

ORDER-IN-ORIGINAL NO. 129 OF 2015-2016
M/s. Nishat (Chunian) Limited, (NTN-0225898), Lahore
Adj-II/Coll/SCN-128/MCC.E/Cont.4(402)/Nishat (Chunian)Limited/2015



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

FBR

Adj-II/Coll/SCN-128/MCC.E/Cont.4(402)/Nishat (Chunian)Limited/2015

Dated 26-11-2015

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

Respondents : M/s. Nishat (Chunian) Limited,
(NTN-0225898), 31-Q, Gulberg-II,
Lahore

Date of Institution : 27-05-2015 (show cause notice)
Dates of hearings : 04-06-2015, 16-06-2015 & 12-11-2015.
Date of judgment : 26-11-2015
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. Nishat (Chunian) Limited, (NTN-0225898), 31-Q, Gulberg-II, Lahore, imported (13) consignment of "Raw & Ginned Cotton" and filed goods declaration bearing GiD numbers mentioned as below, the detail of the case is as under:

1	Name and address of the importers:	M/s. Nishat (Chunian) Limited, (NTN-0225898), 31-Q, Gulberg-II, Lahore
2	No of GiDs where the contravention was detected	KAPE-HC-2664-15-07-2013 / KCSI-HC-139202-11-04-2013 KCSI-HC-160400-17-05-2013 / KCSI-HC-160403-17-05-2013 KCSI-HC-142510-17-04-2013 / KCSI-HC-163779-22-05-2013 KCSI-HC-163776-22-05-2013 / KCSI-HC-163781-22-05-2013 KCSI-HC-176705-12-06-2013 / KCSI-HC-180635-19-06-2013 KCSI-HC-14197-16-04-2013 / KAPE-HC-90574-10-04-2014 KAPE-HC-96951-29-04-2014

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3.	Description of Goods	"Raw & Ginned Cotton"
4.	Total Value of the Imported goods	Rs. 589,614,292/-
5.	Total Amount of Taxes Evaded.	Rs. 23,584,572/-
6.	Nature of Offence	Evasion of taxes by misusing of SRO 1125(I)/2011 dated 31-12-2011 and amending SRO 154(I)/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. And whereas, M/s. Nishat (Chunian) Limited, (NTN-0225898), 31-Q, Gulberg-II, Lahore 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. And whereas, the M/s. Nishat (Chunian) Limited, (NTN-0225898), 31-Q, Gulberg-II, Lahore unlawfully claimed the benefit of SRO 1125(I)/2011 dated 31-12-2011 on all the above mentioned consignments and paid Sales Tax Zero Percent under SRO 551(I)/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(I)/2013 dated 14-03-2013 is only available to goods that are covered under SRO 1125(I)/2011 dated 31-12-2011. The Customs Computerized System cleared their consignments through "Green Channel" without any human intervention.
4. And whereas the M/s. Nishat (Chunian) Limited, (NTN-0225898), 31-Q, Gulberg-II, Lahore was not entitled to the benefit of SRO 1125(I)/2011 dated 31-12-2011 in the light of the amending of SRO 154(I)/2013 dated 28th February, 2013 which has excluded "Raw and Ginned Cotton" from the purview of SRO 1125(I)/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(I)/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. 23,584,572/- 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 (I) of the Customs

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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. Nishat (Chunian) Limited, (NTN-0225898), 31-Q, Gulberg-II, Lahore is 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. 23,584,572/- (along with the 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 Sales Tax Act, 1990 and Section 148 of the Income Tax Ordinance, 2001 may not be taken against them.

8. In this case the show cause notice was issued to my predecessor on 27-05-2015. 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 24-09-2015. However, the said time limits further stood extended to 01-10-2015 by seven (07) days on account of adjournment sought by the respondents advocate namely Mr. Rashid Malik of M/s. Tax Haven vide their letter No. TH/NC/SCN/2015/1 dated 16-06-2015, in terms of proviso to sub-section (3) of section 179 of the Customs Act 1969. 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 approach 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 04-06-2015 & 16-06-2015. The hearing before undersigned was concluded 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:-

Subject: REPLY TO SHOW CAUSE NOTICE ISSUED VIDE C. No. Adj-II/CoII/SCN-128/MCC.E/Cont.4(402)/Nishat (Chunian)Limited/2015 DATED 27.05.2015

Respectfully submitted:

1. Through the titled show cause notice it has been communicated that M/s. Nishat Chunian Limited [hereinafter called the "answering respondent"]

- (i) availed the facility of self declaration in terms of section 79 of the Customs Act, 1969 determining their duty and taxes on their own and paid the same in respect of 13 consignments of raw and ginned cotton valuing Rs. 589,614,292 imported during the period from April 2013 to April 2014;
- (ii) unlawfully claimed the benefit of SRO 1125(1)/2011 dated 31.12.2011 on all the subject 13 consignments and paid sales tax @ zero percent under SRO 551(1)/2008 dated 11.06.2008 and income tax @ 1% whereas the goods were subjected to 5% income tax at import stage

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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 all the consignments through green channel without any human intervention.

(iii) was not entitled for 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 excluded raw and ginned cotton from the purview of SRO 1125(1)/2011 dated 31.12.2011 through condition No. (ii) of the said SRO which stipulated that the benefit of SRO will be available to textile sector "from spinning stage onward" whereas the goods imported through subject GIDs are clearly of ginning stage hence were excluded from the purview of SRO 1125(1)/2011 dated 31.12.2011.

(iv) has willfully and dishonestly evaded legitimate government taxes to the tune of Rs. 23,584,572 and has committed offence in terms of provisions of the Customs Act, 1969, Sales Tax Act, 1990 further read with section 148 of the Income Tax Ordinance, 2001.

2. The answering respondent has been called upon to show cause as to why the aforesaid amount along with default surcharge may not be recovered and penal action punishable under clauses 14 and 14A of sub section (1) of section 156 of the Customs Act, 1969, clause 11(c) or section 33 of the Sales Tax Act, 1990 and section 148 of the Income Tax Ordinance, 2001.

3. That the impugned show cause notice is liable to be vacated *inter alia* on the following

GROUND

(I) The show cause notice suffers from legal infirmities as the appellant has been charged of "violating the provisions of section 32(1) & (2) of the Customs Act, 1969. The appellant has neither made any wrong statement nor has submitted any false documents before an officer of customs for evading any duty or tax, therefore, the charge of contravening the provisions of section 32(1) & (2) of the Customs Act, 1969 is misconceived. The penal provisions contained in clause (14) of section 156 of the Customs Act, 1969 are therefore not attracted to the merits of the instant case.

(II) The subject adjudicating proceedings are beyond the jurisdiction of the learned Collector of Customs (Adjudication-II) Karachi who has been appointed by the Federal Board or Revenue as an officer or customs under section 3 read with section 179 of the Customs Act, 1969 through SRO 886(1)/2012 dated 18.07.2012 hence is authorized to exercise powers under the Customs Act, 1969 only. The learned Collector of Customs Adjudication is however not authorized to exercise powers under the Sales Tax Act, 1990 or Income Tax Ordinance, 2001 as he has not been appointed as an officer of Inland Revenue to adjudicate the cases involving contravention, if any of the provisions of the Sales Tax Act, 1990 and Income Tax Ordinance, 2001.

(III) The learned Collector of Customs Adjudication cannot take cognizance of short payment of an amount of income tax, if any. There does not exist any notification issued by the Board under the provisions of the Income Tax Ordinance, 2001 through which Collector of Customs Adjudication has been appointed as an officer of Inland Revenue. The Adjudication Collectorates were previously established in the year 2000 and the officers of the Adjudication Collectorates including Collector Adjudication were given powers under the relevant provisions of Customs Act, 1969, Sales Tax Act, 1990 and the Central Excise Act, 1944 as is evident from Board's notification 448(1)/2000 dated 01.07.2000. However

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the Adjudication Collectorates were abolished in the year 2005 and have been again established in 2012 but the officers of the Adjudication Collectorates have been given powers only under the Customs Act, 1969 whereas the powers under the Sales Tax Act, 1990 and Income Tax Ordinance, 2001 have not been given to the officers of Adjudication Collectorates therefore exercise of powers under the Ordinance of 2001 by the Collector Adjudication is beyond jurisdiction.

- (IV) The learned Collector of Customs Adjudication is not authorized to exercise powers under the Ordinance of 2001 unless he is authorized under the respective statute. The Collector of Customs has been specifically authorized by the Board under the respective statutes of 1990 and 2001 whereas no such authority has been given to the learned Collector of Customs Adjudication hence demand of income tax raised by the learned Collector Adjudication is not only beyond his jurisdiction but is otherwise nullity in the eyes of law.
- (V) Under section 148 of the Ordinance, Collector of Customs has been empowered to collect advance tax from every importer of goods whereas the Collector of Customs Adjudication has not been given any powers to make recovery of short levied amount of income tax, if any. The provisions of "collection" and "recovery" of any levy, duty or tax are independent of each other so if the Ordinance empowers the Collector of Customs to collect tax only, the powers relating to recovery of tax cannot be assumed automatically.
- (VI) The Collector of Customs of the executive Collectorate is an entity quite distinct from Collector of Customs Adjudication. It has been held by the Honorable Lahore High Court, Lahore in its judgment titled *Khan Trading Company Gujranwala Vs. Collector of Customs Adjudication, Lahore* that the Collector of Customs exercising the functions of administering the Customs Act, 1969 and making collection is separate and distinct legal entity from the Collector of Customs Adjudication who is responsible for adjudicating process. The learned Collector of Customs Adjudication can neither take cognizance for recovery of short payment of an amount of income tax in respect of goods which have already been cleared from Customs, if any.
- (VII) That prima facie it appears that the learned Collector has raised the demand of income tax on the premise that since the Ordinance empowers the Collector to collect income tax as customs duty so the recovery of income tax can be effected as if it were a customs duty; that this is not so; that if it had been so, then the customs officers would have been empowered to refund the amount of income tax if collected in excess at the import stage; that any amount of income tax collected in excess on imported goods is refunded by the officers of income tax and not by the officers of customs; that same is the case of "recovery of income tax", if any, short levied or not levied at import stage and that has to be effected by the officers of income tax and not by the officers of customs as they have not been empowered to recover the short levied amount of income tax if any.
- (VIII) Since jurisdiction of assessment of income tax is not vested with Customs authorities and they are merely collecting agents on behalf of income tax Department, advance income tax cannot be recovered at this stage by Additional Collector of Customs.
- (IX) Advance (income) tax on imports is collected under section 148 of the Income Tax Ordinance, 2001 at the rates specified in Part-II of First Schedule of the Ordinance. The recovery of unpaid advance tax is made under Part V, section 162 of the Income Tax Ordinance, 2001; sub section (1) thereof reads as follows:
"162. Recovery of tax the person from whom tax was not collected or deducted
--(1) Where a person fails to collect tax as required under Division II of" this Part or Chapter XII or deduct tax as required under Division III of this Part or


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Chapter XIII, the Commissioner may pass an order to that effect and recover the amount from whom the tax should have been collected or to whom the payment was made.

It may be seen that the recovery of unpaid advance tax can only be made by the Commissioner Inland Revenue who under clause (13) of section 2 of the said Ordinance means a person appointed as a Commissioner of Inland Revenue under section 208 ibid. The Collector of Customs or the Collector of Customs Adjudication does not enjoy the powers of the "Commissioner" under the said Ordinance. Evidently the unpaid advance tax cannot be recovered in the absence of an order passed by the Commissioner. The impugned show cause notice is therefore ab-initio void and without lawful jurisdiction.

(X) *In its judgment in Suit No. 1544 of 2012 decided on 16.05.2014 titled M/s. Shujabad Agro Industries Pvt. Limited Vs. Collector of Customs, it has been held by the Honourable Sindh High Court at Karachi that the customs authorities are not empowered to make recovery of income tax once the goods are cleared from the Customs.*

(XI) *It is a settled principle of law that the opinion rendered by the High Court is binding not only on the Appellate Tribunal but on all the authorities functioning under various statutes:*

(a) *It has been held by the Hon'ble Lahore High Court, Lahore in its judgment Commissioner Inland Revenue Vs. Macca LNG Gas Enterprises reported at PTCL 2015 CL 540 that besides Article 201 of the Constitution of the Islamic Republic of Pakistan, 1973, the opinion of High Court is also binding under section 133 of the income Tax Ordinance, 2001 on the Appellate Tribunal and on all authorities under the income Tax Ordinance, 2001 as well.*

(b) *It has been held by the Customs Tribunal in its judgment in M/s Khyber Tea and Foods Company Peshawar Vs. Collector Customs Peshawar that ignoring the case laws by the Collector Appeals is the violation of Article 201 of the Constitution of Islamic Republic of Pakistan, 1973 the said article provides that the decisions of "High Courts are binding on subordinate courts.*

(XII) *Relying on the judgment of Hon'ble High Court, the Appellate Tribunal Karachi Bench in Customs Appeal No. K-1136/2014 titled M/s Siemens Pakistan Engineering Company Limited has also held that the custom officers cannot recover the amount of income tax once the goods are out of charge from custom authorities*

(XIII) *The learned Appellate Tribunal (Customs, Excise and Sales Tax) in appeal No.187/CU/IB/2008 reported at PTCL 2010 CL 564 titled "M/s Global Marketing services and another Vs. The Model Collector of Customs and another" where it has been held that*

(i) *the Collector of Customs do not have the authority to recover the amount of "income tax due" it is only the Commissioner income Tax who can start the proceedings of recovery against the person. In case of "default, the exercise of jurisdiction by Additional Collector was therefore not legal, justifiable and also not within four corners of law;*

(ii) *section 148 of the income Tax Ordinance, 2001 is only giving the power of "collection to the customs department and the power of recovery in case of default under section 148 vests with the income tax department;*

(iii) *merely providing the manner of collection of tax as an advance tax under any tax enactment, the nature of tax can not be changed; the power to collect the advance income-tax under section 148(5) can not have the effect of converting income tax into customs duty*


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(XIV) It has also been held by the learned Customs Tribunal, Islamabad Bench in its judgment *M/s Global marketing Services Vs MCC* of Customs reported at PTCL 2010 CL 564

(XV) Notwithstanding the fact that the impugned show cause notice is beyond the jurisdiction of learned Collector Adjudication, he has failed to appreciate that through SRO 212(1)/2013 dated 14.03.2013, the federal government made an amendment in Part II of the Second Schedule of the Income Tax Ordinance, 2001 through which a new clause (9C) was inserted which read as follows

(9C) Tax under section 148 shall be collected at the rate of 1% in case of manufacturers and 3% in case of commercial importers covered under Notification SRO 1125(1)/2011 dated 31.12.2011.

There is no doubt that the answering respondent is operating as manufacturer and fully covered under SRO 1125(1)/2011 dated 31.12.2011 which is evident from the following facts:

(i) in terms of STGO 08/2007, the Federal Board of Revenue has granted zero rating of sales tax on electricity supplied by LESCO to the manufacturers operating under SRO 1125(1)/2011 subject to the conditions inter alia including that electricity is consumed only in the manufacture of goods specified in SRO 1125(1)/2011 dated 31.12.2011 and the name of the answering respondent appears at Sr. No. 430 of the Table given below said STGO;

(ii) in terms of STGO 17 of 2007, the Federal Board of Revenue has granted zero rating of sales tax on gas supplied by SNGPL to the manufacturers operating under SRO 1125(1)/2011 subject to the conditions inter alia including that gas is consumed only in the manufacture of goods specified in SRO 1125(1)/2011 dated 31.12.2011 and the name of the answering respondent appears at Sr. No. 566 of the Table given below said STGO;

(iii) the answering respondent is selling yarn at the rate of 2% in terms of condition at Sr. No. (vi) of the conditions given under SRO 1125(1)/2011 dated 31.12.2011;

(iv) the answering respondent is selling fabric at the rate of 3% in terms of condition at Sr. No. (viii) of the conditions given under SRO 1125(1)/2011 dated 31.12.2011;

(v) the answering respondent is selling finished products at the rate of 5% in terms of condition at Sr. No. (vii) of the conditions given under SRO 1125(1)/2011 dated 31.12.2011;

(XVI) That the learned Collector Adjudication has fallen into error of law by framing his opinion to the extent that the imported cotton was subjected to 5% income tax as per clause (a) of Part II of Schedule One of the Ordinance on the grounds that under clause (9C) of part II of the Second Schedule, reduced rate of income tax of 1% was applicable only on goods covered under SRO 1125(1)/2011 dated 31.12.2011. It is a


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settled principle of law that fiscal statutes are to be interpreted in favour of the taxpayer. The learned Collector has failed to appreciate that under clause (9C), the facility of reduced rate of income tax of 1% was granted to the manufacturers covered under SRO 1125(I)/2011 dated 31.12.2011 and not to the goods specified in SRO 1125(I)/2011 dated 31.12.2011. There is no doubt that the answering respondent is operating under SRO 1125(I)/2011 dated 31.12.2011.

(XVII) A plain reading of the legal provisions contained in clause (9C) would reveal that reduced rate of 1% of income tax shall be applicable not only to cotton but on every goods imported by a manufacturer covered under SRO 1125(I)/2011 dated 31.12.2011 irrespective of the fact whether or not those goods are specified in SRO 1125(I)/2011 dated 31.12.2011.

(XVIII) The attention of the learned Collector Adjudication is further invited toward amendments made in the Ordinance through Finance Act, 2014 through which inter alia

(i) Clause (9C) of Part II of Second Schedule was omitted

(ii) Part-II of First Schedule of the Ordinance [where the rates of advance income tax to be collected by collector of customs were specified] was substituted and the facility of reduced rate of 1% income tax was allowed to manufacturers covered under Notification SRO 1125(I)/2011 dated 31.12.2011 as per clause (iv) of Sr.No.1 of the Table given therein;

(iii) Part II of Second Schedule of the Ordinance has been again substituted through SRO 136(I)/2013 dated 13.02.2015 and the facility of reduced rate of 1% income tax remains intact for the manufacturers covered under SRO 1125(I)/2011 dated 31.12.2011 who are filer whereas for the manufacturers operating under SRO 1125 if non filer, shall be subjected to reduced rate of 1.5% advance tax as 148 of the Ordinance. The intention of the legislature is very clear that the reduced rate of 1% income tax shall be applicable to the manufacturers covered under SRO 1125(I)/2011 dated 31.12.2011 irrespective of the fact whether or not the goods are specified in the said Notification.

(XIX) The attention of the learned Collector Adjudication is further invited towards the judgment of the Hon'ble Lahore High Court, Lahore in W.P. No. 7842/2015 titled M/s. Nishat Chunian Limited Vs. Federation where the Hon'ble Court has advised the petitioner to approach Commissioner Inland Revenue who shall complete the verification process under SRO 1125(I)/2011 dated 31.12.2011 and forward its report to the relevant Collectorate. It is very much clear from the aforesaid observation of the Hon'ble Court that in case the Commissioner Inland Revenue confirms that the petitioner is operating under SRO 1125(I)/2011 dated 31.12.2011, it is entitled for benefit of reduced rate of income tax under Clause (iv) of Sr. o 1 of Part II of First Schedule to the Ordinance [parallel to the provisions of clause (9C) of Part II of Second Schedule]. As per directions of the Hon'ble Lahore High Court, Lahore an application has been submitted to Commissioner Inland Revenue, Zone-II, LTU, Lahore for issuance of a certificate to the extent that the answering respondent is operating under SRO 1125(I)/2011 dated 31.12.2011.

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PRAYER

That on the basis of the above grounds it is prayed that the impugned show cause notice may kindly be withdrawn.

For and on behalf of

M/s. Nishat Chunian Limited

-sd/-

Rashid Malik

Advocate

10. Time and again this office issued notices to the department for submission of para-wise 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 para-wise comments in this case. It is also observed that the detecting agency submitted para-wise 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 para-wise 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. Monnoowal 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:-

- 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.

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- 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 concessional 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 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.

PARAWISE 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 concessional rate of 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

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clearly reveals that the petitioners are mis-quoting the factual position to avail the inadmissible benefit of income tax at concessory rate of @ 1% instead of @ 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 concessory 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.
- 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

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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, 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:-

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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 [or 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(1) (ie 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 tax at the concessionary 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 concessionary 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 concessionary rate of income tax @ 1% under the relevant provision of law.

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1. 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(I)/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(I)/2013 dated 26-02-2013 and as per the Condition No 2(I) 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(I)/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. Nishat (Chunian) Limited, (NTN-0225898), 31-Q, Gulberg-II, Lahore imported consignments of raw and ginned cotton and filed goods declarations bearing Nos. (i) KAPE-HC-2664-15-07-2013, (ii) KCSI-HC-139202-11-04-2013, (iii) KCSI-HC-160400-17-05-2013, (iv) KCSI-HC-160403-17-05-2013, (v) KCSI-HC-142510-17-04-2013, (vi) KCSI-HC-163779-22-05-2013, (vii) KCSI-HC-163776-22-05-2013, (viii) KCSI-HC-163781-22-05-2013, (ix) KCSI-HC-176705-12-06-2013, (x) KCSI-HC-180635-19-06-2013, (xi) KCSI-HC-14197-16-04-2013, (xii) KAPE-HC-90574-10-04-2014 & (xiii) KAPE-HC-96951-29-04-2014 at an invoice value of Rs. 589,614,292/- 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(I)/2011 dated 31-12-2011 on the above consignment; and paid Sales Tax @ 0% (under SRO 551(I)/2008) and Income Tax @ 1%, while the goods were subject to 5% Income Tax at import stage as the concurrent benefit of SRO 312(I)/2013 dated 14-03-2013 is only available to goods that are covered under SRO 1125(I)/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(I)/2011 dated 31-12-2011 in the light of amending SRO 154(I)/2013 dated 28-02-2013 which has excluded raw and ginned cotton from the purview of SRO 1125(I)/2011 dated 31-12-2011 through condition (ii) of the SRO.

12. For arriving at a logical conclusion, the provisions of SRO 1125(I)/2011 dated 31-12-2011 needs to

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be examined. For ease of reference the same are re-produced hereunder:

- (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. 1(7)WHT/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. 1(7)WHT/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.

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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(1)/2011 dated 31.12.2011 as amended through SRO 154(1)/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 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;


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- (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 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 10[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;*

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- (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

I am directed to refer to the subject cited above and to enclose herewith a copy of a letter No. F.242/2012-Law-I, 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 (IV of 1969), and the provisions of the said Act included 31A therefore shall apply"

2. Since identical provisions also 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/2012-8259-R dated 16-04-2012 and C.No. 6(8)S/IR Ops/2012-8958 dated 18-04-2012 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 -

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- (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. Nishat (Chunian) Limited, (NTN-0225898), 31-Q, Gulberg-II, Lahore is hereby ordered to deposit an amount of Rs. 23,584,572/- into the government treasury in terms of the provisions of Sections 32,32(2),32(A) & 79 of the Customs Act, 1969. A penalty of Rs. 2,000,000/- (Rupee Twenty Hundred Thousands Only) is also imposed to M/s. Nishat (Chunian) Limited, (NTN-0225898), 31-Q, Gulberg-II, Lahore 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 (19) nineteen pages and each page bears my seal and initial.

M/s. Nishat (Chunian) Limited,
(NTN-0225898), 31-Q, Gulberg-II,
Lahore


(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. Mr. Rashid Malik, Advocate of M/s. Tax Haven, 1165, Business Arcade, Shara-e-Faisal, Karachi
3. Notice Board
4. Guard File


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