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

Before: Mr. Tahir Zia, Member Judicial-II, Karachi
Mr. Mohammad Nazim Saleem Technical-II, Karachi

Customs Appeal No. K-1252/2015

M/S. REHMAT ALI LTD,
JALALABAD, AFGHANISTAN
C/O MOHAMMAD HABIB KHAN
KARACHI.

Customs Appeal No.K-1299/2015

M/S. NAWI TAJ SHINWARI LTD,
JALALABAD, AFGHANISTAN
C/O HAJI AKBAR, LANDI KOTAL,
KHYBER PAKHTUNKHWA.

Versus

1. THE PRINCIPAL APPRAISER,
   DIRECTORATE GENERAL OF TRANSIT TRADE,
   12TH FLOOR, CUSTOM HOUSE,
   KARACHI.
2. THE DEPUTY COLLECTOR OF CUSTOMS,
   COLLECTORATE OF CUSTOMS- ADJUDICATION-II, MEZANINE FLOOR,
   CUSTOM HOUSE,
   KARACHI.
3. THE COLLECTOR OF CUSTOMS- APPEALS, 81C, BLOCK 6, P.E.C.H.S,
   KARACHI.

ATTESTED

Mr. Nadeem Ahmed Mirza (Consultants) present for the Appellant.
Mr. Shahid Murad , Appraiser for respondents

Date of Hearing: 15.12.2015
Date of Order: 23.05.2016

JUDGMENT

TAHIR ZIA, MEMBER JUDICIAL-II, KARACHI: Through this common order, we intend to dispose of two (02) Appeals bearing Nos. K-1252/2015 & K-1299/2015 filed against Order-in- Appeal Nos. 10261/2015 & No.10270/2015 dated 03.07.2015 passed by Collector of Customs, Appeals (hereinafter to be referred as respondent no.3) maintaining the Orders in Original no. 371255 dated 29.05.2015 & 373145 dated 02.06.2015 passed by

be referred as respondent no.2) in the capacity of Principal Appraiser. these appeals have identical issues of law and facts.

02. Since, these 02 appeals are based on similar facts and questions of law, therefore it is needless to reproduce facts of each case separately. Hence, being heard and dealt with and disposed off 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*. For reference the facts of Appeal No. K-1252/2015 as reported by the Principal Appraiser, Directorate General of Transit Trade (here-in-after to be referred as respondent no. 1) are taken into consideration, the appellant is a importing company and is registered with the Ministry of Commerce & Industry of Afghanistan (MOCA) in the said capacity, during the course of his business activities he imported a consignment of 2549 cartons, comprising of 658160 pcs stuffed in container No. PCIU864074-5 of different items/articles namely Soaps, LED TV's 24', Radio, Blank CD-R from Pawa Brothers Trading PTE Ltd, Singapore amounting to $. 7816 C&F Karachi in transit to Afghanistan against invoice No. RAL-050/2015 dated 20.03.2015 and B/L No. SINKHI150000050 dated 23.03.2015. Upon receipt of documents from the shipper, he delivered those to his clearing agent M/s Arif Associates, Karachi.(CHAL No. 1976) for transmitting Goods Declaration (hereinafter to be referred as GD) in transit under the provision of Section 129 of the Customs Act, 1969 and Rule 472 of Sub-Chapter VII of Chapter XXI of Customs Rules 2001 inserted in the Customs Rules through S.R.O. 121(I)/2014 dated 24.02.2014, with the Directorate General of Transit Trade (hereinafter to be referred as DGTT) which he did on the strength of the documents supplied to him by the appellant. The information so transmitted was accepted and DGTT allotted number ITTK-AT-23868 on 06.04.2015 to the GD. After receipt of which on his desktop, the Appraiser concerned instead of inspecting container and the seal affixed thereon as declared in GD, and there after get it scanned and weighed. Inspite finding of weight as declared after getting those weighed, opted to conduct examination, which was not warranted, as no discrepancy was visible, nor the container was falling within the selectivity criteria of 5% within the said period of time. Upon conduction of the examination, it was transpired that the goods stuffed therein are

infact 23 in numbers as against shown i.e. 4. The said discrepancy was reported to the respondent no 1 by the examining official through system. who termed the discrepancy corresponding to the excess found quantity as contravention to the Transit Rules and framed contravention report for proceeding in terms of proviso to Sub-Rule (6) of Rule 473 ibid., and transmitted it to respondent no.2, who issued show cause notice dated 12.05.2015 stating inter alia that the appellant has concealed the quantity of 19 transit goods detailed above to the contents of show cause notice on page 1 & 2 annexed at page 29 and 30 as Exhibit "H" of memo of appeal with the connivance of his clearing agent, these undeclared goods falls within the ambit of the term " mis-declaration", which is in violation of clause / rule 473 and 484/Q of Transit Rules embodied in Sub-Chapter VII of Chapter XXI of Customs Rules, 2001, to be read with Section 127,128,129 & 209 of the Customs Act, 1969, punishable under sub-Clause (63) & (64) of Section 156(1) of the Customs Act, 1969, the appellant and his clearing agent were asked to justify the discrepancy. The clearing agent of the appellant submitted the reply, which failed to satisfy the respondent no.2 and he passed Order in Original dated 11.05.2015 against the appellant, through which he validated the charges leveled in the show cause notice. Para 5 & 6 of the order are relevant, which are reproduced here in below for easement:

> "5- I have gone through the record of the case and perused verbal/written reply of the importer. The importer has allegedly mis-declared the description of the consignment which led to the establishment of contravention and show cause notice was issued to the importer. In reply to the allegation leveled in the show cause notice, Mr. Muhammad Habib Khan, representative of the importer appeared for hearing in the case and submitted written reply stated therein that the shipper stuffed the found undeclared items by mistake and failed to intimate the same . On the basis of this argument, the representative of the importer submitted that the subject goods may be released as the same are destined for Afghanistan and no duty and taxes are involved. The contention of the representative of the importer is flawed in the subject case as the same has failed to provide any documents to support his contention. Secondly as the subject goods are being destined for Afghanistan and no duty/ taxes are involved, the prima facie reason for not declaring the recovered items is to avoid the incidence of Insurance Guarantee to be deposited by the importer in lieu of duty/taxes involved on the subject goods / if the same has been imported into Pakistan. The mis-declaration on the part of importer and their Clearing Agent clearly reflect that both have tried to hoodwink the Custom Authorities to void the incidence of insurance guarantee whereby the same was agreed to insure that the goods are not pilfered en-route their transit to Afghanistan via Pakistan. The Importer and their authorized Clearing Agent have clearly failed in fulfilling their responsibilities under Customs Act, 1969. Read with Afghan Transit Trade Rules. No further query is required to be answered in the case.

6- In view of the discussion above, the charges of mis-declaration of description of the consignment whereby undeclared items appearing at S.Nos. 5 to 23 of the GD stands established. Accordingly the impugned goods are out rightly confiscated for violation of Clause/ Rule 473 &784-Q of S.R.O 121(I)/2014 dated 24.02.2014 read with Sections 127,128,129 & 209 of the Customs Act, 1969 punishable under sub-Clause (63) & (64) of Section 156(1) of the Customs Act, 1969. In addition to this, a penalty of Rs 50,000/- is imposed on importer M/s Rehmat Ali Ltd., Jalalabad, Afghanistan and Rs 50,000/- the duly authorized Clearing Agent M/s Arif Associates (CHAL no. 1976), for violation of Clause/ Rule 473 &784-Q of S.R.O 121(I)/2014 dated 24.02.2014 read with Sections 127,128,129 & 209 of the Customs Act, 1969 punishable under sub-Clause (64) of Section 156(1) of the Customs Act, 1969. The importer as well as their Clearing Agent is also warned to be careful in future regarding fulfillment of their legal responsibilities."

03. The varies of the order was challenged before Respondent no.3 by the appellant vide Appeal No. Cus/7075/2015/TT, who also vide his order dated 03.07.2015 rejected the appeal by observing in para 5 & 6 that :

5- I have examined the case record. The transit goods are not subject of payment of import or export duties and taxes, however they are required to follow the relevant rules. The traders or their authorized agents are required under these rules to file complete and correct declaration which include correct HS Code and value so that financial security could be calculated and secured covering all import levies. The said security is en-cashable incase the trader fails to take the goods out of territorial jurisdiction of Pakistan. As such failure to declare true particulars in GD has revenue implications. In terms of rule 484-Q of the Customs Rules, contravention of the rules pertaining to transit trade are punishable under Clause (64) of Section 156(1) of the Customs Act, 1969. The position regarding discovery of undeclared items upon examination is not disputed by either side. The adjudicating officer has passed a well reasoned order. There are no cogent reasons to interfere with the order. The appeal being without merit fails.

6- This order shall apply mutatis mutandis to another appeal bearing no. Cus/7076/2015 TT filed by M/s Arif Associates against Order in Original No. 371255-29052015 involving the same facts, circumstances and the points of law.

ATTESTED

04. Being aggrieved and dissatisfied with the impugned Orders-in-Appeal the appellants filed the these appeals before this Tribunal on the ground incorporated in the Memo of Appeal, on the date of hearing Mr. Nadeem Ahmed Mirza (Consultants) appeared and contended that:

(i) That for obtaining WeBOC user ID for filing transit trade GD with the DGTT, by the importer/ trader of Afghanistan as expressed in Rule 424 of Sub- Chapter II of Chapter XXI of Customs Rules, 2001., an application has to be filed by him with the Ministry of Commerce & Industry of Afghanistan (MOCA), annexed with the documents prescribed therein by the Pakistan Customs, which after scrutinizing of those, register him under Rule 424 and allocate him unique user identification under Rule 427, to which MOCA has been authorized by the Pakistan Customs to create user IDs of the Afghan traders. Subsequent to that, the nominated officer of

MOCA, to whom a specific user ID has been allocated by the Pakistan Customs for the said purpose for logging in the software of WeBOC, intimate the allocated unique user identification to the Assistant Collector (MIS) of the Collectorate of Appraisement (East) along with user ID of the trader and form submitted for the said purpose on the registered email address. This confirms that Pakistan Customs/ DGTT has no interaction with the trader of Afghanistan right from registration with WeBOC, till filing of GD for home consumption at the Dry port of Afghanistan for clearance of the goods imported by a trader of Afghanistan in Karachi for transit to Afghanistan, for levy of duty and taxes as prescribed in the Afghanistan Customs Tariff, by the Custom department of the Government of Afghanistan, any contravention of the Afghanistan Customs Act/Afghanistan Customs Tariff, rest with the Government of the Islamic Republic of Afghanistan and none else, respondents are no exception.

(ii) That the respondent no. 2 has issued show cause notice to the appellant, who is operating in the Islamic Republic of Afghanistan without consulting to the instruments, through which Transit Trade is governed, namely (i) Revised Kyoto Convention 1999 (ii) Afghan Pakistan Transit Trade Agreement, 2010 (APTTA) (iii) Notification S.R.O. No. 121(I)/2014 24.02.2014 & even the Customs Act, 1969 Preliminary of Section 1 of Chapter, read as "short title, extend and commencement" and clause (1) says as "This Act may be called the Customs Act, 1969 and Clause (2) as "it extent to the whole of Pakistan" The appellant failed to find any phrase, Article, condition and Rule, inclusive of Customs Act, empowering the respondent no. 2 to issue show cause notice to an Importer/Trader of Afghanistan and this is due to the fact that they are non entity, stood validated from clause (2) of the Act, which says it is applicable to the extent of whole of Pakistan not beyond that. Meaning thereby that Customs Act is not applicable on the importer of Afghanistan. Hence, the respondent no. 2 has no mandate to issue show cause notice to an importer of Afghanistan. It is for the Custom Officials of the Government of Islamic Republic of Afghanistan to proceed against the appellant under the Customs Act of Afghanistan after receipt of report, contrary to declaration from the Officials of DGTT along with import documents and Goods Declaration, copies of the same had to be dispatched separately by courier through Ministry of Commerce of Pakistan to Ministry of Commerce and Industries of Afghanistan (MOCA) for information and proceeding by the Revenue division of Afghanistan. Acting in derogation of Section 1 the Customs Act, 1969., Render the act of respondent no. 2 without lawful authority/ jurisdiction by virtue of having no *locus standi*. Hence, void and ab-initio.

(iii) That since none of the Sections of the Customs Act, 1969 are applicable on the consignment meant for Afghanistan, with the exception of Section 129 of the Customs Act, 1969, which is a machinery Section outlining the procedure through Notification No. i.e. 121(I)/2014 dated 24.02.2014, which is also not a valid document due to the fact that it is in conflict with the Articles of APTTA 2010 beside does not contain approval/assent of the Government of Islamic Republic of Afghanistan. Any proceeding under any provision of the Customs Act 1969 and Rules by either of the respondents against the appellant is void and ab-initio. Hence, *corm non judice* and this stood validated from the reported judgments *PLD 1993 Karachi 93 M/s. Najib Zarab Ltd v Government of Pakistan and 1996 SCMR 727 FOP v Jamaluddin & others and Najib Zarab Ltd* and order of Hon'ble High Court of Sindh in a similar case instituted by Directorate General of Intelligence and Investigation-FBR vide order dated 27.10.2010 in *C.P. No. D-2410 of 2010*

(iv) That since the consignment of the appellant has been brought into Pakistan for transit to Afghanistan, on which no duty and taxes are payable, his case falls under the technical violation of the Afghan Pakistan Transit Rules embodied in Chapter VII of Chapter XXI of Customs Rules, 2001 and therefore by all means pertains to technical violation of import or export restriction without the involvement of any evasion of duty and taxes and it falls within clause (d) of para 3 of notification No. 886(I)/2012 dated 18.07.2012. The appropriate authority to adjudicate such cases rest with the Respondent no.1 in terms of proviso to Sub Rule (6) of Rule 473 ibid., the opinion of respondent no. 2 in para 5 & 6 of the order in regard to the word "mis-declaration", which is expressed in Section 32 of the Customs Act, 1969 is out of context as Section 32 can only be invoked on the consignment imported into Pakistan for home consumption or warehousing etc. Therefore, by laying hands on the sovereign territory of the respondent no.1, respondent no. 2 transgressed the power of respondent no.1. Rendering the show cause notice and order-in-original and subsequent order passed by respondent no.3 as without power/jurisdiction. Therefore, void and ab-initio as held in reported judgment *PLD 1975 SC 331, ST Appeal No. 984/98, ST Appeal 72/04, ST Appeal 54/09, St Appeal No. 2352/99, ST Appeal No. 106/03, PTCL 2001 CL 615 , 2004 PTD 624, 2004 PTD 3020, PTCL 2007 CL 498, 2009 PTD (Trib) 1925, PTCL 2004 CL 551, 2010 PTD (Trib) 759 , 2010 PTD (Trib) 1283, Customs Appeal No. K-44/2010 & Customs Appeal No. K-435/08 to 455/08, 2010 PTD (Trib) 2523 & K-638/2010- 727/2010.*

ATTESTED

(v) That it is settled proposition of law that neither superior nor subordinate can exercise powers of each other while acting as quasi judicial officer in any circumstances. Exercise of power not vested amounts to transgression and render the entire super structure built thereon to crumble down, reference is placed to the reported judgment PLD 1973 Supreme Court 49 The State v Zia-ur-Rehman & others & 2009 PTD 1083 held that *"Superior authority cannot exercise the power of his subordinates for adjudication purpose .....powers of sub-ordinate exercise by superior authority is held as without jurisdiction beside usurpation "* and in *Abida Rashid v Secretary, Government of Sindh PLD 1995 Kar 587* is referred. Their lordship observed as under:

> "It is trite law that power vested in an authority should only be exercised by that authority, in default whereof, the exercise of power and authority becomes without jurisdiction, illegal, void , ab-initio and of no legal effect. The term "without jurisdiction" has been judicially interpreted to include usurpation of power warranted by law (the Chief Settlement Commissioner Lahore v Raja Muhammad Fazil Khan & others PLD 1975 @ p.339) an act done which the person doing, it has no jurisdiction at all to do or which was clearly outside the scope of his activities (The State v Zia-ur-Rehman PLD 1973 SC 49) and a judgment or order delivered by a court or a judicial or a quasi judicial authority not competent to deliver it (Muhammad Saleh & others v M/s. United Grain and Fooder Agencies PLD 1964 HC 97) . The Constitution jurisdiction can thus be exercise when it is shown that the order is passed without jurisdiction or in excess of jurisdiction. As observed earlier the respondent no. 1 has no jurisdiction to pass the impugned order. As such we declare the same to be of no legal effect. Accordingly, we allow this petition but leave the parties to bear their own cost".

(vi) The assuming of jurisdiction either intentionally or inadvertently is fatal by virtue of the fact that it is not a technical defect instead an act in derogation of the expression of statute and render the whole proceeding without jurisdiction/lawful authority as held in reported judgment *2010 PTD 465 Collector of Customs, Model Customs Collectorate v M/s. Kapron Overseas Supplies Co., (Pvt) Ltd* "any transgression of such jurisdiction for not being a technical defect would render entire exercise of authority to be ab-initio, void and illegal" and "the exercise of jurisdiction by an authority is a mandatory requirement and its non fulfillment would entail the entire proceeding to be "coram non judice." The said defect render the show cause notice as well as Order-in-Original ab-initio, null and void by virtue of suffer of lack of power/jurisdiction. Hence, coram non judice and needs to be struck down.

(vii) That the goods arrived in Pakistan for transit to Afghanistan are not subject to examination with the exception of checking of seal, which should be intact and only 5% of the containers so arrived on a vessel are permitted to be examined according to the RMS Protocol and that also upon finding any irregularity such as broken seal, difference in container number on the import documents/bill of lading etc. The container of the appellant least falls within the ambit of 5%. Even otherwise, if the goods are examined for any reason, inspite not warranted under law the respondent no. 1 should had allowed the transit of the same, upon securing insurance guarantee equivalent to the found excess goods and value ascertained therewith, for return of the same upon receipt of cross border certificate. Holding the consignment of the appellant is in derogation of the Revised Kyoto Convention, 1999 and Afghan Pakistan Transit Trade Agreement, 2010(APTTA).

ATTESTED

(viii) That the conclusion of respondent no. 3 in its order is very unique, wherein in one breath he stated that the transit goods are not subject to payment of import or export duties and taxes, meaning thereby that these have to be transited without payment of duty and taxes and duty due to the fact that duty and taxes are to be levied at the port of destination and those are to be deposited in the Afghanistan, being the revenue of the Islamic Republic of Afghanistan not Pakistan. Whereas, in the second breath he termed insurance guarantee submitted as security for crossing border as revenue of Pakistan, which is not infact as evident from Kyoto Convention 1999, Afghan Pakistan Transit Trade Agreement, 2010 (APTTA) and notification No. 121(I)/2014 dated 24.02.2014 which has to be returned, upon submission of cross border certificate. Rendering the observation of the respondent no. 3 of no legal effect and void and ab-initio.

(ix) The respondents no. 2 & 3 also lost sight of the fact that even in the case of goods imported into Pakistan for home consumption, GD against which has to be filed under the provision of Section 79(1) of the Customs Act, 1969 and that contains certain mis-statement/declaration, having no implication of revenue of the exchequer, the provision of Section 32 is not applicable due to the fact that the said mis-declaration/ statement contains no consequences and this stood validated from the reported judgment *PLD 1996 KARACHI 68, Kamran Industries V Collector Of Customs (Exports)* in which it has been held in unequivocal terms that where there is no revenue loss the provision of Section 32 cannot be invoked. Similarly in reported Judgment 2007 PTD 2215 *Collector Of Customs(Exports) and another V R.A Hosiery Works*, their Lordship Rana Bhagwan Das and Saiyed Saeed Ashhad JJ, held that; provision of

"Provision of S.32(1) of Customs Act, 1969, would be attracted only when a mis-declaration or mis-statement was made with a view to obtain illegal gain by evasion of payment of customs duty and other taxes or by causing loss to Government revenue---Mis-declaration alleged to have been made in the case, was neither for evasion of payment of customs duty to other taxes/charges nor the same has caused any financial loss to the Government---Petition for leave to appeal by the Authorities being without merit, was dismissed."

(x) That it is appropriate to state that the transit goods for Afghanistan are akin to the goods transshipped to the Dry Ports under Section 121 of the Customs Act, 1969 for clearance for home consumption in terms Section 79(1) of Customs Act, 1969. These cannot be held or examined even in case of any discrepancy, mis-declaration, loss to the exchequer and these has to be allowed to be transshipped to the port of clearance for examination and initiating proceeding in accordance with the provision of Customs Act, 1969 and if those had examined, the discrepancy so found has to be communicated to the clearance station in Afghanistan, who is the appropriate authority to proceed. Transit of goods to Afghanistan is synonymous to transshipment of the goods to the respective Dry Ports as held by the superior Judicial For a in reported and unreported Judgment at PTCL 2003 CL 312, 2003 PTD 14 and order dated 22.10.1991 in *C.P. No. D-719 of 1991.*

ATTESTED

(xi) The order passed by the respondents No. 3 shows that it has not been passed with the application of mind and provision of the Act/Rules. Instead is a non speaking order and did not conforms to the mandated requirement of S.24-A of the General Clauses Act 1897 and this stood validated from the fact that no rebuttal on the grounds of appeals, inspite incorporated in para 3 of the order has been made and opted to pass the impugned order on personal absurd opinion, contrary to law and that too also has not based on objective consideration. Such type of orders are deems to be always treated as illegal, void arbitrary and a result of misuse of authority vested in public functionary. No room was available for such illegal, void and arbitrarily order in any system of law. If any authority Court or Tribunal gave a finding of fact which was not based on material available on record was illegal arbitrarily without discussing and considering the material available on record it became perverse and a perverse finding of fact which is violative of the established principle of appreciation of evidence on record was not sustainable in law. The principle that every judicial or quasi-judicial finding should be based on reasons containing the justification for the finding in the order itself is an established principle of dispensation of justice. The Adjudication/Appellate orders are being violation of basic principle of the goods governance and mandatory requirement of Section 24A of the General Clauses Act, is not only illegal and void but also not sustainable under law. The said position is also fortified by the judgments of Superior Courts reported as 2005 YLR 1019, 2007 PTD 2500, 2004 PTD 1973, 2005 YLR 1719, 2003 PTD 777, 2003 PTD (Trib) 2369, 2002 MLD 357, 1983 CLC 2882, 2005 PTD 2519, 2005 PTD 1189, 2003 PTD 2369 and PLD 1995 SC (Pak) 272, PLD 1970 SC 158, PLD 1970 SC 173 1984 SCMR 1014 and 2012 PTD (Trib.) 619.

05- 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 department, for validation verbatim of those are reproduced here-in-below:

(i) . Ground (i) is denied the show cause notice has been issued by the Respondent No. 1. The appellant without going through the document raised a frivolous objection. The appellant in connivance with the clearing agent committed an offence of mis-declaration. Since the offence has been committed within the territory of Islamic Republic of Pakistan therefore Pakistani law will be applicable on all who have connived in the commission of the offence.

(ii) Regarding contents of Para ii, it is respectfully submitted that the contention of the appellant is not correct. The fact of the case cited by the appellant is different from the instant case. It is further submitted that the learned Collector Appeals rightly observed and hold accordingly that "although transit goods are not subject of payment of import or export duties and taxes, however they are required to follow the relevant rules. The traders or their authorized agents are required under these rules to file complete and correct declaration which include correct HS Code and value so that financial security could be calculated and secured covering all import levies. The said security is en-cashable incase the trader fails to take the goods out of territorial jurisdiction of Pakistan. As such failure to declare true particulars in GD has revenue implications. In terms of rule 484-Q of the Customs Rules, contravention of the rules pertaining to transit trade are punishable under Clause (64) of Section 156(1) of the Customs Act, 1969.

ATTESTED

(iii) Regarding contents of para iii it is respectfully submitted that the case law cited by the appellant is not applicable to the instant case. The case law cited by the appellant deals with the situation where provision of Section 32 of the Custom Act, 1969 was violated whereas in the instant case the appellant is charged for the violation of Rules 473 & 484-Q of SRO 121(i)/ 2014 dated 24.02.2014 read with Section 209 of Custom Act, 1969., hence both the situation are entirely different.

(iv) Ground iv is vehemently denied. It is respectfully submitted that neither the show cause notice nor the Order in Original was passed by Respondent No.2 the said respondent is made party to the appeal unnecessarily and the name of respondent no.2 are liable to be struck down.

(v) With regards to contents of para v it is respectfully submitted that the ground has been raised without going to the show cause notice. it is respectfully submitted that the show cause notice has been issued by the Principal Appraiser of Directorate General of transit Trade i.e Respondent No.1. hence plea raised by the appellant is frivolous.

(vi) The ground raised in para vi is frivolous and not relevant to the instant case. the case law cited in this para is also not relevant.

(vii) The ground raised in para vii is irrelevant and have no connection with the instant case. the appellant has raised frivolous grounds and have cited irrelevant case laws.

(viii) Ground viii has been raised in ignorance of the facts of the case. it is reiterated that the order has been passed by the Respondent No.1 who is the competent authority and as such the ground is not available to the appellant. The case law is also cannot be applied on the instant case.

(ix) With regard to the contents of para ix it is respectfully submitted that the consignment was examined in accordance with law. It is further submitted that

reply to the show cause accepted the offence and requested for the condonation of the same.

(x) Ground x is vehemently denied. It is respectfully submitted that the observations and conclusion of the learned respondent No.3 is correct and is accordance with law.

(xi) Ground xi is incorrect, hence vehemently denied. Hence the appellant has wrongly taken the plea which is incorrect presumption. It is respectfully submitted that if the goods imported in Pakistan for home consumption and found mis-declared, such mis-declaration shall cause loss of revenue.

(xii) Ground xii is incorrect hence vehemently denied. Hence the case law is also not applicable to the instant case.

(xiii) Ground xiii is incorrect as such vehemently denied. It is respectfully submitted that the show cause notice as well as the order in original and the order in appeal are correct and in accordance with law. Such orders are liable to be upheld by the Hon'ble Appellate Tribunal. It is vehemently denied that the order is a non speaking order and does not fulfill the requirements of Section 24-A of the General Clauses Act.

06- 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.

ATTESTED

(i) Whether respondent/Officials of DGTT have any *locus standi* to proceed against importer of foreign country under any provisions of the Customs Act, 1969 and whether the words "mis-declaration" is available in the Revised Koyoto Convention 1999, Afghan Pakistan Transit Trade Agreement 2010 (APTTA) and Transit Trade Rules, incorporated in Sub Chapter VII of Customs Rules, 2001 and as to whether an importer of foreign country can be proceeded for the charge of mis-declaration falling under the provisions of Section 32 of the Customs Act, 1969 or Import Policy Order 2013?

(ii) Whether the respondent No.2 has jurisdiction to adjudicate the case in derogation of para 3(d) of notification No. SRO 886(I)/2012 dated 18.07.2012 and the show cause notice in the instant case has been issued by the authority defined in the proviso of Sub –Rule (6) of Rule 473 of Sub Chapter VII of Customs Rules, 2001?

(iii) Whether the goods found in excess during the course of examination as against

VII of Chapter XXI of Customs Rules, 2001 and can be either seized or confiscated in terms of Rule 484-Q ibid and clause (64) of Section 156 (1) of the Customs Act, 1969 merely on the presumption that the subject goods shall be smuggled back into Pakistan or pilfered during the course of transit?

07- That as regard issue No. (i), we refer to the preliminary of Chapter 1 of the Customs Act, 1969, sub section (2) which expresses that it extent to whole of Pakistan. Meaning thereby, that the provisions of the Act are applicable on the person who is citizen of Pakistan and is engaged in the business of Import or Export or manufacturing and during the course of his business activities commits any contravention of the provisions of the Act, shall be proceeded against under the relevant applicable provisions of the Act and the Rules framed thereunder. The appellant is a citizen of Afghanistan and is duly registered as an importer with the Ministry of Commerce & Industry of Afghanistan (MOCA) vide Trade License No. 06-01-1885 vide registration No. 33888 dated 13.04.2015 for importing goods for home consumption in Afghanistan at Karachi for transit to the place of business in Afghanistan under the APPTA Agreement 2010. Since, import for transit to Afghanistan is handled by DGTT, every importer has to get itself registered with the online system of filing GD i.e. "WeBOC" regime, he submitted an application with the designated authorized Official of MOCA in Afghanistan by the MCC of Appraisement-East, Karachi. The Official of MOCA registered him and allotted User ID and password, which the Officials of MOCA through mail along with application and submitted documents forward to the Deputy Collector MIS, MCC of Appraisement –East. In this whole procedure, the appellant has no direct communication with either the Official of MCC of Appraisement-East or DGTT. Any discrepancy found in import documents submitted for transit of the goods or in the goods so imported has to reported by the DGTT to the MOCA through Ministry of Commerce, Pakistan and subsequently has to file a complaint under para (2) of Article 3 of Section II Afghan Pakistan Transit Trade, 2010 (APTTA) before the Afghanistan Pakistan Transit Trade Co-ordination Authority under Article 34 of Section X ibid. under the provision of Customs Act, 1969, the Official of Customs are not empowered to

against an importer of Afghanistan in accordance with their Import Policy Order or Custom Act, not the Officials of Customs including DGTT, due to the fact that the provisions of Customs Act, 1969 are not applicable in Afghanistan nor on the citizen of Afghanistan, which the appellant is. As deliberated we are clear in mind that the Officials of DGTT and respondent no 2 have no *locus standi* to serve show cause notice to the appellant. We have gone through the Revised Kyoto Convention 1999, Afghan Pakistan Transit Trade Agreement, 2010 (APTTA) and Sub Chapter VII of Chapter XXI of Customs Rules 2001 and fail to find the said word in these. Confirming that the word mis-declaration is alien to these, the emphasis laid in proviso to Sub Rule (6) of Rule 473 ibid speaks about **"discrepancy"**. Since, no definition of the word discrepancy is given in Article 2 of APTTA, or even in any taxing Statute/notification, ordinary meaning has to be adopted as it is elementary rule of construction that phrases and sentences of the statute should be construed according to the rules of grammar and the words of a statute should be interpreted in their plain grammatical sense. The word discrepancy is defined in ***The Chambers Dictionary 1997 Edition***: *Disagreement; variance of facts or sentiment and in* ***The Lexicon Webster Dictionary of English Language Encyclopedic Edition***: *the state of being discrepant; and discrepant means inconsistence; at variance.* Meaning thereby that if facts shown in TT GD differs or in variance, the word discrepancy is used in the Rules intentionally because the provision of Customs Act, are not applicable on these goods due to non declaration, which an importer of Afghanistan has to file with the Afghan Customs at the port of clearance, goods found contrary to the said declaration, are deems to be mis-declared , consequent of which is that the said person/importer is liable to adjudication proceeding by the Official of Customs under the Customs Act of Afghanistan. The importer of Afghanistan vide transmitting goods declaration under WeBOC regime, narrate the tentative facts of the goods stuffed in container, that could be varied, in description, quantity, quality and weight, which is curable through an amendment or if i.e. not possible, the importer can be asked to submit additional insurance guarantee for the amount of leviable duty and taxes on the value determined under Section 25 or 25A of the Customs Act, 1969 for home consumption in Pakistan under provision of Section 79(1) of the Customs Act, 1969.

ATTESTED

evident from the show cause notice and Order-in-Original and which falls within the ambit of Section 32 of the Customs Act, 1969 and applicable on the import for Pakistan, clearance of which is obtained under the provision of Section 79(1) of the Customs Act, 1969 and this is validated from the expression of Section 32, which read as:

> *Section 32 False statement, error, etc. ------ 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,*
>
> *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. (Emphasis Supplied)*
>
> *(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. (Emphasis Supplied)*

ATTESTED

08. The appellant has not filed Goods Declaration under the provision of Section 79(1) of the Customs Act, 1969, instead under Section 129 of the Customs Act, 1969, which read as:

> "Transit of goods across Pakistan to a foreign territory. Where any goods are entered for transit across Pakistan to a destination outside Pakistan, the appropriate officer may, subject to the provisions of the rules, allow the goods to be so transited without payment of the duties which would otherwise be chargeable on such goods."
>
> Provided that the Federal government may, by notification in the Official Gazette prohibit the bringing into Pakistan by Sea, land or air in transit to a foreign territory any goods or class of goods.

From conscientious study of the Section 129, it is abundantly clear that the goods imported in Pakistan for transit to foreign country is not leviable to duty and taxes, which are otherwise leviable and to be paid in case of filing Goods Declaration under the provision of Section 79(1) of the Customs Act, 1969 and this has been done in the light of Revised Kyoto Convention, 1990 and definition given in Article 2 of APTTA, 2010 "Customs Transit" means procedure through which goods are transported under Customs Control from one Customs Office of one contracting party to Customs Office of other

contracting party under suspension of duty and taxes and in Article 30 of Chapter IX Customs Duties the contracting parties agreed that no custom duties and taxes shall be levied on the goods regardless of their destination and purpose." Since, the appellant has shown facts of the goods stuffed in container on the strength of the documents received by him from the shipper and on those or even found in excess no duty and taxes are leviable in Pakistan. Using of word mis-declaration in the show cause notice and order-in-original is out of context beside based on mis-conception as the provision of Section 32 of the Customs Act, 1969 or any other provision are not applicable on the said goods and this stood validated from the judgment of the Hon'ble Supreme court of Pakistan reported at *PLD 1993 Karachi 93 M/s. Najab Zarab Ltd v Government of Pakistan* & *1996 SCMR 727 FOP vs Jamal Din & Others.* "Goods imported by Afghan National from other country for use and consumption in Afghanistan could not be said to have been imported into Pakistan merely because they crossed the Customs barrier and enter into Pakistan to be transited to their destination viz Afghanistan, such goods infact are goods in transit to be dealt with and transshipped to Afghanistan in accordance with the transit agreement and protocol appended thereto. Customs Laws relating to importation would not, therefore applicable to them. The Hon'ble judges of the Supreme Court of Pakistan further held "that the provision of Customs Act and Import Control Order dealt with different kind of situation that after being imported into Pakistan and not imported into Afghanistan. the provision of Customs Act, do not deal with the goods in transit which are not really imported into Pakistan. In a case where liquor seized by the Directorate General of Intelligence and Investigation –FBR after clearance for transit to Afghanistan on the pretext that the goods found in examination are liquor as against shown in Goods Declaration as mineral water amounts to mis-declaration attracting Section 32 of the Customs Act, 1969 and so the prohibition laid down in Import Policy Order. The Division Bench of the Hon'ble High Court of Sindh observed vide order dated 27.10.2010 in C.P. No. D-2410 of 2010 that "in the present matter a simple allegation is made by the respondent no. 2 that a very specific provision of the Customs Act namely Section 32(1) has been violated and the same amounts to an offence which could be taken cognizance by the Customs Judge appointed under the Customs Act. In our view, the petitioner's consignment and the description of the goods in the documents accompanying that consignment do not come within the preview of Section 32 and even such description may have been within the ambit of said section the same would amounts to mis-declaration only if the goods were intended for import into Pakistan . that obviously does not apply in the present case since the goods admittedly are in transit under the Afghan Transit Agreement. The Hon'ble Bench on the strength of the said observation allowed the petition to the extent of FIR's C.No. Appg-287//DCI/ESKO/2010 dated 24.05.2010 and FIR C.No. Appg-288//DCI/ESKO/2010 dated 24.05.2010 and quashed and all proceeding there-under were declared to be without lawful authority." With this we answer issue No. (i) in negative.

09- That as regard issue no. (ii), the Board in exercise of the powers conferred upon it under Section 3 of the Customs Act, 1969, established a separate forum namely Collectorate of Customs Adjudication through notification No. 886(I)/2012 dated 18.07.2012 for adjudication of the cases of mis-declaration, causing revenue loss under the provision of Section 179 of the Customs Act, 1969 w.e.f. 01.08.2012. From perusal of the show cause notice, it has been observed that although the word mis-declaration is

been incorporated. Rendering the case outside the purview of the Collectorate of Customs , Adjudication-II and falls within the ambit of para 3(d) of the notification i.e. cases pertaining to contravention of technical violation of Import or Export restriction without involvement of any evasion of duty and taxes. The case of the appellant at the most falls under the said sub para and the power to adjudicate such type of cases rest with the Executive Collectorate i.e. DGTT. The respondent no. 2 inspite of the fact that being a Deputy Collector of the Collectorate of Customs Adjudication-II, preferred and assumed the powers of Principal Appraiser given in Serial No. (vi) of Section 179 of the Customs Act, 1969 and issued the show cause notice and passed order-in-original. This act is transgressional from statue and not permitted under the law. Since, he is not Principal Appraiser of Collectorate of Adjudication nor the case in question falls within the jurisdiction of Collectorate of Customs Adjudication, he usurped the powers of the appropriate authorities. This transgression renders the show cause notice, Order-in-Original and subsequent orders passed by respondents without power/jurisdiction. Hence, void and ab-initio and as such of no legal effect. The exercise of jurisdiction by the authority is the mandatory requirements and its non-fulfillment, entails the entire proceedings *coram non-judice*. All relevant quarters having *quasi judicial* jurisdiction and authority as well as including the Courts are bound to perform their duties in accordance with the laws and in this particular case, the DGTT and respondent no. 2 were required to perform their duties under para 3(d) of the notification no. 886(I)/2012 dated 18.07.2012 and proviso to Sub Rule (6) of Rule 473 of Sub Chapter VII of Chapter XXI of the Customs Rules, 2001. The action taken by the respondents made during the hierarchy of the Customs does not have any warrant of law and assumed the jurisdiction against the norms of statutory obligations embodied in Section 129 of the Customs Act, 1969 and Rule 473 ibid. For reaching on the said conclusion we are fortified with the decision of the Superior Judicial Fora reported as PTD 2010 (465) PLD 1995 Karachi 587, 2001 SCMR 1822 , PLD 1971 SC 124,

ATTESTED

It is relevant to reproduce proviso to sub rule (6) of rule 473 of Sub chapter VII of Chapter XXI of customs Rules, 2001, which read as follows:

> "Provided that where some discrepancy has been found, the AT GD shall be marked to the concerned Principal Appraiser for further necessary

Upon bare reading of the proviso , it is vividly clear that in case of discrepancy found in documents submitted for clearance for transit trade or in the particulars of the goods , found contrary upon conduction of examination , the appropriate authority to initiate legal proceeding rest with the Principal Appraiser of DGTT, due to the fact that the goods are in the terminal and those have to be transited without levy of duty and taxes, meaning thereby that no implication on the revenue to the exchequer of Pakistan. the proceeding whatsoever has to be under taken for the rectification of the discrepancy through amendment or by securing insurance guarantee for the amount of duty and taxes levied on the excess found goods on the value determined by the Officials of DGTT on the strength of data maintained under Rule 110 of Customs Rules, 2001 or Valuation Ruling issued by Director, Directorate General of Valuation under the provision of Section 25A of the Customs Act, 1969, subject to its return after cancellation upon receipt of T-1, as enunciated in clause (b) of Rule 484-D(1) of Sub Chapter VII of Chapter XXI of Customs Rule, 2001, bearing cross reference of GD filed in Pakistan and the certificate to the effect that the transit goods had crossed border and the said effect had been fed in the system by the Cross Border Verification Officer (CBBO).

ATTESTED

Initiation of legal proceeding in case of discrepancy against the importer of Afghanistan through his clearing agent rest with Principal Appraiser of the DGTT. Notwithstanding, it is for the Principal Appraiser, to take cognizance of the discrepancy found in the documents and the goods during the course of examination and in case of need he is competent to issue show cause notice himself to the clearing agent of the importer of Afghanistan for seeking justification for the found discrepancy and if i.e. not convincing, pass an observation, for preparation of complaint for submission with the Ministry of Commerce Pakistan for onward submission with the Ministry of Commerce and Industry of Afghanistan (MOCA) for placing before Afghanistan Pakistan Co-ordination Authority in terms of para 2 of Article 3 of Afghanistan Pakistan Transit Trade Agreement , 2010.

10. In the instant case although the Principal Appraiser of the DGTT took the cognizance of the issue and instead of proceeding himself inspite being competent to do so under para 3(d) of notification No. 886(I)/2012 dated 18.07.2012 opted to frame contravention report instead of complaint and transmitted it to the respondent no. 2, who issued the show cause notice and subsequently passed the order, to which he is not empowered being a Deputy Collector of the Collectorate of Customs Adjudication-II, who is even otherwise not empowered to adjudicate the cases where there is technical violation of import and export having no revenue loss and this has been expressed in para 3(d) of notification No. SRO 886(I)/2012 dated 18.07.2012. It is settled principle of law

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ATTESTED

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subordinate in the matter of adjudication and this has been held on countless time by the Superior Judicial Fora in reported judgment referred in para 4(v) supra and which are applicable on the instant case with full vigor. Therefore, we hold that the show cause notice has not been issued by the authority defined in proviso of Sub –Rule (6) of Rule 473 of Sub Chapter VII of Customs Rules, 2001. Hence, without power/jurisdiction and as such void, ab-initio and coram non judice. The issue no. (ii) is answered in negative.

11- That as regard to issue No. (iii), prior to deliberation on the issue , it is beneficial to reproduce clause (64) of Section 156(1) and Rule 484Q of Sub Chapter VII of Chapter XXI of Custom Rules, 2001 for better understanding of the essence and spirit of these and so the applicability.

(64):	If any person contravenes any rule or condition relate-able to section 128 or 129	[Such person including the custodian and inland carrier shall be liable to a penalty up to twice the value of the goods and upon conviction by a Special Judge be further liable to imprisonment for a term not exceeding five years, and the goods in respect of which such offence has been comm.-itted shall also be liable to confiscation.]	128 & 129

ATTESTED

484Q. Penalty under the Act – Whosoever commits any contravention of the provisions of this Sub Chapter shall be liable to be proceeded against under Serial No. 64 and the entries relating thereto, in the table of sub-section(1) of Section 156 of the Act.

From meticulous study of the above, it is observed that these are applicable in such like situation, wherein the importer of the Afghanistan or his clearing agent remove the goods from the terminal / port in clandestine manner without completion of codal formalities of transit trade envisaged in Afghan Pakistan Transit Trade Agreement, 2010 and Rules embodied in Chapter VII of Chapter XII of Customs Rules, 2001 or pilfered the goods during the course of transit or wherein, cross border certificate is not submitted along with verification of the Afghanistan Government as per the expression of clause (b) of Rule 484-D(1) of Sub Chapter VII of Chapter XXI of Customs Rule, 2001. In these circumstances the concerned person shall be charged under Section 2(s) and Section 129 of the Customs Act, 1969 and have to award punishment of the criminal intent under clause (64) of Section 156(1) of Customs Act, 1969. The case in hand is not of the

examination as against shown in the goods declaration for transit trade and those goods are lying in the terminal. It is immaterial that the goods so found are in excess as those has also to be allowed to be transited without payment of duty and taxes, upon submission of insurance guarantee of the amount of the leviable duty and taxes on the goods imported for home consumption by a Pakistani importer under the provision of section 79(1) ibid on the value determined by the Officials of DGTT on the basis of value available in data reservoir of the Clearance Collectorate under Rule 110 of Customs Rules, 2001 or with the application of Valuation Ruling issued by Director, Directorate General of Valuation under section 25A of the Customs Act, 1969. Application of Rule 484Q in such like cases is out of context due to the fact that no contravention of the provision of Section 129 of the Customs Act, 1969 has been made. Beside Rules framed for the clearance of transit trade goods cannot be made a tool for creating impediment in implementation of the provision of the statute. Although these are to be complied substantially "but they are not to be applied. and operated as **"stumbling block"** instead of **"stepping stones"** they should also not be used simply to trap people by technicalities of these rules instead of advancing the purpose for which they are framed. " This has been held by the Hon'ble Supreme Court of Pakistan in reported judgment *PLD 1989 Supreme Court 222 Nishat Mills Ltd vs Superintendent of Central Excise Circle-II & 03 Others.*

The application of Rules embodied in Sub Chapter VII of Chapter XXI of Customs Rules, 2001 in the case of appellant has been made as stumbling blocks, on the presumption that the excess found goods shall be pilfered during the course of transit. No case can be initiated either on assumption or presumption, rather should be based on solid tangible evidence. The respondents were not within their right to hold the consignment nor to confiscate in the light of the judgment of the Supreme court of Pakistan reported as *PLD 1993 Karachi 93 Najab Zarab Ltd vs GOP & 1996 SCMR 727 FOP vs Jamaludin* to clear the stock involved in the petition for immediate transit to Afghanistan inspite of the objection of the Government of Pakistan that in these tyres of Indian origin were imported and presumption was that that these shall be smuggled back to Pakistan and the Hon'ble High Court of Sindh in order dated 27.10.2010 in C.P. No. D-2410 of 2010 to allow transit of the seized liquor by the Directorate General of Intelligence –FBR, shown in Goods Declaration for Transit Trade as mineral water. In our view the proper course which should had been adopted by the respondent would had been to allow the transit and report the said fact to the clearance port of the Afghanistan through diplomatic channel. It is of vital importance to adduce that none of the Customs Authorities operating at Karachi for clearance of the imported goods and Enforcement and even Directorate General of Intelligence and Investigations –FBR are not empowered either to hold or detain or examine the goods meant for transshipment under the provision of Section 121 of the Customs Act, 1969 which is synonymous to Section 129 and read as:

"Transshipment of goods without payment of duty :- (1) Subject to the provision of section 15 and the rules, the appropriate officer may, on application by the owner of any goods imported at any customs station and specially and distinctly manifested at the time of importation as for transshipment to some other customs-station or foreign destination, grant leave to transship the same without payment of duty, if any, chargeable on such goods with or without any security or bond for the due arrival and entry of the goods at the customs station of destination.

That akin to the goods transit to Afghanistan falling under the ambit of Section 129 of the Custom Act, 1969, transshipment of the goods for Dry Ports of Pakistan for clearance for home consumption under the provision of Section 79(1) ibid have to be allowed without payment of duty and taxes without any security or bond, presently the goods meant for transit to Afghanistan are subject to submission of insurance guarantee to the extent of the amount of duty and taxes leviable thereon under First Schedule to the Customs Act, 1969 returnable after cancellation upon receipt of confirmation to the effect that the goods have been crossed the border. The Customs Officials at Karachi detain a consignment of M/s. Famous Corporation, which was meant for transshipment , on the pretext that substantial mis-declaration has been made by the importer. The importer approached the Hon'ble High Court of Sindh which held in reported judgment *PTCL 1989 CL 312* that "where the goods were meant for transshipment to Lahore Dry Port, it cannot be examined by Customs Officials at Karachi. Customs Officials may confirm the information from the Dry Port Authority where the Customs Official can examine the question whether there has been factually any contravention of the Customs Laws or any other law and may take action against the petitioner if so warranted. If the consignment has already been examined by the Customs Officer at Karachi , the same may be released and may be forwarded to the Dry Port along with report if any. Similarly, in case relating to M/s. M. Hamidullah Khan , the Directorate General of Intelligence and Investigations detained a consignment of transit shipment on the pretext that the marks and number of the packages on the bill of lading are not in accordance with the marks and number available on the packages of the goods and as such they are empowered to examine the goods for framing contravention report for the purpose of adjudication. The importer filed a petition in the High Court of Sindh which held in reported *judgment PTCL 1992 CL 172 M. Hamidullah Khan vs Directorate General of Customs Intelligence and 03 others that* "" We have already reproduced above the letter containing the instructions issued by the C.B.R. regarding transshipment of imported cargo to up-country dry ports. After going through the same we are of the view, that under sub-paragraph (i) of the above instruction, if the address of the party to be notified to disclosed in the bill of lading as of an up- country destination or the marks and numbers on the bill of lading indicate an up-

Karachi. However, if any mis-declaration or suspected contravention is discovered in respect of such consignments. The information is to be conveyed to the respective Collector of customs or Deputy Collector of Customs, Incharge of Dry Port or the Directorate of Intelligence at the dry port. These instructions are applicable both in cases where either the notifying party is indicated in the bill of lading is situated in up-country destination, or the shipping marks on the consignment indicate the up-country destination via Karachi. In the case before us it is admitted pointation that the bill of lading was allowed to be amended under section 45 of the Customs act and the name of the notifying party has been shown as Allied International , Lahore and therefore in terms of the instruction referred to above transshipment of consignment to the dry Port , Lahore should have been allowed. In our view the absence of shipping marks on the consignment, could not give jurisdiction to the Directorate of Customs Intelligence, Karachi to detain the consignment at Karachi Port when the address of notifying part was shown at Lahore, in such a case if the respondents had discovered any contravention of custom law by the importer they should have allowed the consignment to proceed to its destination namely the dry port at Lahore and notified by the Collector or Deputy Collector of Customs at Dry Port as was required under the law." The High Court of Sindh in yet another judgment reported as *PTCL 2002 CL 481 N.B. Trading Company, Sambrial, Sialkot vs Collector of Customs, Appraisement and others* held that "where there is an information of contravention of Customs , Law, it is to be passed to the respective Dry Port where the imported consignment is destined to which can take action in accordance with an as warranted in law. The action of Customs Officials at Karachi detaining and reopening the said consignment is legally unsustainable, it is without lawful authority and therefore set aside. Therefore it is being held that, neither any action against the appellant was warranted under Rule 484Q or clause (64) of Section 156 (1) of the Customs Act, 1969 and detention and confiscation of the goods is declared to be without power/jurisdiction and lawful authority. The issue No. (iii) is also answered in negative.

12- On the strength of the above deliberation and gaining strength from the law laid down by the Superior Judicial Fora particularly the interpretation of law, legal propositions and observations made thereon and to follow the *ratio decidendi* observed by the Superior Courts, we hereby vacate the impugned show cause notices, and set aside the orders passed thereon, during the hierarchy of the customs being illegal, void and ab-initio, appeals are allowed as prayed and direct the respondents to allow transit of the subject goods shown and found in the GD /examination upon securing insurance guarantee of the amount of leviable duty and taxes under First Schedule to the Customs Act, 1969 against the value determined on the basis of data available in the reservoir maintained under rule 110 of the Customs Rules, 2001. The appellant may apply to the relevant authority for a delay and detention certificate which application shall be considered and disposed of by

the said authority strictly in accordance with law and in the light of S.14-A (2) of Customs Act, 1969.

14- Judgment passed and announced accordingly.

(MUHAMMAD NAZIM SALEEM)
Member Technical-II
Karachi

(TAHIR ZIA)
Member Judicial-II
Karachi

ATTESTED

Mr. Muhammad Nazim Saleem, Member Technical-II, Karachi: With due respect to my learned Colleague Member (Judicial-II), I am not inclined to agree with his findings. The Appellant has raised a number of legal and technical issues in support of their contention. They have also cited quite a number of Judgements by the Hon'ble Superior Courts. After meticulous scrutiny of these issues, I have come to conclusion that either these are incorrect or irrelevant citations being out of the context. Even the memo of appeal is confusing as the title of the same is "M/s. Al-Rehmat Ali Ltd, Jalalabad, Afghanistan Vs. The Principal Appraiser, Directorate General of Transit Trade, 12th Floor, Custom House, Karachi & 02 others". It has not been made clear as to who are two other respondents whereas contents of memo of appeal reveal that Respondent No.2 is some Deputy Collector. Para (v) of Grounds of Appeal is reproduced hereunder:-

> "To the contrary, respondent no.2 inspite of being Deputy Collector transmitted the show cause notice in the capacity of Principal Appraiser, while transgressing the process of the Principal Appraiser, which is not permitted under law, rendering the show cause notice without power/ jurisdiction, hence void and ab-initio and coram non-judice."

ATTESTED

15. Based on above assumption/ point which is absolutely groundless without any basis, the Appellant has cited many Judgements in order to establish that a senior cannot assume jurisdiction of a subordinate officer particularly in quasi-judicial matters. In simple terms, Appellant's point is that the original jurisdiction to deal with the issue at hand lay within the domain of Principal Appraiser, however, the same have been usurped and

show cause notice dated 12.05.2015 and Order-IN-Original No.371255-29052015 dated 29.05.2015. The said point is factually incorrect.The fact on record is that the concerned Principal Appraiser (Muhammad Aftab) has issued both the aforementioned documents i.e. show cause notice and the Order-IN-Original. This fact is further confirmed from the study of Order-IN-Appeal No.10261 to 10262/2015 dated 03.07.2015. During the course of hearing and also in the memo of appeal, the Appellant laid tremendous emphasis on the point that the respondent department had no locus standi as Customs Act, 1969 is not applicable to Afghan Transit. In support of their argument, they have cited Judgments PLD 1993 Karachi 93 M/s. Najib Zarab Ltd. Vs. Government of Pakistan and 1996 SCMR 727, FOP Vs Jamaluddin & others. To my understanding, the essence of these Judgements is that the customs authorities should not treat import meant for transit as import in Pakistan and apply provisions of Customs law accordingly. Instead, such import in transit must be treated as per Treaty between Pakistan and Afghanistan and only the relevant provisions of Customs Act, 1969 relating to Transit would be applicable to such transit consignments. Currently, Afghan Pakistan Transit Trade Agreement (APTTA) 2010 is in vogue. Rules have been framed by the GoP vide SRO 121(I)/2014 dated 24.02.2014 containing procedure/ provisions for processing of Transit Trade Cargo under Customs Computerization System, to and from Afghanistan. As such, in line with above quoted Judgements of Hon'ble Superior Courts, the imported consignments meant for transit to Afghanistan are to be governed and regulated under APTTA, 2010 read with SRO 121(I)/2014 dated 24.02.2014 (Rules incorporated at Sub-Chapter-VII of Customs Rules, 2001) and Chapter XIII of the Customs Act, 1969. The Appellant has also contended that the

ATTESTED

SRO 121(I)/2012 dated 24.02.2014 outlining procedure under section 129 of the Customs Act, 1969 is not a valid document due to the fact that it is in conflict with the Articles of APTTA, 2010. Furthermore, it does not contain approval/ assent of the Government of Islamic Republic of Afghanistan. Here again, the Appellant has made an unsubstantiated general statement by not mentioning as to which rules of procedure under aforementioned notification are in conflict with APTTA, 2010. Regarding approval of Government of Islamic Republic of Afghanistan, they have not cited as to which law required such approval. The fact of the matte is that the Afghan Government was required to issue its own procedure to govern/ regulate transit trade from Pakistan.

16. It may be mentioned here that rule 484-A of Customs Rules, 2001 require that Afghan importer would furnish financial security in the form of Insurance Guarantee for goods destined for Afghanistan from an Insurance Company as per criteria laid down by the Directorate General of Transit Trade on the prescribed format which shall be encashable in Pakistan for ensuring fulfillment of any obligation arising out of customs transit operations between Pakistan and Afghanistan. The said provision of law is reproduced as hereunder:-

ATTESTED

> "**484-A. Financial Guarantee on Transit Goods.**- (1)The Afghan importer of goods or his authorized Customs agents, brokers or transport operators in Pakistan shall furnish financial security in the form of Insurance Guarantee, for goods destined for Afghanistan, from an insurance company, as per criteria prescribed by the Directorate General of Transit Trade, on the prescribed format (Appendix-IV) or any other form prescribed by the Board which shall be valid for at least one year and shall be encashable in Pakistan, for ensuring the fulfillment of any obligation arising out of Customs transit operation between Pakistan and Afghanistan. Financial security shall be obtained in case of non-commercial consignments accompanied by a valid Mafinama also

(2) The amount of financial security for transit operation shall be determined by system on the basis of the assessment done by Customs at the office of departure so that it covers all import levies."

In view of aforementioned law, the Appellant's contention that there is no revenue implication in this case, is absolutely contrary to law. Furthermore, Rule 484-Q prescribes penalty for any violation of Transit procedure, as under:-

"484-Q. Penalty under the Act.- Whosoever commits any contravention of the provisions of this sub-chapter shall be liable to be proceeded against under Serial No. 64 and the entries relating thereto, in the table of sub-section (1) of section 156 of the Act."

It is again important to reproduce hereunder above penal provision:-

64.	If any person contravenes any rule or condition relating to section 128 or section 129, or makes an untrue declaration relating to transit goods or illegally removes or conceals any transit goods,	[Such person including the custodian and inland carrier shall be liable to a penalty up to twice the value of the goods and upon conviction by a Special Judge be further liable to imprisonment for a term not exceeding five years, and the goods in respect of which such offence has been committed shall also be liable to confiscation.]	128 & 129

ATTESTED

TRIBUNAL

17. The study of above penal provision reflects that stringent and deterrent penalty has been prescribed for making untrue declaration relating to transit goods or concealing transit goods. In the instant case, 19 items out of total 23 items were not declared in the AT Goods Declaration which means that they were deliberately concealed by the importer with the help of his Clearing Agent. Therefore, the case under reference is straightaway a case of concealment of transit goods as well as untrue declaration at the same time hence liable to penalty as stipulated in terms of S.No.64 of section 156(1) of

daylight. The motive behind concealing 19 items and making untrue declaration can be either to (i) retain them in Pakistan without payment of duty/ taxes chargeable thereon, or (ii) to show less amount of import levies (duty/ taxes) than due, to the insurance company so that less amount of premium could be paid to them. It is important to mention here that the purpose for requirement of financial security is to cover/ safeguard import levies (duty and taxes) chargeable on transit goods an envisaged in rule 484-A cited at para 16 supara. In view of aforestated legal position, it would be incorrect to say that the Customs Act, 1969 is not applicable to transit goods or no government revenue is involved on transit goods. Regarding point of the Appellant that sub-section (2) of section 1 of the Customs Act, 1969 envisage that the Act extends to the whole of Pakistan, therefore, show cause notice cannot be issued to an importer/ trader of Afghanistan, it is suffice to say that the history of Afghan Transit Trade right from its inception in 1964 is riddled with complaints that most of the goods never crossed Pak-Afghan border and are retained in Pakistan. Therefore, where it is clearly established that attempt was made to conceal/ retain Afghan goods in Pakistan, the Customs Act, 1969 is very much applicable in such situation/ case. More importantly Chapter XIII of the said Act is dedicated to Transit Trade.

ATTESTED

18. It would also be unfair to compare transit goods with transshipment goods. Both have different domain, purpose and procedure. While in case of former, the goods are destined to a foreign country, the latter is meant for up-country dry ports within Pakistan. Therefore, similar treatment/ handling and procedure cannot be laid down for both types of goods. The system of financial security as envisaged in SRO 121(I)/2014 dated 24.02.2014 has

trade by the Afghan importers in collusion with unscrupulous and non-patriotic elements in Pakistan resulting in duty/ taxes evasion worth millions/ billions of rupees per annum. Infact, these goods used to be imported in Pakistan under the garb of Afghan transit trade and were pilfered enroute to Afghanistan or straightway concealed to offload in Pakistan as has happened in the instant case. Even goods not consumed in Afghanistan like betel leaves or betel nuts used to be imported under Afghan Transit Trade. It is an open secret that Afghan transit trade has always been major source of smuggling in Pakistan thus damaging rather devastating Pakistan's economy both in terms of evasion of duty and taxes and also by creating parallel black economy in the country.

19. My learned colleague has strongly agitated against invoking section 32 of the Customs Act, 1969 in the show cause notice as well as in the Order-IN-Original and has discussed at length at paras 7 and 8 supra trying to establish that the said provision of law is applicable only for goods meant for Pakistan and not for Afghan Transit goods. However, the fact of the matter is that quite ridiculously, there is no mention of section 32 of the Customs Act, 1969 either in the show cause notice or in the impugned Order-IN-Original.

19. In view of above-detailed position, I donot find any legal or factual infirmity in the impugned Order-IN-Appeal as such, the same is upheld being a lawful order.

(Muhammad Nazim Saleem)
Member Technical-II
Karachi

20. In view of the difference of opinion between Member (Judicial-II), Karachi and the Member (Technical-II), Karachi, the matter is referred to worthy Chairman for appointment of a Referee Member for hearing and decision on the following points of difference:

(i) Whether or not the provisions of section 129 of the Customs Act, 1969 are applicable to transit goods in the light of judgement passed by the Hon'ble Supreme Court of Pakistan reproduced in Judgement of Hon'ble High Court of Sindh reported as PLD 1993 Karachi 93?

(ii) If the answer of para (i) above is in affirmative, then the issuance of show cause notice as well as Order-IN-Original passed by the Principal Appraiser is well within the ambit of provisions of Customs Act, 1969?

(iii) Whether or not the respondent department in view of circumstances of the case has correctly invoked the provisions of clause (64) of sub-section (1) of section 156 of the Customs Act, 1969 against 19 items (S.No.5 to 23) out of total 23 items concealed by the Appellant and not declared in the Afghan Transit Goods Declaration (ATGD)?

(MUHAMMAD NAZIM SALEEM)
Member Technical-II
Karachi

(TAHIR ZIA)
Member Judicial-II
Karachi