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

*****

Before Mr. Muhammad Nadeem Qureshi (Member Judicial-1)
Mr. Muhammad Yahya (Member Technical-1)

Customs Appeal No.K-599/2015

1. M/s. Patanwala & Sons,
Karachi.

Customs Appeals No.K-600 & 605/2015

2. M/s. Victory Pipe Industries (Pvt) Ltd.,
Islamabad.

Customs Appeal No.K-606/2015

3. M/s. Win Pipe Industries (Pvt) Ltd,
Islamabad.

Customs Appeals No. K-601-604/2015

4. M/s. Qureshi Agencies,
Karachi ..... Appellants

Received
18/12/2015

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Versus

1. The Collector,
MCC of Appraisement- West,
Custom House,
Karachi.

The Collector,
Collector of Customs,
Adjudication-I, Custom House,
Karachi. ..... Respondents

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Mr. Nadeem Ahmed Mirza, Consultant, Mirza Muhammad Abeeullah Nadeem, Consultant & Mr. Obayd Mirza, Advocate, for the Appellants.
Mr. Ammar Aamir Mir, Assistant Collector, for the Respondents

Date of hearing: 05.12.2015
Date of Order: 15.12.2015

JUDGMENT

Muhammad Nadeem Qureshi, Member Judicial-I, Karachi:

Through this common order, we intend to dispose off above 08 Appeals bearing Nos.599 to 606/2015, filed under Section 194A(1)

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of the Customs Act 1969 against the Orders-in-Original No.415/2014-15 dated 26.02.2015, 410/2014-215 dated 26.02.2015, 413/2014-15 dated 26.02.2015 & 409/2014-15 dated 26.02.2015. passed by Collector of Customs (Adjudication-I) (here-in-after to be referred as respondent No.2). These appeals have identical issue of law and facts therefore, being heard dealt with and dispose of simultaneously though this common order in the light of the judgment of the Honorable High Court of Sindh in Customs Reference No.157 of 2008, S.M. Naqi S/o Syed Muhammad Hussain, Karachi Vs Collector of Customs (Adj-I) and Others.

02. Since, these 08 appeals are based on similar facts and questions of law, therefore, it is needless to reproduce facts of each case separately. Hence, for reference the facts of Appeal No. K-599/2015 are taken into consideration for decisions and which are, the appellant imported a consignment of 434711 kgs of prime quality Hot Rolled Alloy Steel Sheet in coils @ US$. 0.5650/kg from China. Upon receipt of import documents from shipper, the appellant delivered those to his clearing agent M/s. Qureshi Agencies, Karachi CHAL No. 1347 for transmitting online Goods Declaration (here-in-after to be referred as GD) through "One Custom" regime under the provision of Section 79(1) of the Customs Act, 1969. The declaration made in the transmitted GD was found correct and it was numbered as KAPR-HC-121011-16062013. The clearing agent of the appellant obtained print out of the said GD and approached the nominated Appraiser namely Muhammad Naeem, who instead of completing the assessment on the basis of annexed letter of credit, invoice , packing list , B/L , FTA and Mill Test Certificates (here-in-after to be referred as

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MTC), opted to get the goods examined first and for that he endorsed examination order on the reverse of GD and referred the same to Principal Appraiser, who endorsed the same. Consequent to which the official of clearing agent approached the nominated examining official namely Nafees Ahmed posted at Shed of West Wharf, who ordered to get the GD registered, after that he conducted the examination in terms of Section 198 of the Customs Act, 1969, wherein the goods were found as per declaration and the said fact was adduced by him on the reverse of GD and referred the same along with drawn sample to the Principal Appraiser of the Group, who after initialing the report marked it to the nominated Appraiser, who instead of passing the assessment order under the provision of Section 80 of the Customs Act, 1969, disputed the veracity of MTC and opined that the goods in question are not alloy instead non alloy and the quantity of "Boron" is infact not available in the goods, instead spray of Boron has been made on the surface of the sheets. Mere spraying of boron least qualify the goods as alloy for levy of duty and taxes on the declared PCT. The said opinion was disputed by the appellant, and his clearing agent, resultant, the respondent no. 1 directed the Deputy Collector of the Group to allow release of the goods under the provision of Section 81 of Customs Act, 1969 after securing differential amount between the duty and taxes of non alloy and alloy steel sheet in the shape of Bank Guarantee or Pay Order and thereafter forward the samples to A.Q. Khan Research Laboratory (here-in-after to be referred as KRL) for determination of the actual description of the goods. In accordance with the orders, the appellant submitted Pay Order bearing No. HMBL /PO/06617665 dated 18.01.2013 for Rs.

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2,829,804.00 and the Deputy Collector of the Group accordingly passed provisional assessment order under Section 81 ibid and the security was ordered to be detached. After detachment of the security, the Principal Appraiser, passed clearance order under section 83 ibid on 24.06.2013 in exercise of power vested upon him under SRO 371(I)/2002 dated 15.06.2002. Consequent to which the appellant clearing agent obtained delivery of the goods from the port.

03. The Deputy Collector of the Group subsequently dispatched the drawn sample to KRL for test through letter dated 21.06.2013, Metallurgy Division of KRL reported the test through analysis/characterization of the Steel Sheet vide dated 22.07.2013 through which reported that "Fe, base, Mn 0.44 C 0.154 & S 0.0048 are found whereas element of Al, B, Co, Cr, Cu, Pb, Mo, Ni, Nb, Si, Ti, W,V & Zr were not detected. Since, the report was not in conformity with the MTC forwarded by the shipper the appellant forwarded letter dated 24.08.2013 to the respondent no. 1 through which he disputed the result of test report of KRL and requested for retesting of the sample by the Peoples Steel Mills Ltd, (here-in-after to be referred as PSML) which was allowed and the Deputy Collector of the Group dispatched sample to the PSML which through its report dated 27.08.2013 confirmed that the goods of the appellant is composed of following elements:

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S.No	Sample ID	Element	Chemical Composition (Wt.%) C	Si	Mn	P	S	B	Test Method
		Standard							
1		Actual	0.18	0.03	0.47	0.019	0.010	8	ASTM E-- 1009 & E-1019

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04. That inspite of the fact that the retest of PSML confirmed the veracity of MTC and FTA, the respondent No. 1 directed the Deputy Collector of Group to ignore it and frame contravention report on the basis of report of KRL and forward it to respondent no. 2. As directed the contravention report was framed and forwarded to respondent no. 2, who issued show cause notice dated 24.10.2013 with the allegation that inspite of confirmation of the quality of the goods as prime, the composition for the determination of actual description cannot be made through naked eye that as to whether the goods are alloy or non alloy and are classifiable either under the declared PCT 7225.3000 attracting 5% duty or non alloy falling under PCT 7208.9090 attracting 10% duty, drawn sample was forwarded to KRL, which vide report No. MIC13-CUS-1028 dated 22.07.2013 confirmed that the quantity of Boron is not found in the imported goods, consequent result of which is that the goods are deems to be non alloy steel sheets as per definition available in Chapter Note (f) of Chapter 72 of the Pakistan Customs Tariff and these falls under PCT 7208.9090 attracting 10% customs duty instead of declared PCT 7225.3000 attracting 5% duty. The result of the test confirmed that the appellant deliberately and willfully attempted to clear the goods through their clearing agent as alloy steel with an intend to hoodwink the Government's legitimate revenue to the tune of Rs. 2,829,804.00 and this act of the appellant's attract the mischief of Section 32(1) and (2) of the Customs Act, 1969, punishable under clause 14 of Section 156(1) of the Customs Act, 1969 read with SRO, 499(I)/2009 dated 13.06.2009. The advocate of the appellant submitted letter dated 18.11.2013 with the

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respondent no. 2, through which intimation was given that since the issue in question is under adjudication with the High Court of Sindh through C.P. No. 4295/2013, the matter should be kept in dormant till the decision of the High Court in the referred Petition and several others. The respondent No. 2 instead of keeping the matter in abeyance, passed order dated 26.02.2015, Para 5 & 6 are relevant, which are reproduced here-in-below:

> *5- I have gone through the case record and considered written / verbal arguments of both the sides. As per M/s. A.Q. Khan Laboratory, Test Report MIC/13-CUS-1028 dated 22.07.2013, the chemical composition of the impugned goods has been found as "Non-Alloy Steel". The respondents declared the imported goods 'Hot Rolled Steel Coils' under PCT heading 7225.3000 CD@5%, whereas upon test the goods have been found to be 'Hot Rolled Steel Plates' of 'Non Alloy Steel' attracting classification under PCT heading 7208.9090 chargeable to CD @ 10% which substantiate that the respondents deliberately and willfully attempted to placed the goods 'alloy Steel'. Section 79 of the Customs Act, 1969 clearly states that the importer is responsible to give correct declaration of the goods mentioning their complete and correct particular of the consignment and to pay duty and taxes as per declaration . it is evident that the respondent have mis-declared the description and classification to evade payment of legitimate amount of duty and taxes applicable on the subject goods. In view of the above charges leveled in the show cause notice stand established. I, therefore, order for confiscation of the offending goods under Section 156(1) of Clause (14) read with Section 32(1) and 32(2) of the Customs Act, 1969, however an option under Section 181 of the Customs Act, 1969 is given to the importer to redeem the confiscated goods on payment of 35% Redemption fine in terms of SRO 499(I)/2009 dated 13.06.2009 of the value of offending goods as determined by the department in addition to the payment of duty and taxes chargeable thereon. I also impose a penalty of Rs. 200,000.00 (Rs. Two hundred thousand) on the importer and Rs.100,000.00 (one hundred thousand) on the clearing agent.*
>
> *6- In order to made statutory limitation of the import of the adjudicating authority in terms of section 179 of the Customs Act, 1969, this order is being made; however the implementation of this order shall be held in abeyance till decision of the Hon'ble Court in Constitution petition No. D-4295/2013 dated 13.08.2013.*

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05. Being aggrieved and dis-satisfied with the impugned Orders-in-original the Appellant's filed the these appeals before this Tribunal on the ground incorporated in the Memo of Appeal on the date of hearing Consultants/Advocates appeared on behalf of the Appellant's and reiterated the fact and contents of the case and argued strictly in accordance with the grounds mentioned in the Memo of Appeal which are:

(i) The provisional assessment under the provision of Section 81 of the Customs Act, 1969 had been passed on 21.06.2013 and the test report of the A.Q. Laboratory was received on or after 22.07.2013 and of People Steel Mills Ltd on or after 27.08.2013. Hence, it was mandated on the subordinate of respondent no. 1 namely Deputy Collector of Customs, Group to pass an assessment order under the provision of Section 80 and 81(5) of the Customs Act, 1969 within six months from the date of provisional assessment i.e. by 18.12.2013. The subordinate of respondent no. 1 was available with no cause or reason for not passing an order within the stipulated period. To the contrary, he has not passed the order to this date.

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(ii) That since no final assessment order has been passed by the respondent no. 1 subordinate till todate, hence the declaration of the appellant goods stood final, under Sub Section (4) of Section 81 of the Customs Act, 1969. Rendering the order dated 26.02.2015 void and ab-initio and of no legal effect and stood validated from the judgments of the Hon'ble High Court of Pakistan reported as **2005 PTD 1968 Trade International v Deputy Collector of Customs, 2007 PTD 2119 S. Fazal Ellahi & Sons v Deputy Collector of Customs and others, PTCL 2008 CL 564 Clover Pakistan Ltd v FOP & others, 2010 PTD 900 Collector of Customs, MCC of Appraisement v Pak Arab Refinery , PTCL 2011 CL 575 Sus Motors (Pvt) Ltd v FOP , 2011 PTD 2851**

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M/s. Crescent Art Fabric v Assistant Collector and Customs & 4 others & 2856 Trend International v Deputy Collector, Dry Port, Multan and 4 others, PTCL 2006 CL 425 Dewaan Farooq Motors Ltd , Karachi v Customs Excise & Sales Tax Appellate Tribunal, 2005 PTD 2116 Collector of Customs (Appraisement) v Auto Mobile Corporation of Pakistan. & PTCL 2004 CL 196 M/s. Farooq Woolen Mills , Gujranwala v Collector of Customs, Dry Port, Sambrial & others, 2012 PTD 980 Dawlance Electronic (Pvt) Ltd v Collector of Customs, Karachi.

(iii) Notwithstanding to the above illegality, it is of paramount importance to state that the show cause notice by the respondent No. 2 was issued on 24.10.2013 and an order under the proviso of sub Section (3) of Section 179 of the Customs Act, 1969 should had to be passed within 120 days from the date of issuance of show cause notice i.e. by 21.02.2014 or within a further extended period of 60 days during the initial period of 120 days with reason to be recorded for extension in writing by the FBR. No extension was obtained/granted by respondent No. 2 / FBR prior to expiry of initial period of 120 days i.e. before 21.02.2014. Instead as evident from para 4 of the order the extension was granted by FBR vide letter dated 30.12.2014 i.e. after expiry of 311 days of the initial period and 251 days after the expiry of entire allotted period of 180 days. Rendering the order-in-original barred by time by 311 days. Hence, without power/jurisdiction, as such ab-initio void as held in reported judgments **2008 PTD 60 M/s. Super Asia Muhammad Din Sons (Pvt) Ltd v Collector of Sales Tax,. Gujranwala & 2008 PTD 578 M/s. Hanif Strawboard Factory v Additional Collector (Adjudication) Customs, Sales Tax & Central Excise Gujranwala, 2009 PTD 762 M/s. Tanveer Weaving Mills v Deputy Collector Sales Tax & 4 others & PTCL 2009 CL 150 M/s. Syed Bhai Lighting Limited, Lahore v Collector of Sales Tax & Federal**

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Excise, Lahore & 2 others & [(2009) 100 TAX 32 (H.C.Lah)] Leo Enterprises v President of Pakistan & others 2010 PTD (Trib.) 1010 Innovative Impex, v Collector of Customs, Sales Tax & Federal Excise (Appeal), 2011 PTD (Trib.) 79 Fazal Ellahi v Additional Collector of Customs, MCC of PaCCS, 2011 PTD (Trib.) 987 Unique Wire Industries v Additional Collector of Customs, MCC of PaCCS , 2011 PTD (Trib.)1146 Kaka Traders v Additional Collector of Post Clearance Audit & & PTCL 2012 CL 347 Pak Electron Ltd v Collector of Customs, Lahore & others.

(iv) That for determination of alloy or non alloy product clause (f) of Chapter Note 72 reading as iron and steel of the Pakistan Customs Tariff is relevant and which read as:

(f) Other alloy Steel

Steel not complying with the definition of stainless steel and containing by weight once or more of the following elements in the proportion shown:

- 0.3 % or more of aluminum.
- 0.0008 % or more of boron.
- 0.3 % or more of chromium.
- 0.3 % or more of cobalt.
- 0.4 % or more of copper.
- 0.4 % or more of lead.
- 1.65 % or more of manganese.
- 0.3 % or more of aluminum.
- 0.08% or more of molybdenum.
- 0.3 % or more of nickel.
- 0.06 % or more of niobium.
- 0.6 % or more of silicon.
- 0.6 % or more of titanium
- 0.3 % or more of tungsten (wolfram)
- 0.1 % or more of vanadium
- 0.05 % or more of zirconium
- 0.1 % or more of other element (except sulphur, phosphorus, carbon and nitrogen) taken separately.

(v) That for determination of the steel that as to whether it is non alloy or alloy, reliance has to be placed on the MTC issued by the shipper, which in the case of the appellant and confirms that the goods in question contain 0.0008 % boron and this answer to the Chapter Note. The said

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definition is adhered around the world as evident from the copies of the Chinese procurement literature and European Standard of classification of grade of steel. Further still validated from the test report of Peoples Steel Mills Ltd annexed at "L", leaving no ambiguity in regards to quality of the appellant goods as alloy and he is entitled for the benefit of FTA under Serial No. 3147 of notification No. 659(I)/2007 dated 30.06.2007. As per which the duty payable by him is 0%.

(vi) That lastly, it is beneficial for the appellant to state that the whole controversy has been created by the respondent by interpreting the Chapter Note in accordance to their own whims and wishes i.e. terming the appellant goods as non alloy despite availability of Boron to the extent of 0.0008%, which according to them least render the goods as alloy instead non alloy. It is settled proposition of law that nothing can be added or subtracted to suits ones opinion as that amounts to redundancy, which has to be avoided . Even otherwise it is settled rule of interpretation that ***"in interpreting the taxing statute the customs must look to the words of the statute and interpret in the light of what is clearly expressed. It cannot imply anything which is not expressed, it cannot import provision in the statute so as to support assumed deficiency. There is no room for intendment. there is no equity about a tax. There is no presumption as to tax nothing is to be read in, nothing is to be implied. One only look fairly at the language used nothing else to be done"*** as held by High Court and Supreme Court of Pakistan in their reported judgment starting from Abbassi Steel Industries Ltd v Collector of Customs **1989 CLC 1463** to M/s. Fazal Ellahi v Additional Collector of Customs, **PTCL 2011 CL 269.** Even otherwise "***if there are two or more interpretation of our provision pertaining to levy of tax on account of anomaly/ambiguity the one favourable to tax payer has to be adopted by the***

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court" as per judgment reported as **1993 SCMR 274, 2005 SCMR 728, 2007 PTD 1656 & 2008 PTD 1227.** It is considered opinion of the Superior Judicial For a in a number of judgments ***"that tax payer should not be made to suffer on account of bad drafting of the statute".*** Reliance is placed on the judgment of High Court of Sindh reported as **2004 PTD 901**, wherein the Hon'ble judges of the Bench held that

"While interpreting the taxing statute the Court must look to the word of statute and interpret it in the light of what is clearly expressed. It cannot imply anything which is not expressed. It cannot import provision in the statute as to support assumed deficiency."

"While finding out intention of the legislature language of the law is not be seen and if the intention is cleared from the language used nothing else is to be done."

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"if the legislature has not sufficiently expressed itself Court has no duty to act for it, for court is concerned with what it lays down and not what it has only in mind, but once it has been articulated enough Court does not more than give effect to the intention that it has succeeded in expressing. The intention may be expressed in faulty language, in very faulty language , in-extremely faulty language, this is of no consequence as long as there is no doubt as to the intention. A draft's man mistake as long as it relates to form in which the legislative intend is expressed and not to the substance of it , is of no effect. Of course ones an element of doubt as to the intention

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of the legislature enter the field consideration otherwise irrelevant may all become relevant.

06. The appellant No. 4, namely M/s. Qureshi Agencies, Karachi, upon which a penalty of Rs. 100,000.00 has been imposed by the respondent no. 2 on the strength that he is clearing agent of the appellant no. 1,2 & 3 and he filed GD's on the basis of documents supplied to him by them and prior to filing GD's he failed to determine the description of the goods after analyzing the mill test certificates and FTA. He challenged orders on the strength of the grounds similar to appellant's No. 1,2 & 3 incorporated in para 3 supra with the exception of following grounds incorporated in Memo of Appeal:

(i) That it is amazing to note that no charges of either of collusion or connivance has been leveled in the show cause notice and the respondent no. 2 has penalized him despite not warranted under law and ignoring the fact that the appellant filed the Goods Declaration on the basis of the import documents supplied by appellant's and those were annexed with the GD and those formed part and parcel of the declaration given in GD in terms of definition given in Section 2(kka) of the Customs Act, 1969 of the appellant in addition to the declaration transmitted online under Section 79(1) of the Customs Act, 1969 and this proposition of law stood validated from the reported judgment 2011 PTD (Trib.) 22 & 2011 PTD (Trib.) 987. For case Section 2(kka) is reproduced here-in-below:

[2{kka} "documents means a goods declaration, application for claim of refund, duty drawback or repayment of duty , import or export general manifest passenger manifest, bill of lading, airway bill, commercial invoice and packing list or similar other

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forms or documents used for customs clearance or making a declaration to customs, whether or not signed or initialed or otherwise authenticated, and also includes:-

i) any form of writing on material, data or information recorded, transmitted, or stored by means of a tape recorder, computer or any other device, and material subsequently derived from information so recorded, transmitted or stored;

ii) a label, marking or other form of writing that identifies anything of which it forms part or to which it is attached by any means;

iii) a book, map, plan, graph or drawing, and

iv) a photograph, film , negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment of being reproduced; and)]

(ii) That the appellant in the capacity of clearing agent has no part to play. The entire transaction is between exporter/importer and the customs. The clearing agent only provides services to the exporter/importer on very nominal charges and extends co-operation to the customs officials for carrying out their job i.e. Examining the consignment in terms of Section 198 & 80 of the Customs Act, 1969 and the rules and regulation framed there-under. **To be most precise, a clearing agent act as a post office or transit station between these two.**

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(iii) That in support of the above submission. It is felt appropriate to place reliance on the judgment of Customs , Excise and Sales Tax Appellate Tribunal , Karachi in a similar nature of cases pertaining to **M/s. Shoaib Enterprises, Karachi and Sakro Corporation, Karachi,** wherein in order-in-appeals

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Nos. K-1833/01 dated 19.01.2002 and K-538/2003 (K-2) dated 25.10.2003, it has been held that **provisions of section 209 of the Customs Act, 1969 provide immunity and limited liability against the agent and an agent cannot be charged for mis-declaration under section 32 of the Customs Act, 1969 if he filed documents under the provisions of Customs Act, 1969 in accordance with the export documents and further held that the action taken by the customs of charging agent and thereafter leveling penalty without any fault or default on his part is not only unfair but also illegal.** The Lahore High Court in the case of *M/s Ports Ways Custom House Agent* and another's Versus Collector of Customs and another's reported at ***2002 YLR 2651*** held that:

> The imposition of penalty on the Clearing Agent / appellant No.1 was all the more unjustified. To hold the clearing agent liable for the act of commissions and omissions on the part of the importer will require a clear finding based upon legally acceptable evidence of his being an active and conscious party to the manipulation. In normal course of his business, a Clearing Agent, files a bill based upon the document and information provided by the importer. He cannot be presumed to be a privy to any illegal arrangement, which the importer may have coined or had intended in his mind. For that purpose some evidence of his direct involvement will have to be brought on record. Particularly when it is not shown that the Clearing Agent was directly or indirectly a beneficiary of invasion of taxes. In the present case no attempt whatsoever was ever made to bring home guilt to the Clearing Agent. The appeal is accepted to the extend of Clearing Agent. all become relevant.

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07. No cross objection under Sub Section (4) of Section 194-A of the Customs Act, 1969 has been submitted by the respondents to this date, instead comments were submitted half heartedly in stereo typical manner having no nexus with the grounds taken by the appellants and least lend any support to the case of

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department, for validation of the same verbatim is reproduced here-in-below:

(i) That in the light of the submission made in regards to the fact of the case in the comments, the contents of ground (a) of ground of appeal are incorrect, hence , denied.

(ii) That in the light of the submission made in regards to the fact of the case in the comments , the contents of ground (b) of ground of appeal need no further comments.

(iii) That in the light of the submission made in regards to the fact of the case in the comments, the contents of ground (c) of ground of appeal are incorrect, hence , denied. It is pointed out that FTA Certificate in respect of origin of the goods was checked by the FTA Cell , whereas the actual description was confirmed through lab test.

(iv) That in the light of the submission made in regards to the fact of the case in the comments, the contents of ground (d) of ground of appeal needs no further comments.

(v) That in the light of the submission made in regards to the fact of the case in the comments, the contents of ground (e) of ground of appeal are incorrect, hence , denied. It is particularly mentioned here that KRL Lab is well equipped Lab and all steel samples are referred to this lab for test. The importer itself get the lab reports from PSML. Department has not reflected the representative samples to PSML.

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(vi) That in the light of the submission made in regards to the fact of the case in the comments , the contents of ground (f) of ground of appeal are incorrect, hence , denied. It is mentioned that as per procedure and considering the provision of Section 81 of the Customs Act, 1969 amount of leviable duty and taxes is secured as Bank Guarantee. Test result of the lab is quite genuine, correct and liable to be considerable.

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(vii) That in the light of the submission made in regards to the fact of the case in the comments, the contents of ground (g) of ground of appeal need no comments.

08. Rival parties heard and the case record perused along with the citation relied upon. We take up the case for decision and frame following issues for determination.

(i) Whether the contents of MTC and FTA can be rejected on the basis/opinion of the official of respondent no. 1 in derogation of Public Notice 01/2002 dated 09.01.2002, SRO 1286(I)/2005 dated 24.12.2005 & Memorandum No. F.No. 1(1)/2014-AP-I dated 17.07.2014 of Ministry of Commerce?

(ii) Whether the appellant committed any act of mis-declaration within the meaning of the provision of Section 32 of the Customs Act, 1969 and as to whether adjudication proceeding can be commenced in the consignment, which has been allowed clearance under the provision of Section 81 of the Customs Act, 1969?

(iii) Whether any assessment order under the provision of Section 80 and 81(5) has been passed by the competent Officer to this date?

(iv) Whether Order dated 26.02.2015 by the respondent No. 2 is within time in terms of Sub Section (3) of Section 179 of Customs Act, 1969?

(v) Whether appellant No. 4 acted contrary to defined duties in the respective provisions of the Act and Chapter VIII of Customs Rules, 2001?

09. As regard to issue No. (i), for determination of quality and description of the goods of Iron and Steel, we have scrupulously gone through Public Notice No. 01/2002 (Appraisement) dated

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09.01.2012, SRO 1286(I)/2005 dated 24.12.2005 and Office Memorandum No. F.No. 1(1)/2014-AP-I dated 17.07.2014 of Ministry of Commerce and thereafter analyzed MTC and Certificate of Origin issued by the Peoples Republic of China under free Trade Agreement, commonly called as FTA and have observed that for examination and assessment of Iron and Steel Sheets imported in mill packing, quality and description of those has to be determined in the light of MTC, essentially accompanying that and the MTC should contain the following for qualification of goods as **"Prime"**.

(a) The date of production normally not later then the date of L/C.

(b) The MTC should confirms, (i) complete chemical composition (ii) complete mechanical properties (iii) tensile strength or yield & (iv) date of production

(c) Prime quality sheet must confirms to International Standard specification and/or standard in vogue in country of origin such as "JISG"- ASIM = BSS-SAE-API- GOST-DIN etc.

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10. Upon perusal of MTC's, it has been observed that those contains all the ingredient specified in the Public Notice and goods imported by the appellant qualify to be of prime quality and this has been endorsed in the show cause notice/order-in original. We are at loss to digest that when the goods are accepted as prime quality, on the basis of MTC, why composition of that was disputed. The MTC with clarity confirms availability of Boron to the extent of 0.0008 ppm, resultant, the goods qualified as alloy in terms of definition given in clause (f) of Chapter Note 72, referred in para 3(iv) supra. The said specification was further endorsed by the Peoples Republic of China in certificate of origin

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accompanying the consignment under Free Trade Agreement (FTA) . The said certificate not only confirms the origin infact entire particulars of the goods as enunciated in SRO No. 1286(I)(I)/2005 dated 24.12.2005 and that cannot be denied acceptance for assessment, due to the fact, it has been certified being genuine by the respondent No. 1 in comments on the grounds of Memo of Appeal. The said vital documents cannot be discarded due to the fact, that it has been issued on the format agreed upon by the Government of Islamic Republic of Pakistan and Peoples Republic of China and has been made a part of SRO 1286(I)/2005 dated 24.12.2005 through attached annexure. The said fact has been validated by the Hon'ble Supreme Court of Pakistan in reported judgment **2006 PTD 2177 M/s. Shamoon Trader, Quetta v Customs , Excise and Sales Tax Appellate Tribunal,** wherein it has been held that "the document, which has validation of both the countries has to be accepted for the purpose of origin and contents of the goods imported". Similarly, the Ministry of Commerce in its Office Memorandum No. F.No. 1(1)/2014-AP-I dated 17.07.2014 ruled that "it is not for the Pakistan Customs or any other Government Agency but Chinese Certifying Authority to assess the eligibility of the product being granted the Certificate of Origin. If the relevant Chinese Authority has issued a certificate of origin to a product as per agreed procedure, then that shipment is entitled to be cleared under FTA Tariff concession, however in case Custom Authorities apprehend any fraudulent practices, then the matter can be taken up with the Chinese Authority for clarification as provided in the Rule 21 & 22 of Attachment A of Rules of Origin of Pak-China Free Trade Agreement.". In case the respondent have any doubt

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on the particulars given in FTA, the proper course of action was to take up the matter with the Chinese Authorities as provided in Rule 21 & 22 of Rules Origin of China Free Trade Agreement. The respondent doubted the veracity of the particulars of the FTA, without terming it either fake or fabricated, which is the basic ingredient for terming any document as invalid. We feel that officials of respondent No. 1 were not available with any valid reason as evident from the deliberation made in the instant para, to dispute the composition of the imported goods. Notwithstanding, it has also been observed that the respondents also acted in derogation of the principal laid down by the Superior Judicial Fora that "*in interpreting the taxing statute the customs must look to the words of the statute and interpret in the light of what is clearly expressed. It cannot imply anything which is not expressed, it cannot import provision in the statute so as to support assumed deficiency. There is no room for intendment. there is no equity about a tax. There is no presumption as to tax nothing is to be read in, nothing is to be implied. One only look fairly at the language used nothing else to be done*", reference is made to the judgment relied upon the appellant and referred in para 3(vi) supra, which are relevant and applicable in the case of appellant with full force. The fact of matter is that the goods of the appellant were alloy without any ambiguity, issue was created unnecessarily by the respondents and sample were dispatched to KRL for test, which seems to be not equipped with sophisticated apparatus required for testing for determination of Boron in such a negligible quantity. The report of KRL compelled the appellant to forward a representation dated 24.08.2013 to the Collector of Customs for according permission for retesting of his

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goods samples from PSML, which was permitted and sample so drawn were forwarded by the Shed Official during the course of examination were forwarded to PSML, which reported vide test report dated 24.08.2013, that the goods of the appellant contained Boron to the extent of 0.0008 ppm. Inspite settlement of the issue, show cause notice and order-in-original was issued/passed by the respondent no. 2, which was otherwise not warranted, rendering the created issue, show cause notice and Order-in-Original in derogation of Public Notice 01/2002 dated 09.01.2002, SRO 1286(I)/2005 dated 24.12.2005 & Memorandum No. F.No.1(1)/2014-AP-I dated 17.07.2014 of Ministry of Commerce. The issue No. (i) answered in negative.

11. That as regard to issue No. (ii), the declaration given by the appellants in the GD's transmitted under the regime of "One Customs" was cross checked with the invoice, packing list, B/L, FTA & MTC submitted with the GD's with the respondents under Section 79(1) of the Customs Act, 1969 and have observed that the declaration is in accordance with the annexed documents forming integral part of the declaration under Section 2(kka) of the Customs Act, 1969 and are unable to locate any mis-declaration in material particular. It is also mistaken belief of the respondents that in the GD's corresponding to regime of "One Customs" the importers (appellants) has to determine the amount of leviable duty and taxes himself and to pay that as upfront at the time of transmitting GD's. In the regime of "One Customs", no duty and taxes are paid in advance, infact after passing of assessment order under the provision of Section 80 of the Customs Act, 1969 by the competent authority given in SRO No. 371(1)/2002 dated 15.06.2002. This vital fact nullify the

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misconceived formed opinion of the respondents. It seems that the charge of mis-declaration has been leveled on the basis of specification given in MTC, which according to the respondent was not as shown therein instead contrary, which they could not determine while seeing through naked eye and for that test is desired. We are flabbergasted to note that when the respondents are not able to determine the specification through naked eye, how appellant or his clearing agent is able to determine that, they had to rely on MTC and FTA. Under the provision of Section 80 of the Customs Act, 1969, it is built-in duty of the custom officers to determine the exact description, specification, quantity, weight and PCT heading as these all falls within the ambit of "assessment", they are empowered under the said provision to either accept or reject the claim of exemption and complete the assessment as ascertained by them under the respective PCT heading, mentioning or claiming ascertained PCT, under which appellant goods does not falls, cannot be construed an act of misdeclaration on the part of importer/appellant in reported judgment 2003 PTD (Trib.) 293 of the Customs Excise and Sales Tax Appellate Tribunal, Karachi Bench held that "We believe that clearing agents while filing a bill of entry is required to fill the PCT column for the easement and assistance of the Assessing Officer. The perusal of section 80 of the Customs Act, 1969, indicates that during the process of assessment it is the duty of the Assessing Officer not only to examine the goods but also to tally the description, its weight and value of the goods thereof, and to consider any extra information available on the bill of entry in order to arrive at a correct assessment of duty and taxes. Simply assuming that a

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wrong PCT heading amount to mis-declaration would not be a correct approach to interpret section 32, where emphasis is on the word "material particular" which means something going to root cause of the basic declaration. To our mind, a mis-declaration in material particulars terms has not been made by the appellant." and in *Customs Appeal No. K-333/06 Umme Kulsoom Trading Co v Collector of Customs Appeals and others* that "It is gathered from the record that only charge against the appellant is that he misquoted PCT heading for which he is being charged for mis-declaration within the frame work of Customs Law. It is now well-settled law that to constitute a criminal act an element of *mens rea* and intentional knowledge is necessary and the offending act must be one in which material particulars have been wrongly given or provided to the Customs authorities. It is evident from the record that in the goods declaration all the entries relating to description, quantity and nature of goods were found true and no charge has been framed against the appellant on that count. In such circumstances, alleging a charge of mis-declaration particularly on the basis of wrong classification heading does not constitute an offence within the framework of section 32 of the Customs Act, 1969 as there is no material falsity in the statement made by the appellant. In these circumstances, we would like to allow the appeal and set aside the impugned order as no case has been made out against him. Similar issue of classification was also decided vide Customs Appeal No. K-432 and others, which went up to the Apex Court and the order of the Tribunal passed were maintained with the observation "The difference of opinion with respect to classification does not fall within the mischief of section 32 of the Customs Act, 1969, the confiscation and

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imposition of penalty in this count, therefore ab-initio void and illegal." The Hon'ble High Court of Sindh at 2002 MLD 1980 State Cement Corporation v GOP held that "if the wisdom of Customs Authorities for invoking Section 32 for not giving correct declaration is acceded to and that no responsibility lays upon the hierarchy of the Customs officials to levy and assess the duty according to law. The provisions of Section 80(1) of the Customs Act, 1969 in such a state of mind would become redundant." In the same judgment the observation of Honourable (Late) Justice Sabihuddin Ahmed is worth reading as it ridicule the irrational approach of the Customs Authorities, in the following words "We are rather amazed at the line of reasoning put forward to the effect that while an assessee is required to interpret the law and relevant notification correctly and could be held guilty of a penal offence for not doing so in terms of Section 32(1) of the Customs Act, no responsibility of any kind would devolve on the Customs officials, indicate that the entire exercise was malafide". Whereas, lately the Hon'ble High Court of Sindh in the case of M/s. Sadaat Khan FOP & Others reported at 2014 PTD 1615 held "It is settle proposition of law that an interpretation of a notification as well as the classification of the goods does not fall within the definition of mis-declaration."

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12. That since determination of the specification of the goods could not be made by the Official of respondent No. 1, through naked eye as stated in Show Cause Notice and Order-in-Original, unless test is obtained, for clearance of the appellant goods the Deputy Collector of the Group opted to exercise the power given in Section 81 (1) of the Customs Act, 1969, which read as:

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81. Provisional determination of liability.- (1) Where it is not possible for an officer of Customs during the checking of the goods declaration to satisfy himself of the correctness of the assessment of the goods made under section 79, for reasons that the goods require chemical or other test or a further inquiry, an officer, not below the rank of Assistant Collector of Customs, may order that the duty, taxes and other charges payable on such goods, be determined provisionally:

Provided that the importer, save in the case of goods entered for warehousing, pays such additional amount on the basis of provisional assessment or furnishes bank guarantee [or pay order] or a post-dated cheque of a scheduled bank along with an indemnity bond for the payment thereof as the said officer deems sufficient to meet the likely differential between the final determination of duty over the amount determined provisionally:

Provided further that there shall be no provisional assessment under this section if no differential amount of duty and tax is paid or secured against bank guarantee [or pay order] or post-dated cheque.

13. After securing bank guarantee or pay order provisional assessment order was passed in the GD's of the appellant, subject to passing of Assessment Order under Section 80 and 81(5) of the Customs Act, 1969 upon receipt of test reports from KRL. The Sub Section (1) of Section 81 is very clear to the extent that where "it is not possible for an Officer of customs during the checking of the goods declaration of the correctness of the assessment goods made under Section 79 for reason that the goods required chemical or other test or further inquiry an Officer not below the rank of Assistant Collector may order that the duty, taxes and other charges payable on the such goods be determined provisionally, which they did. This means that final assessment order under Section 80 and 81(5) ibid has to be passed after receipt of chemical, or other test or completion of further inquiry.

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None of the provision speaks about leveling of charge of mis-declaration and this is due to the fact that the assessing officer was handicapped to assess the goods under Section 80 of the Customs Act, 1969, for removing such difficulty, the legislature crafted the said provision of Section 81 of the Act, without incorporation of the word mis-declaration. A final assessment order has to be passed as no proceeding under Section 32 is warranted in such type of cases. This is the true essence of spirit of Section 81 of the Customs Act, 1969 stood validated from the reported judgment ***PLD 1990 Karachi 378 M/s. Abdul Aziz Ayoob v Assistant Collector of Customs and 03 others***, wherein it has been held "where the goods were provisionally released subject to post importation cheque and corresponding order have been passed by the competent authority under section S.81 of the Act, the release of goods could be under S.81 alone and neither S.32(2) or 32(3) would be applicable these sub section of Section 32 of the Customs Act, 1969, which contemplate absence of levy or short levy or erroneous refund of any duty or charge, are attracted only and notices under one or the other of the Sub Section are issuable exclusively, when a final assessment either wrongfully or erroneously has been made, if a case is not covered by Section 32(2) or 32(3) no notices under those provision can arise. A *fortiori* no periodicity for notices as contemplated in section 32 of the Customs Act, would be attracted and a notice under Section 81 ibid would be competent without any restriction as to limitation of time." The Hon'ble High Court in *PLD 2002 Karachi 54 M/s. Golden Plastic (Pvt.) Ltd vs Collector of Customs and others* held "a bare perusal of Section 32 shows that it pertains to non levy of duty or charge or short levy or

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erroneous refund and is not applicable to the recovery proceeding under Section 202 of the Customs Act, 1969 in respect of the demand created as a original assessment as is evident from the narration of the fact in the earlier part of the judgment a provisional assessment was under Section 81 and thereafter, within the period of limitation a final assessment was made under Section 80 of the Customs Act, 1969 and department has neither alleged that there was any case of non levy of duty/charge or short-levy therefore the contention that notice under section 32 was required to be issued is totally misplaced". The issue no (ii) is answered in negative.

14. That as regards issue No. (iii), the provisional assessment under Section 81 of the Customs Act, 1969 by the Appropriate Officer defined therein was made on 24.06.2013 and test report of KRL was received on 12.07.2013 and PSML on 27.08.2013. The final assessment order under Section 80 and 81(5) of the Customs Act, 1969 should had been passed by the officer expressed therein within 06 months i.e. 18.12.2013 or further extended period of 90 days by the Collector of Customs, after serving a notice to the appellant as held in reported judgment *1993 SCMR 1881 Khalid Mahmood vs Collector of Customs* and with recording reason for the extension based on "*exceptional circumstances*" in terms of 1st proviso to Sub Section (2) of Section 81 of the Customs Act, 1969. In the case in hand no extension was given under sub Section (2) within the currency of 06 months i.e. 18.12.2013 and no order till the time of filing of instant appeal has been passed. Consequent to which the declaration of the appellant stood final in terms of under Sub Section (4) of Section 81 of the Customs Act, 1969 and the law laid down by

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the Superior Judicial Fora relied by the appellant and referred in 3(ii) supra. However, we feel appropriate to refer to the case of Hon'ble Supreme Court filed by Collector of Customs, PMBQ, Karachi through CPLA No.728-K of 2010 against the judgment of the Hon'ble High Court of Sindh dated 01.10.2010 in the Special Customs Appeal No. 33/2010 filed by M/s. International Industries Ltd, wherein the Hon'ble High Court of Sindh held that "when no final assessment is made in terms of subsection (4) to Section 81 of the Customs Act, 1969 the declaration stood final". The Hon'ble Supreme Court of Pakistan refused leave to appeal and dismissed the petition vide order dated 08.08.2011 while holding in para 2 to 4 that:

> "2- As it appears from record, short controversy involved in the said petition was as regards the interpretation and applicability of sub section (4) to section 81 of Customs act, 1969, which read as follows:-
>
> "81(4) if the final determination is not made with the period specified in sub section (2), the provisional determination shall, in the absence of any new evidence, be deemed to be the final determination."

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15. In this regard, learned Division Bench of the Hon'ble Supreme Court, while passing the order had taken into consideration two earlier judgments of the High Court corresponding to the case of Hassan Trading Company v CBR (2004 PTD 1979) and Collector of Customs Appraisement v Automobile Corporation of Pakistan (2005 PTD 2116) and affirmed its earlier view, which lays that when no final assessment is made in terms of sub section (4) to Section 81 of the Customs Act, 1969 within the stipulated period, the provisional assessment becomes

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final as per declaration made by the a importer in the GD. The issue No. (iii) answered in negative.

16. That as regard issue No. (iv), the show cause notice in the instant case was issued on 11.08.2013 by the respondent no. 2 and an order under the proviso of Sub-Section (3) of Section 179 of the Customs Act, 1969 should had been passed by him within 120 days i.e. on or before 21.02.2014, from the date of show cause notice or within a further extended period of 60 days by the FBR prior to lapse of initial period of 120 days after serving a notice to the person concerned as per law laid down by the Hon'ble Supreme Court of Pakistan in reported judgment *1993 SCMR 1881 Khalid Mahmood vs Collector of Customs* and thereafter recording reasons for the extension based on "**exceptional circumstances**". To the contrary, the Board extended the period as stated by respondent no. 2 in para 4 of the order vide letter dated 30.12.2014 i.e. after expiry of 311 days of the initial period of 120 days and 251 days from the expiry of entire period of 180 days. The Board is not competent to extent the time period after the expiry of the currency of period given in Sub Section (3) ibid, rendering the extension without any lawful authority, hence void and ab-initio. Therefore, the order-in-original passed by respondent No. 2 vide dated 26.02.2015 is barred by time by 311 days and is without power/jurisdiction and not enforceable under law as held in reported judgments relied upon by the appellant and referred in para 3(iii) supra. The issue (iv) is answered in negative.

17. That as regard to issue No. (v), the appellant no. 4 as observed from show cause notice and Order-in-Original and as verbally explained by the learned Counsels, was held guilty of an

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offence under Section 32(1) and (2) of the Act. The charge framed in the notices relates to a claims made by the importer through him, the goods in question be assessed as alloy and under the declared PCT. The respondent, however, claimed that the goods are not alloy and are to be assessed under PCT heading meant for non alloy iron and steel sheets. As per show cause notice the only charge against appellant No. 4 is that he filed GD's for the clearance of the goods of appellant No. 1,2 & 3 and for the said act, for which he is accorded License by the respondent no. 1, the assertion is that he should not have made the declaration in the GD's and since he made, the act attracted the provision of Section 32 of the Act. According to the show cause notice itself and construing it in the light of the Act, the Customs should have made distinction between a declaration or "a statement in answer to any question put" and a "claim". As regards declaration it means a communication by a person in relation to a business being conducted. The word 'declaration" came to judicial scrutiny in the case of *Vithoba Syamna vs Union of India reported as AIR 1957 Bom. 321*. It was held in that case that the word "declaration" refers to the nature, description and value of goods so that assessing officer can apply appropriate Tariff rate for assessment and charging. On the other hand the word "claim" means a demand for something suppose due to or demanded as a right. Here the only charge against the appellant no. 4 is that he filed GD's on the basis of the documents supplied by the appellant no. 1,2 & 3. There is no charge that his declaration in respect of nature, description and value of the goods were found to be wrong in the case of *Eastern Rice Syndicate vs Collector of Customs (PLD 1959 SC 364)*, the Supreme Court had held that in order to

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attract a penal provision of Section 39 now Section 32) it must be established that the person who alleged to have made any statement in a documents submitted to the Customs authorities must be false to his knowledge and it would depend upon the facts and circumstances of each case. It is not disputed here that the statement made in the Customs documents regarding the nature and value of the goods were in any ways wrong; rather that information was found correct and true. The assumption of the Customs that violation of the said section did take place appears to be wrong. Infact, the charges against the appellant No. 4 was wholly misconceived, as his action does not falls within the operative mechanism of Section 32 of the Act. A study of Section 79 and 80 of the Act reveals that importer or his agent has to file GD for release of the goods on which assessing officer has to made an assessment any claim made by an importer is subject to scrutiny by the assessing officer who has been vested with unfettered powers to complete an assessment. A claim is a request subject to approval by a competent officer, and where a competent authority grants or reject the claim, no charge of fraud or otherwise can be linked to the agent or to his principal, whose duty is to submit relevant document for processing for release of consignment or application. It appears that the respondent no. 2 who issued the show cause notice grossly mi-understood the scheme meaning an operative mechanism of the Section 32 and 80 of the Act. The liability of a clearing agent during the course of clearance of the consignment has to be evaluated under the provision of Section 207, 208 & 209 of the Customs Act, 1969, which indicate that an agent represent his principal and until and unless any direct evidence is attributed against him or when

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department is not able to prove any criminal intend on his part, he cannot be penalized under the General provision of the Customs Act, unless he violates the governing condition of his License and this stood validated from the judgment relied upon by the appellant no. 4 and are referred in para 4 (iii) supra and observation made by their lordship in *2002 YLR 2651* holding that "to hold the clearing agent liable for an act of commission and omission on the part of the importer will require a clear findings based on legally acceptable evidence of his being an active and conscious party to the manipulation. In normal course of his business a clearing agent files a bill based upon the documents and information provided by the importer. He cannot be presumed to be privy to any illegal arrangement, which the importer may have coined or had intended in his mind for that purpose some evidence of his direct involvement will have to be brought on record. Particularly when it is not shown that the clearing Agent was directly or indirectly a beneficiary of evasion of taxes. With this we answer to issue No. (v) in negative.

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18. To what have been stated/discussed and observed herein above, particularly the interpretation of law and legal preposition in the light of prescribed law and observations made thereon, we hold that issuance of show cause notices and passing of orders-in-original by the respondent no. 2 were not warranted in the cases of appellant's. Therefore are declared illegal, null and void, hereby set-aside, appeals are allowed accordingly with no order as to cost.

-Sd/-

(MOHAMMED YAHYA)
Member Technical-I
Karachi

-Sd/-

(MUHAMMAD NADEEM QURESHI)
Member Judicial-I
Karachi

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