs Act, 1969 for violation of Sections 16, 32, 178 and 187 read with 156(2) of the Customs Act, 1969 and Appendix B, Part II (Sr.No.11) of Import Policy Order in vogue punishable under clauses (9) & (14) of Section 156 (1) read with SRO 499(1)/2009 dated 13-06-2009."

08. Being aggrieved and dis-satisfied with the impugned Order in-Original the appellants filed these instants appeal before this Tribunal on the grounds incorporated in the Memo of Appeals.

09. On the date of hearing Rana Zahid Hussain, Advocate appeared on behalf of the appellants, reiterated the contents of the appeal and further contended that the impugned Order-in-Original is non speaking, arbitrary and bad in law may be set aside accordingly. He further contended that, on the one hand the respondent/Additional Collector of Customs, held that the seized items were 'smuggled' while on the other hand states that the said items were 'imported' in violation of the Import Policy Order, 2013. The Show Cause Notice never leveled allegations of 'smuggling'. The respondent Additional Collector has concluded that the items were imported in violation of Import Policy Order, 2013. The

ATTESTED

consignments were duly examined and tested by the trained staff of the Appraisement Collectorate. The respondent ADC ignored the self-explanatory Tax registration documents produced by the appellants which clearly show the appellants as being manufacturers. The impugned imported goods are not "standard goods" as perceived by the customs authorities in the impugned Show Cause Notice. In fact these goods are printed / misprinted film waste, which were cleared from customs under the GDs after making a request on each GD for first examination for determination of description, duties and taxes. He further contended that, the provisions of Import Policy Order vide Appendix-B, Part-II, Sr. No.11 are not applicable as asserted in the Show Cause Notice by considering the impugned goods as "standard quality" as these are misprinted or printed with signs, characters, words, expressions, logos and shapes which are not associated or aligned with products which are produced locally, consumed by people or even imported. The use of these film / impugned goods / foils / poly paper etc. cannot be attributed to the purpose for which these were manufactured and that thing which cannot be used for the original purpose for which it was manufactured is considered as scrap / waste. He argued that, M/s Nawab Traders and M/s. M.S Enterprises run and operate recycling industries. These legally imported goods were shifted to warehouse at Plot No.F-2/A-D, SITE, Karachi, due to shortage of space in the factory premises. The legally imported goods which are factually waste and for which examination report on the GD is available, can neither be termed as standard goods nor provisions of clause 11, Appendix-B of Import Policy Order can be applied to the goods stored in the warehouse. The appellants cooperated fully

ATTESTED

CUSTOMS APPELLATE TRIBUNAL BENCH-I, KARACHI

with the customs authorities and provided all the required documents against Notice under Section 26 of the Customs Act, 1969, and also provided the Sales Tax Record / Returns to prove their view point that goods were imported legally and had been declared in their Sales Tax Record. The impugned goods were neither seized properly as envisaged in provisions of Section 168 of the Customs Act, 1969, nor any proper notice was issued complying with the dictates of law. He further argued that, the purported information itself vows against the ASO who are empowered to act only in the case of smuggled goods and are not empowered to reject, re-examine or re-count any imported goods cleared legally against G.Ds under section 79 read with section 80 & 81 of the Customs Act, 1969. This is a clear-cut case of mis use of powers, jurisdiction and authority vested in the ASO. The impugned order has also been passed in violation of principles of natural justice and Article 10A of the Constitution of Pakistan, 1973. Key documents, such as the notice / search order under Section 163 of the Customs Act, 1969, were not been provided. The search & seizure has been made in clear violation of sections 162 & 163 of the Act. Section 162 provides that the only person with authority to issue a 'search warrant' is a Judicial Magistrate. Section 163, on the other hand, allows the Assistant Collector to 'search or cause to be searched' certain premises without a 'search warrant' by way of a 'statement'. Such without warrant search is only available where there is a danger that any goods may be removed before a search can be effected under a legal search warrant issued by a Judicial Magistrate. The respondent Collector of Customs, MCC Preventive, in breach of both sections 162 & 163, issued a 'WARRANT OF SEARCH under Section 163'. The

ATTESTED

respondent Collector was not empowered to issue a 'warrant of search', i.e. a 'search warrant', for the search of any premises. In order to effect a lawful search under a 'search warrant', as required by section 162 and the provisions of the Code of Criminal Procedure, the officer of Customs had to make an application to a Judicial Magistrate seeking a 'search warrant'. If the 'search warrant' was deemed appropriate in the case, it was only the Judicial Magistrate who could have issued it. The section 163 of the Act gives a "Power to search and arrest without warrant". Section 163 can only be engaged exceptional and extraordinary circumstances. Accordingly, in order to invoke section 163 the stringent requirements laid out therein need to be fulfilled. These conditions, to be fulfilled by the Assistant Collector, are in place in order to ensure that this enormous power is exercised with extreme care and to safeguard the rights of persons under Article 4(2)(a) of the Constitution of Pakistan. He referred the decisions of the High Courts of Pakistan. Extracts from PTCL 1988 CL. 176 and PTCL 1992 CL. 155. That the premises could only be searched upon fulfillment of the stringent requirements laid down in section 163 of the Act. By failing to comply with the requirements, the respondents have occasioned extreme misuse of their powers under section 163 read with section 162, and impugned the liberty of the appellants by making an improper and illegal statement causing the search to be effected. Secondly, there needed to be reasonable grounds for belief that there is a danger that the goods might be removed before a lawful 'search warrant' was obtained from a Judicial Magistrate. The ASO and/or the Assistant Collector had no information indicating the presence of such a danger. Further, the goods weighed more than 67846.kgs, as per the

ATTESTED

CUSTOMS APPELLATE TRIBUNAL
GOVT. OF PAKISTAN
BENCH-I, KARACHI

Respondents' own weighments. This would indicate that removal of these goods would be extremely difficult, if not impossible, especially at a short notice. Finally, as is apparent from the SCN, there is no evidence to suggest that any preparations had in fact been made to remove the goods from the godown. The Assistant Collector had no grounds for believing that such a danger existed and occasioned a serious violation of the Respondent No.2's Article 4 rights enshrined in the Constitution of Pakistan. Due to the non-fulfillment of the necessary requirements of sections 162 & 163, the statement was completely illegal and improper. Therefore, the search and seizure without warrant is also illegal. Further, such illegality in the search and seizure is not curable and any subsequent proceedings are non-existent in the eyes of law. This point has been decided numerous times by the High Courts of Pakistan in the past. Accordingly, the ASO further failed to comply with the vital requirements of the search and seizure procedure. The ASO were not allowed to enter the premises without the presence of two independent musheers of the same locality where the premises is situated. The mushirnama produced by the ASO does not indicate the residence of the musheers who were present at the time of search and seizure. As such, the Respondents have repeatedly requested that the proof of residency of the musheers also be produced. However, the ASO has failed to do so. Therefore, without prejudice to the preceding submissions, the failings of the ASO in the search and seizure also cause it to be illegal and without any lawful authority. He prayed that this Honorable Tribunal may be pleased to set-aside the impugned Order in Original and order the release of the Appellants' goods imported vide GD NO. KPQI-HC-5734 dated 24.04.2014, GD NO. KPQI-HC-

ATTESTED

CUSTOMS APPELLATE TRIBUNAL
GOVT. OF PAKISTAN
BENCH-I, KARACHI

5794 dated 28.04.2014 and GD No. KPQI-HC-5762 dated 26.04.2014.

10. Memorandum of cross objections under sub-section (4) of Section 194-A of Customs Act, 1969 was submitted by department/respondents. The representative of the department reiterated the same and further argued that the Order-in-Original passed by the learned Collector is a very detailed order and discussed each and every aspect of the case. He further contended that the goods were brought into the country by way of mis-declaration as the seized goods do not pertain to the goods declaration as mentioned in the photo copies of GDs and in complete roll form without cut into pieces which is violation of Import Policy order in vogue. The goods were imported under "mis declaration" as the same is found in complete roll form / shape whereas its conditionality is that it is importable only in completely "cut into pieces" form so that no piece contains the complete brand name. The PCT heading 3915.9000 as indicated at the copy of provided GDs denotes that under this PCT the importable goods should be Waste, parings and scrape of plastic excluding hospital waste of all kind, used sewerage pipes and used chemical containers falling under their respective PCT codes. The condition of import is that it is importable by industrial consumers subject to the fulfillment of following conditions (i) Certification confirming appropriate manufacturing facility and determination of import quota from concerned Federal / Provincial Environmental Protection agency. (ii) Inspection form technically qualified designated pre-Shipment Inspection companies to be notified by the Federal Government from time to time that the imported consignment does not contain any hazardous waste, as defined in

ATTESTED

the Basel Convention. Contrary to aforesaid, the seized goods are not in aforementioned condition. It is standard quality and completely roll shape which cannot be construed as waste / miss printing plastic paper scrap. The Respondent confiscated the seized goods according to the provisions of law. No contradictions available in the Order-in-Original. The contention of appellants to the extent that "goods are not standard goods" is incorrect. Facts of the case are that misprinted film waste is importable under the above mentioned condition of Import Policy order in vogue. Import of Printed film waste is not allowed. He denied the contention of the appellants and contended that Sr. No. 11 of Part-11 of Appendix B of Import Policy in vogue is completely applicable in the instant case as clearly mentioned in Show Cause Notice because the seized goods are neither misprinted nor are they in completely "cut into pieces" form and the complete name and brand printed on it can be easily read. The definition asserted by the appellants that" as these are misprinted or printed with sighs, characters, words, expressions, logos and shapes which are not associated or aligned with products which are produced locally, consumed by people or even imported" is supposition of the appellants this kind of definition is not available in Import Policy Orders in vogue. The mis-printed plastic paper scrap is only importable in completely "cut into pieces" form so that no piece contains complete brand name. The recycling plant of M/s. Nawab Traders is situated at Shop No. 3, First floor, G. C center Chatier Gee Road, Urdu Bazar Lahore but he stores the raw material at Karachi, which is not tenable at all. He should be stored the raw material in the vicinity of Lahore. On the other hand, M/s. M.S Enterprises stores raw material at the storage place due to

shortage of space but he did not provide any proof that said facility had been engaged by him which is evident to the fact that the copies of GDs are being used to deceive the law enforcement agencies including Customs. The seized goods have no relevance to the copies of GDs provided by the importers of seized goods. The appellants were not provided the information as required under notice of section 26 of the Customs Act, 1969. Thus, the appellants have failed to comply with the notice under section 26 of the Customs Act, 1969 as they have not provided following documents as required: 1. Closing balance as on 16.5.2014 as per Sales Tax Record. 2. Inward/outward registers for the goods in question. 3. Sales tax record for the corresponding transaction / period of goods imported. 4. Sales Tax Return for the months of February, March and April, 2014. 5. Stock position as per Sales Tax Return in the month of April & May 2014 (till 16.5.2014). 6. Sales Tax inventory. 7. Sales Tax Registers. 8. Sales invoices.9. Customer order requests.10.Purchase orders (POs). 11.Goods received note (GRNs). 14.Purchase ledger/register. He argued that the impugned goods were properly seized in accordance with the provisions of Section 168 of the Customs Act, 1969 and all the notices have been accordingly issued to the appellants. The staff of ASO is allowed to perform their function in terms of section 3 of the Customs Act, 1969 read with SRO 581 (I)/2013 dated 18-06-2013. The staff of ASO has performed the preventive activities within the jurisdiction conferred upon them as per law. The Order-in-Original was passed in accordance with law and principal of justice and no violation of Article of Constitution of Pakistan 1973 as well as was made out. All the relevant notices have already been communicated to the appellants. The contention of appellants is

denied as the search of the premises situated at Plot No.F-2/A D, S.I.T.E, Karachi was conducted under the supervision of Assistant Collector in terms of Section 163 of the Customs Act, 1969, the search is quite legal and within four corners of law. The respondent no 1 is duly empowered to conduct a search under section 163 of the Customs Act, 1969. The Assistant Collector who ordered for search and the said goods can easily be removed from one place to another place before the search can be affected under Section 162 of the Customs Act, 1969. The legal formalities in terms of section 162 & 163 were accordingly fulfilled, statement prepared by the authorized officer in terms of section 163 is proper and legal. The citation presented by the appellants has no relevance with the instant case. The search and seizure is legal and lawful in accordance with the provisions of law and subsequently Show Cause Notice is also legal issued by the Respondent No. 1 after examination of the case and after assumed his jurisdiction provided with him under the law. The provisions of section 163 of the Customs Act, 1969 allows the powers of search without warrant to the Customs Authorities. The respondents exercised their powers conferred to them within the territorial and functional jurisdiction in accordance with law. The above mentioned premise was searched in presence of independent musheers and their testimony cannot be challenged if proved otherwise. Hence, search, seizure made by the respondents is legal and lawful in accordance with the provisions of Customs Act, 1969. He further prayed that this Tribunal may upheld the impugned order and dismissed the appeal in the interest of justice.

11. Arguments heard and concluded, record perused.

ATTESTED

CUSTOMS APPELLATE TRIBUNAL GOVT. OF PAKISTAN BENCH-I, KARACHI

12. After going through the contents of the grounds mentioned in the appeal as well as the counter objections and arguments placed before the Court by both the parties, it has been observed that the respondent, under Section 163 of the Customs Act, 1969, conducted the search of godown/premises situated at Plot No.F-2/A-D, S.I.T.E., Karachi. The subject search was conducted evidentally after receiving report/information from MCC Preventive Karachi on 16-05-2014. Even though the raiding party/seizing agency have the prior knowledge and information, for the reasons better known to them, without giving any plausible reason not complied the provisions of Section 162 and 163 of the Customs Act, 1969 and conducted the raid in violation of aforesaid sections. The wisdom behind the legislature's mind for the determining the statutory requirements under Section 162 and 163 is to the effect that ordinarily the place is to search only after obtaining the search warrant from the Magistrate is contemplated under the proceeding section, only in extraordinary cases this section could be dispensed with as admissible under Section 163 of the Customs Act, 1969. In case of such circumstances appropriate customs officer shall state the grounds and reasons for his believe for taking the decision without obtaining the search warrant from the magistrate.

13. For example, information is received from such and such person that the party concerned has taken steps or is about to take steps for removal of goods and if search-warrant is obtained the same will consume time or the Magistrate is not available, hence there is no other way but to go for the search without warrant. By providing such statutory requirement, the intention of legislature is to provide safe-guard against mala fide interference

with rights of citizens in respect of property and against violation of right of privacy, such observation made by the Apex Court in (PTCL 1992 CL. 155).

14. It must not however, be lost sight of that such a raid could have been conducted pursuant to the provisions as contemplated under Section 163 of the Customs Act, 1969. In so far as the provisions as contemplated in Sections 162 and 163 of the Customs Act, 1969, are concerned, the same have been interpreted in different cases on various occasions and judicial consensus seems to be that "before embarking upon a search without warrant the customs officer shall prepare a statement in writing of the grounds of his belief that the goods liable to confiscation are concealed or kept in any place and that there is a danger that they may be removed before a search can be effected under the provisions of Section 162 of the Act. The law further requires that the statement must also mention the goods, documents or things for which the search is to be made. These are stringent requirements prescribed by law in order to ensure that the enormous power of search without warrant given to customs officers is exercised honestly and judiciously. By insisting that the grounds for his belief shall be recorded before hand by the customs officer concerned, the law seeks to ensure that the search without warrant is made for a *bona fide* purpose and on reasonable grounds which can be tested later, if challenged by the aggrieved party. To put it differently, it seems that this is a safeguard prescribed by the Legislature to ensure that the rights of the citizen in respect of private property are interfered with only for genuine reasons related to the prevention of smuggling and evasion of customs duty, *etc.* This safeguard can be effective only if

ATTESTED

CUSTOMS APPELLATE TRIBUNAL GOVT. BENCH-I, KARACHI

the procedure prescribed by law is faithfully and honestly followed by application of mind in each individual case. Legislative wisdom behind the statutory requirement under sections 162 and 163, is to the effect that ordinarily a place is to be searched only after search warrant is obtained from the Magistrate as is contemplated under the preceding section and only in extraordinary cases this section can be dispensed with as is permissible under section 163 but then grounds are to be stated by the Customs Officer who is allowed this facility for his belief and decision in not obtaining the search warrant. He must state the grounds which justify apprehension of danger of removal of goods. The law does not recognize any general right in the place of entry into private property for the purpose of obtaining evidence of smuggled goods. The right is available only upon the fulfillment of certain conditions. The defects pointed out are neither minor nor just technical. They are violative of the basic conditions prescribed for carrying out a search under Section 163, a breach of which will strike at the protection guaranteed under Article 4 of the Constitution itself. Clause (2) (a) of Article 4 requires that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. (PTCL 1983 (CL) 176).

15. It has also been observed on the record of the case that the seizing agency without given any specific reasons through any statement supported thereof deliberately violated the mandatory provisions of Section 103 of Criminal Procedure Code. The premises/godown is situated in thickly populated area and raid was conducted during the day time, preparation of inventory and mushir nama causes the serious doubt because neither the

ATTESTED

mushir nama nor the inventory was witnessed by any independent mushir/witness from the locality and the seizing agency is not given a single reason in writing, why they had not comply the specific provisions of Section 103 of the Criminal procedure code and as such the authority having the power derogates the statutory obligations for reasons better known to them.

16. It is also evident from the show cause notice that even having the knowledge about the impugned goods seized from the said premises/godown no specific charge has allegedly been attributed against the appellant nor any show cause notice was issued against the appellant for claiming the charge of smuggling under Section 2(s) of the Customs Act, 1969, which means the only allegation which they had allegedly attributed at the most case in hand is about the violation of Section 16 of the Customs Act, 1969 for violation of Serial No.11 Appendix-B Part II of import Policy Order, 2013 punishable under clause (9) and (14) of Section 156 (1) of the Customs Act, 1969. It appears that on imports, the precise controversy, has been raised in the instant matter is in respect of the applicability of relevant para of Serial No.11 Appendix B Part II of import Policy Order, 2013 through said show cause notice, as such proceedings initiated thereon, during the hierarchy of the Customs beyond the provision mentioned in the show cause notice, have no legal warrant to be implemented.

ATTESTED

17. Another crucial point which has to be observed with regard to the power of adjudication, which were in fact conferred upon another authority called Collector of Customs (Adjudication) vide SRO-886(I)/2012 dated 18.07.2012. It is now clear from the

contents of the aforesaid SRO that the power of adjudication assigned through Section 179 to the officers of customs specifies their designation to categories under the definition of appropriate officer. Section 2 sub-section (b) of the Customs Act defines the appropriate officer which means that the officer of the customs to whom such functions have been assigned by or under this act or the Rules made thereunder and the appointment of the officers of the customs for enforcement of their power and required to be notified by the board in the official Gazette through Section 3 of the Customs Act.

18. It is also important to refer and mention here that in case of dispute involving technical violation of import or export restrictions without involvement of any evasion of duty and taxes SRO 886/2012 dated 18-07-2012 imposed the embargo on to the Collectorate / respondent that such category of cases shall not be adjudicated by the adjudicating officer of Collectorate of Customs Adjudicating, in spite of that subject case was adjudicated by the Collectorate of Customs Adjudication-I, Custom House, Karachi.

19. The term jurisdiction is really synonymous with the word "power". Any court possesses jurisdiction over matters only to the extent granted to it by the Constitution, or legislation of the sovereignty on behalf of which it functions. The question whether a given court has the power to determine a jurisdictional question is itself a jurisdictional question. Such a legal question is referred to as "jurisdiction to determine jurisdiction." The Respondent had no powers to ascertain his jurisdiction and adjudicate the cases involving duty & taxes exceeding three million rupees because authority for such act was never vested in him, rather it is the

statute which can decide the jurisdiction and such jurisdiction has been decided by the statute vide section 179 of the Customs Act, 1969. The provisions of substantive law can neither be ignored nor by passed for any adjudication. Therefore, provisions of the Customs Act, gives no powers to the Respondent to adjudicate the impugned case. The jurisdiction is the court's authority to decide the issue in controversy such as a contravention issue, or a civil rights issue. The courts have *general jurisdiction*, meaning that they can hear any controversy except those prohibited by state law whereas in *quasi judicial* proceedings the only designated officers can hear and decide the case pertaining to disputes arising out of any violation of the Customs Act, 1969, and allied laws. In those cases where the confiscation of goods or penalty is involved, the adherence to monetary limits for adjudication (Section 179) is mandatory.

20. I get the strength from the judgment authored by Mr. Justice Iftikhar Muhammad Chaudhery, the case Khyber Tractors (Pvt) Ltd Vs Government of Pakistan published in PLD 2005 SC 482, while observing the issue of jurisdiction. It has been observed that the question of jurisdiction is always considered to be very important and no order passed by a court or a forum having no jurisdiction, even if it is found to be correct on merits, is not sustainable. The Jurisdiction of a court lays down a foundation stone for jurisdiction or as quasi judicial functions to exercise its powers/authority and no sooner the question of jurisdiction is determined in negative. The whole edifice of such defective proceedings, is bound to crumble down. It is also an elementary principle of law that if the mandatory condition for exercising of jurisdiction by a Court, Tribunal or authority is not fulfill then the

entire proceeding become illegal and suffers from want of jurisdiction. Any order passed in continuation of these proceedings in built or revision equally suffer from illegalities and are without jurisdiction. It is one of the mandatory requirement if the statute enacts with certain actions shall be taken in a certain manner and courts are required to do justice between the parties in accordance with the provisions of law, as the litigant who approach the court for the relief is bound to substitute with the procedure had been adopted by him in accordance with law, because it is elementary principle of law that if a particular thing is required to be done in a particular manner it must be done in that manner, otherwise it should not be done at all. In this present case the administrative order given by the authority to govern the procedure of the adjudication have no warrant under the law.

21. From the perusal of aforesaid provisions, it appears that the import of misprint plastic/paper scrap, having brand of edible products, has been made permissible / importable, only in completely 'cut into pieces' form, so that no piece contains the complete brand name. This appears to have been notified for the reason that no unscrupulous person/importer can misuse the brand name of an edible product by using the misprinted plastic/paper scrap in selling inferior / spurious quality of goods by packing them with such plastic / paper scrap. On perusal of the samples placed before me I have noticed that in fact the consignments do not contain any such brand name of an edible product, which is either being used or imported in Pakistan. On such examination of the samples, it appears that the contention of respondent is not justifiable and appears to be misconceived, as apparently the

ATTESTED

CUSTOMS APPELLATE TRIBUNAL
GOVT. OF PAKISTAN
KARACHI

goods in question do not appear to be hit by the provision of Part II of Appendix-B of the Import Policy Order, 2013, and the restriction attached thereto. It is perhaps for this reason that the Customs Collectorate, after having examined the goods and checking of other aspects, including the importability of such consignments, has released the same. The relevant documents alongwith GDs were also placed by the appellants before the seizing agency during the hierarchy of the Customs, in proof of their stance required to be considered as admissible evidence, which was outrightly denied/refused by the seizing agency, without getting its proper verification from the concerned quarters. No iota of evidence in this regard has been placed or produced by the seizing agency, about any such correspondence and verification caused and obtained from the concerned relevant quarters. Only presumptions and apprehensions referred and placed by the respondents in rebuttal to the claim of the appellants. Another fact is evident from the record file that, the provisions of Section 178 were attributed against the appellants without placing any specific evidence. Under this Section the essential ingredient for the joint liability of the person accompanying the real owner of the goods liable to confiscation under the Customs Act is that, every such person must have knowledge of the fact that the goods are contraband, smuggled ones and liable to confiscation. In case the knowledge of each person is proved then, every person is liable to penal action in accordance with the provisions of the Customs Act, as if goods were found on such person.

ATTESTED

CUSTOMS APPELLATE TRIBUNAL
GOVT. OF PAKISTAN
BENCH-I, KARACHI

22. It is the duty of the seizing agency if they wanted to robe any person they have to proof by same cogent evidence that the person allegedly named in show cause notice was the associate of the smuggler. In absence of such evidence no case has been made out against the appellant. In this case the act of smuggling has not been allegedly attributed against the appellant. The issue was only about the violation of Import Policy Order and no specific charge for other persons including the clearing agent and their associates, for which the cancellation of import license could be seek or processed by the Ministry of Commerce or by relevant department. Such activity even otherwise has not been performed by the seizing agency. Section 32, 156 (9) (14) and 178 of the Customs Act, 1969 are not applicable under these circumstances. Before departing further, I also prefer to mention the scope and object of Section 168 of the Customs Act, 1969, which says about the seizure of things liable to confiscation. This provision is in *pari material* with Section 178 of the Sea Customs Act, 1878, since repealed. In the case of Collector of Customs and others vs. S.M. Yousaf (1973 SCMR 411) their Lordships of the Supreme Court had the occasion to examine the provisions of Section 172-A (which is equivalent to Section 163 of the Customs Act) and Section 178 of the Sea Customs Act, 1878. In that case high Court had come to the conclusion that the Customs officer had failed to record the grounds for believing that any goods liable to confiscation were either concealed or kept at any place that there is a danger of their removal before search. For this reason the seizure was held to be illegal and direction for the return of

the goods was made. But in appeal before the Supreme Court the advocate for the Collector of Customs took the plea that after returning the goods to the respondents and before the truck would move, the Customs authorities had seized the goods under Section 178 of the Sea Customs Act, 1878. Their Lordships, while dealing with this aspect of the matter, came to the conclusion that the authority of seizing the goods could not be exercised unless the goods "are liable to confiscation" under the Act which means that liability for confiscation has already been determined in appropriate proceedings or is not in dispute. On the same analogy it can be held that in the absence of a determination, that goods being seized are liable to confiscation, through proper proceedings, the seizure of ship, under Section 168 of the Customs Act is without lawful authority. The fact of such illegal import has [illegible] established through proper proceedings before such seizure can take place. The seizure, though notional in nature, is therefore, without lawful authority (PLD 1981 Quetta 1).

23. In this present case the seizing agency hopelessly failed to follow the above referred proper provisions of law and failed to perform their legal obligations. The relevant documents produced during the hierarchy of Customs are specific in nature and corresponds with the goods seized by the respondents. Before clearance of the subject consignment the relevant GDs were properly processed by the relevant quarters and subject goods were out of charge. Chapter 39, 47 and 76 of the Customs Tariff and Trade Control specifically elaborate the HS Codes for subject goods. Part II of Appendix-B of the Import Policy Order, 2013, describe the

ATTESTED

procedural requirements. If there should be any dispute on that, the Department/seizing agency with effect of para 8 of the Import Policy Order, 2013, require to refer the matter to the concerned Ministry of Commerce for final decision, if there was any dispute or clarification required regarding the import status of any item, which could required be resolved by the Customs authorities, shall be referred to Ministry of Commerce for final decision, such aspect was also over looked by the seizing agency/respondents.

24. I also get the strength from the judgment authored by Mr. Justice Iftikhar Muhammad Chaudhery, the case Khyber Tractors (Pvt.) Ltd Vs Government of Pakistan published in PLD 2005 SC 482, while observing the issue of jurisdiction. It has been observed that the question of jurisdiction in form is always considered to be very important and no order passed by a court or a forum having no jurisdiction, even if it is found to be correct on merits, is not sustainable. The Jurisdiction of a court lays down a foundation stone for jurisdiction or as quasi judicial junctions to exercise its powers/authority and no sooner the question of jurisdiction is determined in negative. The whole edifice of such defective proceedings, is bound to crumble down. It is also an elementary principle of law that if the mandatory condition for exercising of jurisdiction by a Court, Tribunal or authority is not fulfill then the entire proceeding are follow become illegal and suffers from want of jurisdiction. Any order passed in continuation of these proceedings in built or revision equally suffer from illegalities and are without jurisdiction. It is one of the mandatory requirement if the statute enacts with certain action shall be taken in a certain manner and courts are required to do justice between the parties in accordance

with the provisions of law, as the litigant who approach the court for the relief is bound to substitute with the procedure had been adopted by him in accordance with law, because it is elementary principle of law that if a particular thing is required to be done in a particular manner it must be done in that manner, otherwise it should not be done at all. In this present case the administrative order given by the authority to govern the procedure of the adjudication have no warrant under the law.

25. In terms of judgment of the Honourable Supreme Court reported as PLD 1971 SC 197. The relevant extract being as under:-

> "Whether the Court is not properly constituted at all the proceedings must be held to be coram non judice and, therefore, non-existent in the eye of law. There can also be no doubt that in such circumstances" it could never be too late to admit and give effect to the plea that the order was a nullity", as was observed by the Privy Council in the case of Chief Kwame Asante, Trdahone V. Chief Kwame Tawia."

In Roumaq Ali's case [PLD 1973 SC 236], their lordships of the Supreme Court did observe in the following terms:

> "It is now well-settled that where an inferior tribunal or Court has acted wholly without jurisdiction or taken any action "beyond the sphere allotted to the tribunal by law and, therefore, outside the area within which the law recognizes a privilege to err", then such action amounts to a "usurpation of power unwarranted by law" and such an act is a nullity; that is to say, "the result of a purported exercise of authority which has no legal effect whatsoever". In such a case, it is well-established that a superior Court is not bound to give effect to it, particularly where the appeal is to the latter's discretionary jurisdiction. The Courts would refuse to perpetuate, in such circumstances, something which would be patently unjust or unlawful".

ATTESTED

CUSTOMS APPELLATE TRIBUNAL GOVT. OF PAKISTAN BENCH-I, KARACHI

26. In view of the foregoing reasons and on the strength of judgments passed by the superior Courts noted above in conformity of aforesaid observations made thereon, I am of the considered view that, the proceedings in the subject case are infested with inherent legal infirmities and substantive illegalities, tantamount to patent violation of prescribed law, and that too in

utter disregard of principle of natural justice, hence the impugned orders passed during the hierarchy of the customs are hereby declared null and void, *ab initio*. The impugned orders are therefore, set aside and appeal is allowed with no order as to cost.

27. Order passed accordingly.

-Sd/-

(MUHAMMAD NADEEM QURESHI)
Member Judicial-I
Karachi

ATTESTED

CUSTOMS APPELLATE TRIBUNAL
GOVT. OF PAKISTAN
BENCH-I, KARACHI

K-464/2015
Muhammad Anwar S/o Wali Muhammad
14/03/15
Addl. Collector D. Customs
14/01/2015

Muhammad Anwar S/o Wali Muhammad.

1-
2. Collector
3. Collector
4. The D.G Intelligence
5. The D.G Valuation
6. Office Copy

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24/8/15