



ORDER-IN-ORIGINAL NO. 128 OF 2015-2016
M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079), Karachi
Adj-II/Coll/SCN-136/MCC.E/Cont.4(402)/Lucky Cotton Mills /2015

GOVERNMENT OF PAKISTAN
COLLECTORATE OF CUSTOMS (ADJUDICATION-II)
11TH FLOOR, CUSTOMS HOUSE, KARACHI

FBR

Adj-II/Coll/SCN-136/MCC.E/Cont.4(402)/Lucky Cotton Mills /2015

Dated 23-11-2015

Before : Ch. Muhammad Javaid
Collector
Collectorate of Customs (Adjudication-II), Karachi

Respondents : M/s. Lucky Cotton Mills (Pvt) Limited,
(NTN-2224079)
23-C, Khayaban-e-Sehr, Phase -VI, D.H.A.,
Karachi

Date of Institution : 28-05-2015 (show cause notice)

Dates of hearings : 09-06-2015, 22-06-2015 & 12-11-2015.

Date of judgment : 23-11-2015

Present

For Respondents : None

For Department : None.

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- 1) This copy is granted free of charge for the private use of the person to whom it is issued.
- 2) An appeal against this order lies with the Appellate Tribunal, Karachi, within 60 days from the date of communication of this order. The appeal shall be accompanied by a fee of Rs.1000/- (One thousand only) to be paid in the manner that may be prescribed by the Board.
- 3) The appellant should state in his Appeal if he desires to be heard in person or through a pleader.

* * * * *

Brief facts of the case are that the Model Customs Collectorate of Appraisement (East), Customs House, Karachi vide contravention report No. 4(402)KAPE-DC(IV)/2015 dated 21-04-2015 has reported that M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079) 23-C, Khayaban-e-Sehr, Phase -VI, D.H.A., Karachi imported (17) consignment of "Raw & Ginned Cotton" and filed goods declaration bearing GD numbers mentioned as below. The detail of the case is as under:

1	Name and address of the importers:	M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079) 23-C, Khayaban-e-Sehr, Phase -VI, D.H.A, Karachi
2	No of GDs where the contravention was detected	KAPE-HC-10061-07-08-2013 / KAPE-HC-26034-27-09-2013 KAPE-HC-30838-11-10-2013 / KAPE-HC-26033-27-09-2013 KAPE-HC-3671-18-07-2013 / KCSI-HC-150651-02-05-2013 KCSI-HC-168891-31-05-2013 / KCSI-HC-125753-19-03-2013 KCSI-HC-130201-27-03-2013 / KCSI-HC-184817-27-06-2013 KAPE-HC-61139-13-01-2014 / KAPE-HC-67233-30-01-2014

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		KAPE-HC-60969-13-01-2014 / KAPE-HC-70445-10-02-2014 KAPE-HC-75783-24-02-2014 / KAPE-HC-76339-26-02-2014 KAPE-HC-82066-17-03-2014
3.	Description of Goods	"Raw & Ginned Cotton"
4.	Total Value of the Imported goods	Rs. 236,063,462/-
5.	Total Amount of Taxes Evaded.	Rs. 9,442,538/-
6.	Nature of Offence	Evasion of taxes by misusing of SRO 1125(1)/2011 dated 31-12-2011 and amending SRO 154(1)/2013 dated 28-02-2013
7.	Sections of law violated	Sections 32, 32(2), 32(A) & 79 of the Customs Act, 1969, Section 33 & 34 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance 2001. Punishable under clauses (14) & (14A) of Section 156(1) of the Customs Act, 1969, clause 11(c) of Section 33 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001.

2. Whereas, M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079) 23-C, Khayaban-e-Sehr, Phase -VI, D.H.A, Karachi availed the facility of self-declaration available to them under Section 79 of the Customs Act, 1969, determining their duty and taxes on their own and paid the same.

3. Whereas, the M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079) 23-C, Khayaban-e-Sehr, Phase -VI, D.H.A, Karachi unlawfully claimed the benefit of SRO 1125(1)/2011 dated 31-12-2011 on all the above mentioned consignments and paid Sales Tax Zero Percent under SRO 551(1)/2008 dated 11.06.2008 and Income Tax @ 1% while the goods were subject to 5% Income Tax at import stage as the concurrent benefit of SRO 212(1)/2013 dated 14-03-2013 is only available to goods that are covered under SRO 1125(1)/2011 dated 31-12-2011. The Customs Computerized System cleared their consignments through "Green Channel" without any human intervention.

4. Whereas the M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079) 23-C, Khayaban-e-Sehr, Phase -VI, D.H.A, Karachi was not entitled to the benefit of SRO 1125(1)/2011 dated 31-12-2011 in the light of the amending of SRO 154(1)/2013 dated 28th February, 2013 which has excluded "Raw and Ginned Cotton" from the purview of SRO 1125(1)/2011 dated 31-12-2011 through condition (ii) of the said SRO.

5. And whereas, the above said condition (ii) has stipulated that the benefit of the SRO will be available to the textile sector "from spinning stage onwards". As the goods of the importer were clearly of the 'ginning stage' hence were categorically excluded from the purview of the SRO/1125(1)/2011 dated 31-12-2011.

6. And whereas, in view of the above factual position, it is well established beyond any reasonable doubt that the importer have willfully and dishonestly evaded legitimate government taxes/ revenue to the tune of Rs. 9,442,538/- and have committed offence in terms of Section 32,32(2),32(A) & 79 of the Customs Act, 1969 read with Section 33 & 34 of the Sales Tax Act, 1990 further read with Section 148 of the Income Tax Ordinance,2001 punishable under clauses (14) & (14A) of Section 156 (1) of the Customs Act,1969 read with clause 11(c) of Section 33 of the Sales Tax Act, 1990 further read with Section 148 of the Income Tax Ordinance,2001

7. Accordingly, M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079) 23-C, Khayaban-e-Sehr, Phase -VI, D.H.A, Karachi was called upon to show cause under provisions of Sections 32, 32(2), 32(A), 79 of the Customs Act, 1969, Section 33 & 34 of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001 as to why the evaded amount of taxes amounting to Rs. 9,442,538/- (along with the

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default surcharge) may not be recovered from them and penal action punishable under clauses (14) & (14A) of sub-section (1) of Section 156 of the Customs Act, 1969, Clause 11(c) of Section 33 of the of the Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001 may not be taken against them.

08. In this case the show cause notice was issued to my predecessor on 28-05-2015. The period of 120 days as provided in sub-section (3) of section 179 of the Customs Act, 1969, for conclusion of adjudication proceedings was set to expire on 25-09-2015. The subject case was not decided in the time frame provided in terms of section 179 of the Customs Act, 1969 due to the reason that many traders/importers had filed Constitutional Petitions in the High Court of Sindh, Karachi on the similar/identical issue. However, the department also failed to provide the parawise comments on the subject case in time as well as the file record indicated that the respondent did not allowed the High Court of Sindh, Karachi. Therefore, the undersigned in exercise of power conferred in terms of Section 179(3) of the Customs Act, 1969 extended limitation for sixty days (60) in the instant case as per above section *ibid*.

9. Hearings in this case were fixed for 09-06-2015 & 22-06-2015. The hearing before undersigned was conducted on 12-11-2015 in the instant case. The file record indicated that the respondent submitted written reply to the show cause notice, which reply is reproduced hereunder:-

REPLY TO THE SHOW CAUSE NOTICE-ADJ-II/COLL/SCN-136/MCC.E/CONT.4(402)
LUCKY COTTON MILLS PVT LTD-2015 DATED 28TH MAY 2015

1. The case: As per Show Cause Notice, based on Model Customs Collectorate of Appraisement (East)'s report, it has been alleged M/s. Lucky Cotton Mills (Pvt.) Limited (NTN-2224079) imported 17 consignments of "Raw and Ginned Cotton" and filed GDs claimed benefit of SRO 1125 (I) 2011 dated 31-12-2011 on all consignments and paid sales tax zero percent under 551(1) 2008 dated 14-06-2008 and Income Tax @ 1% while the goods were subject to 5% Income Tax at import stage as the concurrent benefit of SRO 212(1) 2013 dated 14-03-2013 is only available to goods that are covered under SRO 1125(1) 2011 dated 31-12-2011. The Customs Computerized System cleared their consignments through "Green Channel".
2. As per perception of the Collectorate, the imports were not entitled for the said benefit and therefore Show Cause Notice, based on Collectorate's contravention was issued alleging that the importer had committed offence in terms of section 32, 32(2), 32(4) & 79 of the Customs Act, 1969 read with Section 33 & 34 of the Sales Tax Act, 1990 further read with Section 148 of the Income Tax Ordinance, 2001 punishable under clause (14) & (14A) of Section 156(1) of the Customs Act, 1969 read clause 11(c) of Section 33 of the Sales Tax Act, 1990 further read with Section 148 of the Income Tax Ordinance, 2001.
3. **Legal Position:** It is submitted that contravention report, prepared by Customs Collectorate, is based on incorrect understanding of the matter which was issued arbitrarily and as a routine was converted/translated into Show Cause Notice without examining the genuineness of the contravention report and the legal basis on which it was prepared. The issue, in fact, relates to Income Tax on import of Raw Cotton under SRO 1125(1) 2011 dated 31-12-2011. The said SRO deals with local supplies while in this case the goods, after manufacturing process, have been exported. It is clarified that our company Lucky Cotton Mills Pvt. Ltd imported raw cotton and consumed it for manufacturing of cotton yarn supplied to Pak Denim Ltd. for manufacturing and export of denim fabric under SPOs for the month of June & July 2013 and January & February 2014, copies enclosed against the referred 17 GDs of the period February 2013 to March 2014, Annex GDI to GDI 17 and therefore as a deemed exporter, 5% Income Tax is not applicable to us under the said SRO.


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4. **legal position of Jurisdiction:** The contravention issuing Collectorate has based its report on self conceived view that the importer has misused the SRO to evade Income Tax although as clarified above this view cannot be applied in the case where the goods have not been supplied locally and instead the same after going through manufacturing process have been exported. The Show Cause Notice loses its legal basis when the foregoing correct view is understood properly. However, even if Collectorate's view is accepted (which is not legal), it is abundantly clear that Customs have no jurisdiction to recover Income Tax when the goods have been cleared as per the due process. Following are legal citations in this regard:

- a) Ch. Muhammad Tariq, Chairman/Member Judicial, Islamabad.
(M/S Singer Pakistan limited)
Customs Appeal No. K-1113 of 2014

"Issuance of Show Cause Notice by the Customs Officer for the short recovery of Income Tax is against the very spirit of Law and the Maxim, "UBI IUS IBI REMEDIUM" which means that where ever there is a right, there is a remedy. The income tax department and its legal fora are already functioning under a statute. Customs department has been authorized only to collect advance Income Tax under section 118(5) of the Income Tax Ordinance. However, the department cannot recover any short payment of Income Tax under section 162 or 166 of the Income Tax Ordinance, 2001, nor can invoke jurisdiction to such effect under the Customs Act, 1969. The guidance is also derived from the plethora of judgments on the ground that adequate alternate and remedy is available to a party. The upshot of above discussion is that this Bench of Appellate Tribunal is unanimously of the view the Customs authorities cannot demand the short levied taxes.

- b) 2014 PTD (Trib.) 299
[Customs Appellate Tribunal]
Before Muhammad Nadeem Qureshi, Member (Judicial-I)
Messrs M.I. TRADERS, LAHORE
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"Hence keeping in view, all such observations made above and the strength of judgments passed by the superior courts noted and in conformity observations made thereon, I am of the considered view that the proceeding in the subject case are infested with patent deficiencies and violation of statutory requirement, regarding issuance of Show Cause Notice, all subsequent proceedings and order passed thereon tantamount to substantive illegalities, adequate breach of natural justice has been equated with breach of law and super structure built thereon are hereby declared illegal, void, ab-initio and accordingly set aside."

- c) Case 22004 PTD 801: High Court of Sindh.

In this case it was argued that penalty imposed under section 156(1) of the Customs Act was without jurisdiction and that customs department cannot recover income tax. The Hon'ble High Court of Sindh after examining the relevant provision of law observed as follow:-

"As perusal of the provisions contained in section 50(5) of the Ordinance and section 202 of the Customs Act, shows that the Collector of Customs has been empowered to collect the advance income-tax under subsequent (5) of Section 50 of the ordinance, at the time of import of goods at the rates specified in the first Schedule to the Ordinance, in the same


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manner and at the same time as the customs duty tax is to be collected in the same manner as customs duty, the recovery thereof can be made under section 202 of the Customs Act. In the judgments cited above, it already stands decided that merely by providing the manner and time of collection of tax under any tax enactment, the nature of the tax shall not be changed, meaning thereby that if the advance tax under section 50(5) of the Ordinance can be collected as customs duty and can be recovered by the Customs Act, it will not change the nature of tax and the Income-tax shall not become the customs duty. We fully subscribe to the views held earlier by this Court in the Judgments cited above, that the collection of Tax and assessment are not one and the same. The power to collect the advance income tax under section 50(5) of the Ordinance by the collector of Customs, shall not have the effects of converting the Income-Tax into customs duty and consequently the customs officials shall be empowered by virtue of the provisions contained in the Income Tax Ordinance and the Customs Act, merely to collect the determined amount of tax and shall not have the Authority to resort to the chargeability or assessment of a tax. Likewise, when the income-tax shall not be changed into customs duty, the applicability of section 156 of the Customs Act shall be excluded as a logical conclusion."

5. To conclude it is submitted that in view of the foregoing the Show Cause, issue out of jurisdiction, may kindly be withdrawn.

-sd/-

M/s. Lucky Cotton Mills (Pvt) Limited
Karachi

10. Time and again this office issued notices to the department for submission of parawise comments however neither the departmental representative attended the hearing nor any comments were submitted. To provide a fair opportunity to the department the Collector of Customs Model Customs Collectorate of Appraisalment (East), Karachi, was requested vide letter of even number dated 10-08-2015 and 06-11-2015, but unfortunately the department failed to provide the parawise comments in this case. It is also observed that the detecting agency submitted parawise comments of the similar/identical nature case vide show cause notice no. Adj-II/Add.Coll/SCN-113/MCC.E/Cont.4(402)/Qadri Textiles Mills/2015 dated 10-06-2015 issued by the Additional Collector of Customs of this Collectorate, which parawise comments is reproduced as under:-

"FOR THE HONOURABLE ADC (ADJUDICATION), CUSTOM HOUSE, KARACHI.

1. Reliance Weaving Mills Ltd.
2. M/s. Hira Textile Mills Ltd.
3. M/s. Equity Textiles Mills Ltd.
4. M/s. Qadri Textile Mills.
5. M/s. Monnoawal Textile Mills Ltd.

VERSUS

Federation of Pakistan. *(Respondents)*

PARAWISE COMMENTS ON BEHALF OF THE RESPONDENT NO.2

The answering respondent, submits the following para-wise comments for kind consideration of ADC (Adjudication)

PRELIMINARY SUBMISSIONS:-


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- 1- That it is respectfully submitted that all the assessment orders / decisions of the Customs appropriate officers are appeal-able before the appellate authority in terms of Section 193 & 194-A of the Customs Act, 1969 (hereinafter referred as the "Act"). Since the petitioner approached this Honourable Court without exhausting the remedies available within the relevant statute of customs hierarchy, therefore, considering the provisions of Article 199(1) of the Constitution, the subject petition is not maintainable on this account also.
- 2- That it is respectfully submitted that the petitioner is not entitled for the benefit of reduced rate of Income Tax @ 1% due to the reason that said concession was admissible when SRO 1125(1)/2011 was in field and exemption of Sales Tax on import of raw & ginned cotton was available under aforesaid notification. Simultaneously the Income Tax concession was also available on import of aforesaid item in terms of SRO 212(1)/2013. However, the exemption of Sales Tax was subsequently withdrawn on import of raw & ginned cotton in terms of Condition No.2(1) of SRO 154(1)/2013 dated 26-02-2013. In the aforesaid SRO the exemption of Sales Tax was extended only at spinning stage and onward in the cases of textile. The afore stated position would clearly reveal that imported raw & ginned cotton were not admissible for the benefit of sales tax in terms of SRO 1125(1)/2011 dated 31-12-2011, therefore, the claim of the petitioner for the benefit of the income tax at the reduced rate of 1% also does not merit consideration and is liable to be charged at 5% in view of the amendment SRO 154(1)/2013 dated 26-02-2013.
- 3- That the subject petition has been filed with false statements, concealment of facts and with un-clean hands, therefore, the subject petition is not maintainable and is liable to be dismissed on this account also. It is pertinent to mention that the benefit of SRO 1125(1)/2011 dated 31-12-2011 in respect of exemption of Sales Tax was admissible on import of raw & ginned cotton, further the exemption of income tax under SRO 212(1)/2013 was also admissible at concessory rate 1%. However, the exemption of sales tax on ginned cotton was withdrawn through SRO 154(1)/2013 dated 26-02-2013. Where vide condition No.2(1) the said exemption was extended from spinning stage and onward in cases of textile. The facts of the case mentioned in above lines would reveal that in terms of SRO 154(1)/2013 dated 26-02-2013 the Sales Tax exemption was not available on the import of raw & ginned cotton. Accordingly, the importers of said item were not entitled for availing the benefit of income tax at the concessory rate of 1% under SRO 212(1)/2013. Since through SRO i.e. 154(1)/2013 dated 26-02-2013 the exemption of Sales Tax was extended from spinning stage and not to the raw & ginned cotton in cases of textile. Therefore, the concessory rate of Income Tax was not allowed. The petitioner's claim in respect of their consignments of raw & ginned cotton did not merit consideration under concessory rate of Income Tax @ 1% under the relevant provision of law.

PARWISE COMMENTS ON FACTS OF THE PETITION:-

- 1- That the contents of para (1) of the petition require no comments being facts of the case.
- 2- That the contents of para (2) of facts of the petition require no comments.
- 3- That the contents of para (3) of facts of the petition require no comments.
- 4- That the contention of the petitioner, vide para (4) of facts of the petition is incorrect, hence, is vehemently denied. It is, however, respectfully submitted that the exemption of sales tax & Income Tax @ 1% was admissible under SRO 1125(1)/2011 & SRO 212(1)/2013, however, the benefit of SRO 212(1)/2012 in respect of concessory rate of


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income tax on import of raw & ginned cotton was withdrawn through SRO 154(1)/2013 where in terms of Condition No 2(1), the exemption of sales tax admissible on import of raw & ginned cotton from spinning stage and onward in cases of textile. The aforesaid condition was not changed in the subsequent SROs i.e. SRO 551(1)/2008 rescinded vide SRO 573(1)/2014 where the Sales Tax was chargeable @ 17% and then 5% as per the 8th Schedule of the Sales Tax Act, 1990, through Finance Act, 2014. The afore-stated position clearly reveals that the petitioners are mis-quoting the factual position to avail the inadmissible benefit of income tax at concessionary rate of a 1% instead of a 5%.

- 5- That the contention of the appellant, vide para (5) of facts of the petition is incorrect and mis-statement. The factual position is that the SRO 1125(1)/2011 was rescinded by SRO 154(1)/2013 dated 26-02-2013 where as per the Condition No.2(1) the benefit of exemption of sales tax is extended only from the spinning stage onward in the cases of textile. Therefore, the claim of the petitioner in respect of SRO 1125(1)/2011 is incorrect and did not merit consideration.
- 6- Require no comments.
- 7- Require no comments being irrelevant in this case.
- 8- That as stated in above line the contention of the appellant is incorrect, keeping in view that in terms of Condition No. 2(1) of SRO 154(1)/2013 the exemption of sales tax was admissible from the spinning stage onward in cases of textile. Hence, the benefit of income tax under concessionary rate of 1% cannot be extended on import of raw & ginned cotton to the appellant and the appellant is liable to pay the income tax @ 5%.
- 9- That the contention of the appellant is incorrect as there is no Respondent No.3 in the subject appeal.
- 10- That the contention of the appellant, vide para (11) of facts of the appeal is incorrect, hence, is vehemently denied. It is respectfully submitted that under sub-section (5) & (6) of Section 148 of the Income Tax Ordinance, 2001, the appropriate officer is not only authorized to collect but also to recover Income Tax in same manner and at the same time, as if it were a duty of Customs. Further the Ministry of Law & Justice had clarified vide their letter No.F-242/2012-Law-I dated 11-07-2012 that customs authorities are empowered to recover short paid amount of levies at import stage.

PARAWISE COMMENTS ON GROUNDS OF THE PETITION:-

- a. That the contention of the petitioner, vide para (a) of grounds of the petition is incorrect, hence, is vehemently denied. As already stated in foregoing lines that under sub-section (5) & (6) of Section 148 of the Income Tax Ordinance, 2001, the appropriate officer is not only authorized to collect but also to recover Income Tax in same manner and at the same time, as if it were a duty of Customs. Further the Ministry of Law & Justice had clarified vide their letter No.F-242/2012-Law-I dated 11-07-2012 that customs authorities are empowered to recover short paid amount of levies at import stage.
- b. That the contention of the petitioner, vide para (b) of grounds of the petition is incorrect and even mis-stating the factual position. In-fact the petitioner is required to pay the income tax @ 5% as the Concurrent benefit of SRO 212(1)/2013 dated 14-03-2013 is only available to goods which are covered under SRO 1125(1)/2011 dated 31-12-2011.
- c. That in the absence of the copies of referred decisions of Honourable High Court appropriate comments cannot be offered.

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- d. That the contents of para (d) of the grounds of the petition are irrelevant to the subject petition, keeping in view that the facts involved in the subject petition is different in its nature. As per the case record the petitioner are not entitled for the benefit of reduced rate of Income Tax @ 1% due to the reason that said concession was admissible when SRO 1125(1)/2011 was in field and exemption of sales tax on import of raw & ginned cotton was available under aforesaid notification. Simultaneously the income tax concession was also available on import of aforesaid item in terms of SRO 212(1)/2013. However, the exemption of Sales Tax was subsequently withdrawn on import of raw & ginned cotton in terms of Condition No.2(1) of SRO 154(1)/2013 dated 26-02-2013. In the aforesaid SRO the exemption of sales tax was extended only at spinning stage and onward in cases of textile. The afore stated position would clearly reveal that imported raw & ginned cotton were excluded from the purview of SRO 1125(1)/2011 dated 31-12-2011, therefore, the claim of the petitioner for the benefit of the Income Tax at the reduced rate of 1% does not merit consideration and is liable to be charged at 5%.
- e. That in the light of the submissions made in above lines, the contents of this para is incorrect, hence, is vehemently denied and require no further comments.
- f. That the contention of the petitioner, vide para (f) of the grounds of the petition is incorrect and even mis-stating the factual position. Keeping in view that in the subject case the petitioner is required to pay the income tax @ 5% as the Concurrent benefit of SRO 212(1)/2013 dated 14-03-2013 is only available to goods which are covered under SRO 1125(1)/2011 dated 31-12-2011. Moreover, the exemption of sales tax was subsequently withdrawn on import of raw & ginned cotton in terms of Condition No.2(1) of SRO 154(1)/2013 dated 26-02-2013. In the aforesaid SRO the exemption of sales tax was extended only at spinning stage and onward in the cases of textile. The afore stated position would clearly reveal that imported raw & ginned cotton were excluded from the purview of SRO 1125(1)/2011 dated 31-12-2011, therefore, the claim of the petitioner for the benefit of the Income Tax at the reduced rate of 1% does not merit consideration and is liable to be charged at 5%.
- g. That the contention of the appellant, vide para (g) of the grounds of the appeal is incorrect, hence, is vehemently denied. As already stated in foregoing lines that under sub-section (5) & (6) of Section 148 of the Income Tax Ordinance, 2001, the appropriate officer of Customs is not only authorized to collect but also to recover income tax in same manner and at the same time, as if it were a duty of Customs. The argument of the petitioner that only the officers of Inland Revenue can recover sales tax & income tax is incorrect. It is submitted that the show cause notice has been issued invoking the provisions of Sections 32(1), (2) & (3A) of the Act, which empower the customs authorities to recover short levied amount of duty & taxes. For reference the relevant part of Section 32(2) of the Customs Act, 1969 is reproduced hereunder:-
32. [False] statement, error, etc:- (1) If any person, in connection with any matter of customs:-
(a) ---
(b) ---
(c) ---
(2) Where, by reason of any such document or statement as aforesaid or by reason of some collusion, any duty, taxes or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within [five] years of the relevant date,


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requiring him to show cause why he should not pay the amount specified in the notice.

Furthermore, under the provisions of Section 179 of the Customs Act, 1969 the custom officers are empowered to adjudicate the cases relating to recovery of duty & taxes. For ease of reference the relevant part of Section 179 of the Customs Act, 1969 is reproduced hereunder:-

179. Power of adjudication- Subject to sub-section (2), in cases involving confiscation of goods or recovery of duty & other taxes not levied, short levied or erroneously refunded, imposition of penalty or any other contravention under this Act or the rules made there under, the jurisdiction and powers of the officers of customs in terms of amount of duties & other taxes involved, excluding the conveyance, shall be as follows, namely.

In addition, the Customs Officer has also been empowered by the legislature to recover duty & taxes under Section 202 of the Customs Act, 1969. For ease of reference the relevant part of Section 202 of the Customs Act, 1969 is reproduced hereunder-

202. Recovery of Government dues:- (1) When, under this Act or under any other law for the time being in force, which provides for any tax, duty or other levy being collected in the same manner as customs duties are collected, a penalty is adjudged against, or notice or demand is served upon, any person calling for the payment of any amount unpaid which may be payable by way of penalty or by way of duty, tax or other levy or under any bond [guarantee] or other instrument executed under this Act or such other law or the rules made there under, the appropriate officer.

In the light of afore-stated provisions of law, the officers of customs are empowered to collect, adjudicate & recover customs duty & other taxes not paid or short paid at import stage".

Further the Ministry of Law & Justice, had clarified vide their letter No.F-242/2012-Law-I dated 11-07-2012 that customs authorities are empowered to recover short paid amount of levies at import stage.

- h. That the contention of the petitioner, vide para (h) of grounds of the petition is incorrect, hence, is vehemently denied require no further comments.
- i. That in the light of the submissions made in above lines, the contents of this para is incorrect, hence, is vehemently denied and require no further comments.
- j. That the contention of the petitioner is incorrect as there is no Respondent No.3 in the subject petition.
- k. That the contention of the petitioner, vide para (k) of grounds of the petition is incorrect. It is pertinent to mention that the benefit of SRO 1125(1)/2011 dated 31-12-2011 in respect of exemption of sales tax was admissible on import of raw & ginned cotton, further the exemption of income tax under SRO 212(1)/2013 was also admissible at concessionary rate 1%. However, the exemption of Sales Tax on ginned cotton was withdrawn through SRO 154(1)/2013 dated 26-02-2013. Where vide condition No 2(i) the said exemption was extended from spinning stage and onward in the cases of textile. The facts of the case mentioned in above lines would reveal that in terms of SRO 154(1)/2013 dated 26-02-2013 the Sales Tax exemption was not available on the import of raw & ginned cotton. Accordingly, the importers of said item were not entitled for availing the benefit of Income

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tax at the concessional rate of 1% under SRO 212(1)/2013. Since through SRO i.e. 154(1)/2013 dated 26-02-2013 the exemption of Sales Tax was extended from spinning stage and not to the raw & ginned cotton in cases of textile. Therefore, the concessional rate of income tax was not allowed. The petitioner's claim in respect of their consignments of raw & ginned cotton did not merit consideration under concessional rate of income tax @ 1% under the relevant provision of law.

That as already stated in detail in foregoing paras that under sub-section (5) & (6) of Section 148 of the Income Tax Ordinance, 2001, the appropriate officer of Customs is not only authorized to collect but also to recover Income Tax in same manner and at the same time, as if it were a duty of Customs. Further the Ministry of Law & Justice had clarified vide their letter NO.F-242/2012-Law-1 dated 11-07-2012 that customs authorities are empowered to recover short paid amount of levies at import stage.

That in the light of the afore stated position, it is respectfully submitted that the claim of charging income tax @ 1% as advance income tax under Section 148 read with 151 Schedule Part-II of Income Tax Ordinance, 2001 and SRO 1125(1)/2011 dated 31-12-2011 is incorrect and did not merit consideration due to the reason that the aforesaid SRO was amended through SRO 154(1)/2013 dated 26-02-2013 and as per the Condition No.2(1) of the aforesaid SRO the benefit of exemption of sales tax was not admissible to the raw & ginned cotton. The aforesaid situation clearly shows that the claim of petitioner in respect of SRO 1125(1)/2011 not tenable in these cases. The Honourable ADC (Adjudication), is therefore, graciously requested to kindly dismiss the cases of the importers.

-sd-

Mehtab Ahmed

Principal Appraiser (Group-IV)

11. I have gone through the case record and have considered the arguments put forth by the respondents. The case of the department is that M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079) 23-C, Khayaban-e-Sehr, Phase -VI, D.H.A, Karachi imported consignments of raw and ginned cotton and filed goods declarations bearing Nos. (i) KAPE-HC-10061-07-08-2013, (ii) KAPE-HC-26034-27-09-2013, (iii) KAPE-HC-30838-11-10-2013, (iv) KAPE-HC-26033-27-09-2013, (v) KAPE-HC-3671-18-07-2013, (vi) KCSI-HC-150651-02-05-2013, (vii) KCSI-HC-168891-31-05-2013, (viii) KCSI-HC-125753-19-03-2013, (ix) KCSI-HC-130201-27-03-2013, (x) KCSI-HC-184817-27-06-2013, (xi) KAPE-HC-61139-13-01-2014, (xii) KAPE-HC-67233-30-01-2014, (xiii) KAPE-HC-60969-13-01-2014, (xiv) KAPE-HC-70445-10-02-2014, (xv) KAPE-HC-75783-24-02-2014, (xvi) KAPE-HC-76339-26-02-2014 & (xvii) KAPE-HC-82066-17-03-2014 at an invoice value of Rs. 236,063,462/- and availed the facility of self-declaration available to them under section 79 of the Customs Act, 1969, determining their duty and taxes on their own. The respondent unlawfully claimed the benefit of SRO 1125(1)/2011 dated 31-12-2011 on the above consignment; and paid Sales Tax @ 0% (under SRO 551(1)/2008) and Income Tax @ 1%, while the goods were subject to 5% Income Tax at import stage as the concurrent benefit of SRO 212(1)/2013 dated 14-05-2013 is only available to goods that are covered under SRO 1125(1)/2011. The Customs Computerized System cleared their consignment through "Green Channel" without any human intervention. The respondent was not entitled to the benefit of SRO 1125(1)/2011 dated 31-12-2011 in the light of amending SRO 154(1)/2013 dated 28-02-2013 which has excluded raw and ginned cotton from the purview of SRO 1125(1)/2011 dated 31-12-2011 through condition (ii) of the SRO.

12. For arriving at a logical conclusion, the provisions of SRO 1125(1)/2011 dated 31-12-2011 needs to be examined. For ease of reference the same are re-produced hereunder:


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- (i) The benefit of this notification shall be available only to persons doing Business in textiles (including jute), carpets, Leather, sports and surgical Goods sectors, who are registered as manufacturer, importer, exporter or wholesaler under the Sales Tax Act, 1990, and appear on the Active Tax payers list (ATL) on the website of Federal Board of Revenue;
- (ii) this notification shall apply from:
- a) spinning stage onwards, in case of textile sector;
 - b) production of PTA or MEG, in case of synthetic sector;
 - c) regular manufacturing, in case of carpets and jute products;
 - d) tannery onwards, in case of leather sector; and
 - e) organized manufacturing in case of surgical and sports goods;
- (iii) on import by registered manufacturers of the five sectors mentioned in Condition (i), sales tax shall be charged at the rate of two per cent on goods industrial inputs.

13. A bare perusal of the afore-stated provisions clearly reflects that the benefit of the said SRO is not available on import of raw cotton, because the notification is applicable on the textile sector from spinning stage onwards, thus the importer has claimed an inadmissible benefit. Furthermore, the payment of Sales Tax / Income Tax in subsequent Goods Declarations filed by the importer clearly proved that they claimed inadmissible benefit of SRO 1125(I)/2011 dated 31-12-2011.

14. The Boards has also issued a clarification vide C.No. 117)WH1/2006 E.Dox 91638-R dated 30-06-2015 which is reproduced for ready reference.

GOVERNMENT OF PAKISTAN
REVENUE DIVISION
FEDERAL BOARD OF REVENUE

C.No. 117)WH1/2006 E.Dox 91638-R

Dated 30-06-2015

Mr. S. M. Tanveer,
Chairman, APTMA,
APTMA House, 44-A, Lalazar,
Moulvi Tamizuddin Khan Road,
P.O. Box No. 5446,
Karachi-74000.

SUBJECT: CHARGEABILITY OF HIGHER RATE OF WITHHOLDING TAX AT IMPORT STAGE AT 5.5% FROM THE BENEFICIARIES I.E. TEXTILE SPINNING UNITS UNDER SRO 1125(I)/2011 DATED 31.12.2011.

Kindly refer to your letter No. PZ Admin/FBR/15-005 dated 20th January, 2015 on the subject.

2. Vide above referred letter, a clarification has been sought as to what rate of Income Tax is applicable on import of cotton by manufacturers covered under SRO 1125(I)/2011 dated 31.12.2011.

3. I am directed to refer to the provisions of clause (9C) of Part of the Second Schedule, Part of the First Schedule to the Income Tax Ordinance, 2001 and SRO 1125(I)/2011 dated 31.12.2011 as amended through SRO 154(I)/2013 dated 28.02.2013 and to say that "manufacturers doing business in textiles (including jute), carpets, leather, sports and surgical goods sectors and fulfilling the conditions of

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SRO 1125, irrespective of the type of goods imported, are covered under SRO 1125(1)/2011 dated 31.12.2011 and reduced rate of 1% under Section 148 of the Income Tax Ordinance, 2001 will be applicable on their imports from 14.03.2013 till date.

-sd-

Muhammad Asghar Khan Niazi
Secretary (Law and Clarification)

15. Perusal of Board's clarification reveals that to avail the benefit of reduced rate of Withholding Tax @ 1% it is imperative for the importer to fulfill the conditions of SRO 1125(1)/2011 dated 31-12-2011. As discussed above, the importers do not qualify the conditions SRO 1125(1)/2011 dated 31-12-2011 since raw and ginned cotton has been excluded from the preview of the said SRO. Since the importer do not fulfill the condition of SRO 1125(1)/2011 dated 31-12-2011, therefore, they are not entitled to the reduced rate of Withholding Tax @ 1% as contained in Board's afore-stated clarification.

16. The argument of the respondent that customs authorities are not empowered to recover Sales Tax & Income Tax is incorrect. The Show Cause Notice has been issued by invoking the provisions of Section 32 & 32(A) of the Customs Act, 1969 which empower the Customs authorities to recover short levied amount of duty and taxes. For reference the relevant provisions are reproduced hereunder:

"32. [False] statement, error, etc.- (1) If any person, in connection with any matter of customs,-

- (a) makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or
- (b) makes any statement in answer to any question put to him by an officer of customs which he is required by or under this Act to answer,
- (c) **submits any false statement or document** electronically through automated clearance system regarding any matter of Customs, knowing or having reason to believe that such document or statement is false in any material particular, he shall be guilty of an offence under this section.

(2) Where, by reason of any such document or statement as aforesaid or by reason of some collusion, any duty, taxes or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within [five] years of the relevant date, requiring him to show cause why he should not pay the amount specified in the notice.

32A. Fiscal fraud.-

- (1) If any person, in connection with any matter related to customs
 - (a) causes to submit documents including those filed electronically, which are concocted, altered, mutilated, false, forged, tempered or counterfeit to a functionary of customs;
 - (b) declares in the 82[goods declaration] electronically filed customs declaration, the name and address of any exporter or importer which is physically non-existent at the given address;
 - (c) declares in the 82[goods declaration] electronically filed customs declaration, an untrue information regarding 97[payment of duties and taxes through self-assessment,] description, quantity, quality, origin and value of goods;
 - (d) alters, mutilates or suppresses any finding of the customs functionary on any document or in the computerized record; or (e) attempts, abets or connives in any


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action mentioned in clauses (a), (b), (c) and (d) above, he shall be guilty of an offence under this section.

Furthermore, under the provisions of section 179 of the Customs Act, 1969 the Custom Officers are empowered to adjudicate the cases relating to recovery of duty and taxes. For ease of reference the relevant provision is reproduced hereunder:

"179. Power of adjudication.- Subject to sub-section (2), in cases involving confiscation of goods or recovery of duty and other taxes not levied, short levied or erroneously refunded, imposition of penalty or any other contravention under this Act or the rules made there-under, the jurisdiction and powers of the officers of Customs in terms of amount of duties and other taxes involved, excluding the conveyance, shall be as follows, namely:...."

In addition, the Customs Officer has also been empowered by the legislature to recover duty and taxes under Section 202 of the Customs Act, 1969. For ease of reference the relevant provision is reproduced hereunder:

"202. Recovery of Government dues.- (1) When, under this Act or under any other law for the time being in force, which provides for any tax, duty or other levy being collected in the same manner as customs-duties are collected, a penalty is adjudged against, or notice or demand is served upon, any person calling for the payment of any amount unpaid which may be payable by way of penalty or by way of duty, tax or other levy or under any bond [guarantee] or other instrument executed under this Act or such other law or the rules made there under, the appropriate officer:...."

17. In the light of afore-stated provisions of law, the Officers of Customs are empowered to collect, adjudicate and recover customs duty and other taxes not paid or short paid at import stage. The argument of the respondent that customs authorities are not empowered to recover Income Tax is also not tenable. As section 161(2) read with Section 80 of the Income Tax Ordinance, 2001 empowers the customs authorities to recover short levied Income Tax. For reference Sections 161(2) & 80 of the Income Tax Ordinance 2001, are reproduced hereunder:-

161. Failure to pay tax collected or deducted.- (1) Where a person-

(2) A person personally liable for an amount of tax under sub-section (1) as a result of failing to collect or deduct the tax shall be entitled to recover the tax from the person from whom the tax should have been collected or deducted.

80. Person. - (1) The following shall be treated as persons for the purposes of this Ordinance, namely: -

- (a) An individual;
- (b) a company or association of persons incorporated, formed, organised or established, in Pakistan or elsewhere;
- (c) the Federal Government, a foreign government, a political sub-Division of a foreign government, or public international organization.

18. Further, Federal Board of Revenue (FBR) vide letter C.No. 3(32)Tar-I/90 dated 06-08-2012 has clarified that Customs Authorities are empowered to recover Sales Tax, Federal Excise Duty. For ease of reference, the same is reproduced hereunder:-

Subject: LEGAL OPINION - ADJUDICATION OF CASES RELATING TO LEVY AND COLLECTION OF FEDERAL EXCISE DUTY, SALES TAX AND WITHHOLDING TAX ON IMPORTED GOODS


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I am directed to refer to the subject cited above and to enclose herewith a copy of a letter No. F-242/2012-Law-1, dated 1.07.2012, issued by the Ministry of Law Justice, wherein it has been clarified that the officer of Customs are competent to take cognizance of any short paid amount of Federal Excise Duty at import stage all adjudge such cases in view of the provisions of Section 3(2) of the Federal Excise Act, 2005, namely "Duty in respect of goods imported into Pakistan shall be levied and collected the same manner and the same time as if it were a duty of customs payable under the of the Customs Act, 1969 (II of 1969), and the provisions of the said Act included 31A therefore shall apply

2. Since identical provisions also exist in the Sales Tax and Income Tax laws, the Officers of Customs are also competent to take cognizance of any short paid amount of Sales Tax and Withholding Tax pertaining to import stage. Accordingly, Board's earlier letters on the subject matter bearing C.No. 6(8) S/IR-Ops/2012-8239-R dated 16-01-2012 and C.No. 6(8)S/IR Ops/2012-8938 dated 18-01-2012 issued by the SA to Chairmen FBR and Secretary (IR Operations), FBR are no longer of any effect being contrary to the legal provision of law, as clarified by the law and justice Division.

3. The relevant Officers of Customs may, therefore, continue the adjudication proceedings already initiated and take cognizance of all cases of FED, Sales Tax and Withholding Tax pertaining to import stage in future as well.

4. This issues with the approval of Chairman, FBR.

-sd-

Raza

Secretary (Tariff-I)

19. The argument of the respondent that the provision of Section 32 of the Customs Act, 1969 are not attracted as they have declared the correct description of goods and that the admissibility of claimed SRO is to be assessed by the department carries no weight. It has been observed that as per provision of Section 79(1) of the Customs Act, 1969. The importer is required to make a true and correct declaration which includes claim of any applicable SRO. For reference the provision of Section 79(1) is reproduced hereunder

"79. Declaration and assessment for home consumption or warehousing.-

[1]The owner of any imported goods shall make entry of such goods for home consumption or warehousing or for any other approved purposes, within fifteen days of the arrival of the goods, by:-

- (a) filing a true declaration of goods, giving therein complete and correct particulars of such goods, duly supported by commercial invoice, bill of lading or airway bill, packing list or any other document required for clearance of such goods in such form and manner as the Board may prescribe; and
- (b) assessing and paying his liability of duty, taxes and other charges thereon, in case of a registered user of the Customs Computerized System

20. A perusal of the afore-stated provisions of law clearly reflect that after introduction of Customs Computerized System, the importer is responsible for assessing and paying his liability of duty / taxes. Thus, the importer can't claim that admissibility of claim of SRO is the sole responsibility of customs authorities, besides the payment of Sales Tax & Withholding Tax in subsequent GD's by the respondent is an ample proof that the importer deliberately made short payment of Sales Tax / Withholding in the instant case.

21. In the light of afore-stated facts, the charges leveled in the show cause notice stand established. M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079) 23-C, Khayaban-e-Sehr, Phase -VI, D.H.A, Karachi is hereby ordered to deposit an amount of Rs. 9,442,538/- into the government treasury in terms


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of the provisions of Sections 32,32(2),32(A) & 79 of the Customs Act, 1969. A penalty of Rs. 1,500,000/- (Rupee Fifteen Hundred Thousands Only) is also imposed to M/s. Lucky Cotton Mills (Pvt) Limited, (NTN-2224079) 23-C, Khayaban-e-Sehr, Phase-VI, D.H.A. Karachi in terms of clause 14 of Section 156(1) of the Customs Act, 1969 for claiming inadmissible benefit. The Collectorate may proceed to recover the penal surcharge strictly in accordance with law.

22 Keeping in view the defying attitude of the nominated departmental representative in this case, the Collectorate is advised to put in place a mechanism of ensuring proper representation of departmental stance before the adjudication authorities. The case is disposed off in the manner as stated above.

23 This order consists of (15) fifteen pages and each page bears my seal and initial.

M/s. Lucky Cotton Mills (Pvt) Limited,
(NTN-2224079) 23-C, Khayaban-e-Sehr,
Phase -VI, D.H.A. Karachi


(Ch. Muhammad Javaid)
Collector
Collectorate of Customs (Adjudication-II)
Custom House, Karachi

Copy for information to:-

1. The Collector, Model Customs Collectorate of Appraisalment (East), Custom House, Karachi
2. Notice Board
3. Guard File


(Ch. Muhammad Javaid)
Collector
Collectorate of Customs (Adjudication-II)
Custom House, Karachi