GOVERNMENT OF PAKISTAN
CUSTOMS APPELLATE TRIBUNAL BENCH-II, KARACHI
3rd FLOOR JAMIL CHAMBER, SADDAR

Before: - Mr. Adnan Ahmed Member (Judicial-II), Karachi
Mr. Khalid Mahmood Member (Technical-I), Islamabad

Custom Appeal No. K-688/2005 & 689/2005

M/s. Pakistan State Oil Company Ltd,
Karachi ..... Appellant

Vs

ATTESTED

1. The Collector of Customs
Excise & Sales Tax (Adjudication-II),
Customs House,
Karachi.

The Assistant Collector of Customs
Preventive,
Oil Section, Keamari,
Karachi. ..... Respondents

Mr. Taha Ali Zia (Advocate) present for the appellant
Mr. G.A. Khan (Advocate) present for respondent

Date of hearing : 16.07.2014
Date of Order : 04.08.2014

MR. ADNAN AHMED, MEMBER (JUDICIAL-II): Through this order, we intend to dispose off two Customs Appeals No. K-688/2005 & 689/2005 filed under Section 194-A of the Customs Act 1969 against Order-in- Original No. 98/2005 & 99/2005 dated 30.06.2005 passed by respondent No. 1.

2- Since these two appeals are identical in all material respects as they are against identical facts but through 02 separate orders of the respondent, for that reason

these appeals are heard and decided together, but for reference the facts/grounds of Appeal No. 688/2005 are taken for decision, which are as follows.

3- Brief facts of the case as reported by the Assistant Collector of Customs (Preventive) Oil Section, Keamari, Karachi vide Contravention Report C.No.S-5/Misc/048/06/2002 Oil dated 17.03.2003 that M/s. Pakistan State Oil Company Limited had supplied POL product (High Speed Diesel Oil) to Pakistan Navy vessel detail as per Annex "A" and declared the goods as "duty paid" on relevant Shipping Bill Cargo and charged the rate of local sale price "other then foreign Voyage" as fixed by the Ministry of Petroleum and Natural Resources. Later on they have adjusted this local sale price cargo on form AR-3 being a local manufactures goods and claimed exemption of Government levies under the umbrella of SRO-455(I)/96 dated 13.06.1996. The SRO-455(I)/96 dated 13.06.1996 provide the exemption of Central Excise Duty in case only. "If the goods are supplied to Pakistan Navy for consumption in is vessels". However Development Surcharge Ordinance 1961 sates subject to the provision of this ordinance, every refinery and every Company shall pay to the (Federal Government) a Development surcharge equal to the differential margin in respect of petroleum's products produced or as the case may be purchased by it for resale except for export. Therefore, exemption from payment of Development surcharge on such supplies of POL products to Pakistan Navy vessels are not covered, as the price charged by M/s Pakistan State oil Company Limited from Pakistan navy as local sale price "other than foreign voyage" as fixed by the Ministry of Petroleum from time to time wherein element of taxes is included. Therefore under reference supplies of POL product made by M/s Pakistan State Oil Company Limited to Pakistan Navy vessel can not be treated as export but it in fact domestic / local supplies for which M/s Pakistan State Oil Company Limited is liable to make the payment of Development Surcharge on such supplies. Thus clearance of POL products (H.S.D.O) by M/s Pakistan State Oil Company Limited without payment of Development surcharge to Pakistan navy vessels has no legal authority and M/s Pakistan State oil Company Limited have evaded a sum of Rs.107788749/-

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as Development levy falsely by claiming exemption under SRO-333(I)/2002 dated 15.06.2002. M/s Pakistan State Oil Company Limited are therefore, held to have committed an offence under section 32(1) & (2) read with section 97 and 111(C) of the Customs Act, 1969, read with clause of 3(1) of Development Surcharge Ordinance 1961 punishable under clause 1 & 14 of section 156(1) ibid. M/s Pakistan State Oil Company Limited, Karachi are called to show cause as to why the amount of Petroleum Development levy indicated above may not be recovered and penal action under the aforesaid provision of law may not be taken against them. Their written reply to the show cause notice should reach the undersigned on or before [illegible]2004.

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4- On the strength of above facts appellant was called upon to show cause vide [illegible]/048/06/2006-Oil dated 30.04.2003. The advocate replied to the show cause notice vide dated 10.07.2003 and synopsis dated 04.04.2005, through which he controverted the allegation leveled in the show cause notice and prayed for the vacation of the show cause notice. The respondent no. 1 after consideration of the submissions, disagreed and passed Order-in-Original No. 98/2005 dated 03.06.2005.

I have gone through the record of the case and also considered the written and verbal arguments put forth by the respondent as well as by the departmental representative. My findings / observations on the points raised in the show cause notice and the replies thereof, are as under:-

i. That on the face of shipping bills filed by the respondents words "duty payable" (Local use) have been clearly mentioned by them.

ii. The Ministry of Petroleum and Natural Resources, Government of Pakistan fixes the price of POL products and the price so fixed is inclusive of all taxes and other surcharges, etc. M/s. PSO have charged the price including the element of all taxes and surcharges, etc. but have not deposited the POL with customs in respect of the subject supplies.

iii. That M/s. PSO had previously paid duties and taxes amounting to Rs. 153.59 millions on identical suppiics which were declared duty payable / duty paid -"Local use."

iv. That the contention of the prosecution is further strengthened on account of the fact that M/s. PSO had paid POL amounting to Rs. 12.09 million on the identical supplies to Pakistan Navy.

v. M/s. PSO .have miserably failed to produce any documentary evidence of payment of the POL. They have also not come up with any cogent reason for not depositing the POL for the period 25.01.2001 to 24.05.2002 though M/s. PSO have paid Rs. 12.09 millions as development surcharge in respect of 15 consignments of bunker supplies to M/s. Pakistan Navy. It is crystal clear that the subject supplies to Pakistan Navy are also not exempt from payment of PDL. In view of the above referred facts, I am led to conclude that the charges leveled in the show cause notice have been fully established. I, therefore, order M/s. PSO to pay an amount of Rs. 7,97,14,028/-, as sated in the show cause notice, into the Government treasury within 30 days of the receipt of this order. I also impose a penalty of Rs. 25 million (Twenty Five Million) upon M/s PSO under clause 14 of sub-section (1) of section 156 of Customs Act, 1969. This order shall also be applicable to case No.71(II)Adj-II/2004-P-S1/Misc/048/08/2003-Oil, being of identical nature.

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5- The appellant has now challenged the above order by way of this appeal. Mr. Taha Ali Zia Advocate, appeared on behalf of the appellant and submitted that:-

(a) That the Impugned Order is liable to be set aside as the Respondent No.1 has erred inasmuch as he has not appreciated that the Appellant is exempt from payment of development surcharge under Section 3 of the 1961 Ordinance as the supplies to Pakistan Navy are considered as **"export"**. In fact, the Respondent No.1 failed to give any finding on this issue in the Impugned Order.

(b) That the Impugned Order passed by the Respondent No. 1 is erroneous, bad in law, without lawful authority and based on an incorrect interpretation of Section 106 of the Custom Act (previously Section 112 of the Sea Customs Act, 1878) inasmuch as the Respondent has failed to appreciate that the said supplies were made for use on board the Naval Ships which due to security reasons do not indicate their destination although they invariably go on voyages to foreign territories.

(c) That the Impugned Order passed by the Respondent is in disregard of the established practice followed by the Department, for over 30 years and never before had any such duty or taxes been demanded by the

Department and as such the Respondents are estopped from demanding payment of development surcharge on the supplies made by the Appellant of POL products to the Pakistan Naval Ships.

(d) That the Show Cause Notice was defective and case was wrongly instituted under the provision of the Customs Act, since the supplies made to Pakistan Navy were from local excisable products, and without prejudice to the Appellant's contention, that no case is made out, the Show Cause Notice and case should have been instituted under the relevant provision of the CE Act.

(e) That the Impugned Order is erroneous and misconceived inasmuch as the Respondent no.1 failed to appreciate that duties (namely CED and development surcharge) had been paid by the Appellant on those supplies made from imported excisable products, on which at the material time there was no exemption. The Respondents failed to appreciate that (i) customs duties are not payable due to the exemption under Section 106 of the Customs Act; (ii) development surcharge is not payable due to the exemption under Section 3 of the 1961 Ordinance and (iii) CED is not payable in light of the exemption under SRO 455(I)/96.

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(f) That the Impugned Order is liable to be set aside as the Respondent No.1 failed to appreciate that the machinery for collection of development surcharge is provided for under the provisions of the Customs Act and the CE Act and given that supplies to Pakistan Navy are exempt from payment of both these duties, it belies logic that development surcharge is separately claimed to be payable, especially given the exemption under Section 3 of the 1961 Ordinance. Further, it is absurd to suggest that supplies to Pakistan Navy would be exempt from payment of all duties but development surcharge would be levied on same.

(g) That the Respondent No.1 erred by upholding that the Appellant had falsely sought exemption under SRO 455(I)/96.

(h) That the Respondent No.1 erred in holding in Paragraph 8(v) of the Impugned Order that "M/s PSO have miserably failed to produce documentary evidence of payment of POL". On the contrary, the Respondent Department was unable to produce any evidence to this effect as no such document was ever provided to the Appellant for rebutting the contents of same.

(i) That the Respondent No.1 erred by imposing a penalty under Section 156 of the Customs Act as the alleged demand is for development surcharge and there is no provision under the 1961 Ordinance which empowers the Department to impose additional duties and / or penalties. In fact, Section 3(A)(3) 1961 Ordinance and Rule 8 of the 1967 Rules do not provide for the imposition of penalty and additional duties / taxes but only provide that the provisions of the Customs Act, 1969 or as the case may be the Central Excise Act, 1944 apply "to the levy, collection and refund of the development surcharge". Hence, since there is no concept of additional development surcharge / penalty in the relevant law and hence no question of paying the same can arise. Moreover, if indeed the case has been made out under the Customs Act, then the exemption in relation to supplies to Pakistan Navy under Section 106 is fully applicable.

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(ii) That without prejudice to the foregoing, the Impugned Order is erroneous, and without lawful authority as the Respondent No.1 in imposing penalty therein has not exercised his discretion to do so judicially and/or reasonably in that he has failed to examine whether the Appellant's alleged failure to make the alleged payment of the development surcharge was wilful or intentional especially in light of the established practice of seeking an exemption under Section 106 of the Customs Act and Section 3 of the 1961 Ordinance. There is dicta of the Superior Courts to the effect that where a failure in payment is not due to any wilful act on the part of the person liable to do so, no penalty and additional duty may be levied. Therefore, unless there was a willful failure on the part of the Appellant, which is not the case, the Respondent can not exercise his discretion so as to impose a penalty. Even if the contentions of the Respondent Department are correct (which are denied) that the Appellant is liable to pay the development surcharge as demanded, no penalty is leviable in as much as any said failure to do so would at best be as a result of a **misinterpretation of law and not a wilful failure to pay.**

(k) That the contention of the Customs Department that duty is payable is also incorrect in that in terms of SRO 455(I)/96 dated 13.6.1996 the Federal Government has exempted supplies of goods produced and manufactured in Pakistan as specified therein. This notification clearly provides that supplies of POL products to Pakistan Navy which if locally manufactured are exempt from payment of CED. (Photocopy of SR0-455(1)/96 is annexed hereto and marked as **Annexure "K"**).

(l) That the Appellant craves leave to urge any further or additional grounds at the time of hearing of the Appeal.

(m) That the Impugned Order passed by the Respondent No. I is even otherwise erroneous, unwarranted and not maintainable in law.

(n) The Appellant desires to heard though the Counsel.

(o) The Appellant has paid the requisite Court fee of Rs.1,000.

6- The advocate of the appellant also submitted additional arguments dated 07.11.2013, alongwith copies of relied upon judgments of the Superior Judicial Fora.

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That as the cases have been wrongly instituted under the Customs Act, 1969 ("Customs Act") whereas they should have instituted under the Central Excise Act, 1944 ("CE") since the supplies were made from petroleum products produced in Pakistan and not imported products (please see Section 3-A (2) (b) and (3) of the Petroleum Products (Development Surcharge / Petroleum Development Levy) Ordinance, 1961. Hence, the two Show Cause Notices have been wrongly issued under Section 32 of the Customs Act whereas they should have been issued under Rule 10 of the Central Excise Rules, 1944 ("1944 Rules"). Accordingly, the Show Cause Notices being patently defective the entire proceedings are liable to be dismissed since the Show Cause Notices are void.

b) Without prejudice to (i) above, it is respectfully submitted that even otherwise no mention is made of the relevant shipping bills and / or time periods in the two Show Cause Notices but in fact charts have been annexed to the said Notices setting out, *inter alia,* the dates of the shipping bills etc. In terms of the Show Cause Notice dated 30.4.2003 (In Appeal K-688 of 2005) the chart annexed to same shows that of the 48 shipping bills referred therein, 44 are time barred with reference to Rule 10 (1) of the 1944 Rules since the same has been issued beyond a period of one year being the maximum period at the relevant time. Similarly in relation to the Appeal K-689 of 2005 i.e. the chart annexed to the Show Cause Notice dated 19.5.2004, makes reference to 49 shipping bills. Of these, at least are time barred with reference to Rule 10 (1) of the 1944 Rules having been issued beyond the maximum period at the relevant time.

c) That in terms of an earlier Order of the Appellate Tribunal, specifically Order dated 13.3.2008 (hearing date 17.1.2008), the Tribunal recognized that in similar matters, a factual enquiry was necessary to ascertain the role of the Department and that evidence should be led in that context This has not been done to date despite the Appellant's repeated requests to do so. Hence, the Tribunal being duly empowered under the relevant provisions of the law to record evidence, in this regard, the Appellant submits that the concerned official of the Department i.e. one Mr. M. Raees who had initiated all these cases (and also was the same official who had issued orders for clearance of the products) should be directed to appear to have his testimony recorded and the Appellant be given an opportunity to cross examine him. This is all the more so given that the Appellant has already suffered tremendous losses and is being severely prejudiced due to not being provided this opportunity in violation of the principles of natural justice.

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No cross objection under Sub Section 4 of Section 194-A of the Customs Act. 1969 were submitted by the department, however Mr. G.A. Khan Advocate appeared on behalf of the respondent and supported the orders as correct in facts and prayed for dismissal of the appeal as of no substance.

8- Rival parties heard and case records perused, before analyzing the merit of the case, it is befitting to adduce here that the person/company who does not desires to filed good declaration for home consumption under the provision of Section 79(1) of the Customs Act, 1969 and opt for warehousing of the goods subject to payment of leviable duty and taxes at the time of clearance, the Federal Government has incorporated Chapter-IX reading as **"warehousing"** and this Chapter comprised of several sections starting from Section 84 to 119. In the instant case relevant sections are 84 to 90, 104 to 106 of the Customs Act, 1969, wherein the mechanism of warehousing and their clearance is outlined for knowing the exact perceptive of expedient, verbatim of each section is reproduced here-in-below:-

84. Application to warehouse:- When any dutiable goods have been entered for warehousing and assessed under Section [*****] 80 [or 81] the owner of

such goods may apply for leave to deposit the same in any warehouse appointed or licensed under this Act [:]

{Provided that the Collector of Customs, for reasons to be recorded in writing, may disallow the warehousing of goods or any class of goods or goods belonging to a particular importer [:]

{Provided further that, at customs stations where the Customs Computerized System is operational the system may allow removal to warehouse through system generated clearance documents.]

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85. **Form of Application:-** Every such application shall be in writing signed by the applicant, and shall be in such form as may be prescribed by the Board.

"86. **Submission of post dated cheque and indemnity bond :-** (1) When any such application has been made in respect of any goods, the owner of the goods to which it relates shall furnish an indemnity bond and post dated cheque equivalent to the duty assessed under section 80 or section 81 or reassessed under section 109 on such goods:-

(a) To observe all the provisions of this Act and the rules in respect of such goods:

(b) To pay on or before a date specified in a notice of demand all duties, taxes rent and charges payable in respect of such goods together with surcharge on the same from the date so specified at the rate of [KIBOR plus three per cent per annum] or such other rate as is for the time being fixed by the Board; and

(c) To discharge al penalties incurred for violation of the provisions of this act and the rules in respect of such goods.

(2) Every such post dated cheque shall be equivalent to the

duties and taxes leviable on the goods or portion of the goods of one conveyance only]

87. **Forwarding of goods to warehouse:-** (1) When the provisions of Section 85 and 86 have been complied with in respect of any goods, such goods shall be forwarded in change of an officer of customs to the warehouse in which they are to be deposited.

(2) A pass shall be sent with the goods specifying the name of the bonder and the name or number of the importing conveyance, the marks, numbers and contents of each package, and the warehouse or place in the warehouse wherein they are to be deposited.

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88. **Receipt of goods at warehouse:-** (1) On receipt of the goods, the pass shall be examined by the warehouse keeper, and shall be returned to the appropriate officer.

(2) No package, butt cask or other container shall be admitted into any warehouse unless it bears the marks and numbers specified in, and otherwise corresponds with, the pass for its admission.

(3) if the goods be found to correspond with the pass, the warehouse keeper shall certify to that effect on the pass, and the warehousing of such goods shall be deemed to have been completed.

(4) If the goods do not so correspond, the fact shall be reported by the warehouse-keeper for the orders of the appropriate officer, and the goods shall either be returned to the custom house in charge of an officer of customs or kept in deposit pending such orders as the warehouse-keeper deems most convenient.

(5) If the quantity or value of any goods has been incorrectly stated in the [goods declaration}, due to inadvertence or bona fide error, the error may be rectified at any time before the warehousing

of the goods is completed, and not subsequently.

89. **Goods how warehoused:-** Except as provided in section 94, all goods shall be warehoused in the packages, butt, casks or other containers in which they have been imported.

90. **Warrant to be given when goods are warehoused:-** (1) Whenever any goods are lodged in a public warehouse or a licensed private warehouse, the warehouse keeper shall deliver a warrant signed by such to the person lodging the goods.

(2) Such warrant shall be in such form as the Board may form time to time prescribe and shall be transferable by endorsement, and the endorses shall be entitled to receive the goods specified in such warrant on the same terms as those on which the person who originally lodged the goods would have been entitled to receive the same.

(3) The Board may, by notification in the official Gazette, exempt any class of goods from the operation of this section.

104 **Clearance of bonded goods for home consumption:-** any owner {or a manufacturer-cum-exporter duly authorized by such owner in respect) of warehoused goods may, at any time within the period of their warehousing under section 98, clear such goods for home consumption by paying-

(a) the duty assessed on such goods under the provisions of this Act and,

(b) all rent, penalties, [surcharge] and other charges payable in respect of such goods

[provided that in case of manufacturer-cum-exporter duly qualified for claiming exemption under any notification issued under this Act, the ex-bonding of goods under this section shall be without payment

of duties and taxes.]

105. Clearance of warehoused goods for export; Any owner of warehousing under section 98, clear such goods for export out of Pakistan on payment of all rent penalties [surcharge} and other charges payable as aforesaid but without paying any import duty thereon.

Provided that, if the {Federal Government} is of the opinion that warehoused goods of any specified description are likely to be smuggled back into Pakistan, it may, by notification in the official Gazette, direct that such goods shall not be exported to any place outside Pakistan without payment of duty or allow them to be exported subject to such restrictions and conditions as may be specified in the notification.

106 Clearance of warehoused goods for export as provisions, on a conveyance proceedings to foreign destination: Any warehoused provisions and stores may be exported within the period of their warehousing under section 98 without payment of import duty for use on board any conveyance proceeding to a foreign territory.

9- From bare reading of Section 84 it is clear that a good declaration for warehousing has to be filed under the provision of Section 85 of the Customs Act, 1969 in the format of prescribed good declaration for warehousing by the importer, the goods either are warehoused in Public Bonded Warehouse under Section 12 or Private Bonded Warehouse issued under Section 13 of the Customs Act, 1969 by the Collector of Customs of their respective jurisdiction and in case of liquid items such like oils, petroleum, molasses etc., which are stored in tanks , these tanks are declared as warehouses. Upon filing of the application, the same is assessed for duty

and taxes under Section 80 or 81 of the Customs Act, 1969 in all aspects for levy of duty and taxes to be paid at the time of clearance as define in Section 84 *ibid* and for securing the amount so involved, the importer submit a post dated cheque and indemnity equivalent to the amount of duty and taxes, in case of change of duty or alteration in assessed duty, the Good declaration is reassessed on the basis of altered duty and a new indemnity bond is executed by the owner in accordance with the provision of section 86 to replace the bond originally executed by him under the said section at the time of assessment made under section ibid. Once goods are assessed for duty and taxes these are forwarded to warehouse in terms of Section 87 and upon receipt of those in warehouse the goods are examined by the warehouse keeper and the acknowledgement to the said effect has to be returned to the appropriate officer as per the provision of Section 88 (1) ibid and the goods are to be warehoused in the manner prescribed in Section 89 with the exception given in Section 94, after lodging of the goods in the warehouse, the warehouse keeper delivers a warrant signed by him to the person lodging the goods in terms of Section 19 ibid and the custom officer has an unfettered excess to the warehouse in terms of Section 91 . For these warehouse goods an importer can obtained clearance after filing ex-bond good declaration under Section 104 of the Customs Act, 1969 for home consumption after payment of assessed duty and taxes and in case of clearance of warehouse goods for export, the warehouse owner has to file good declaration for export under section 105 ibid without payment of duty and taxes but subject to payment of all rent or other charges if applicable and when clearance is of warehouse goods for export as provision on a conveyance proceeding to foreign destination under Section 106 ibid.

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10- In the instant case the appellant tanks are granted license of private bonded warehouse under Section 13 of the Customs Act, 1969 and it is permitted by the Federal Government to import motor oil or allied products by the Government. Appellant has been granted a special facility of self assessment/clearance since decade, therefore he himself has to assess the value and the entire leviable duty and

taxes including petroleum development surcharge under Development Surcharge Ordinance, 1961. The appellant obtained clearance of the warehouse POL Product (High Speed Diesel Oil) through different ex-bond good declaration after payment of leviable duty and taxes with the exception of Petroleum development surcharge for supply to the ships of Pakistan Navy and the said fact stood validated from the goods declaration clearly indicating the goods as **"bonded"** or **"duty paid"** and this was in accordance with the contract executed by the appellant with the Directorate of Procurement (Navy) Ministry of Defence, Rawalpindi, vide No. RRC/824021/346026 dated 26.06.99 containing special clause for duty and taxes not and which read as:-

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> **"The price given in the schedule of the stores are firm and final and without any legal claim on the purchaser. However, after opening of the I.T. till signing of the contract and during the currency of the contract (i.e.) within the contract and during the Pendency of the contract (i.e.) within the original D.P.) if any fresh duty or taxes levied by the Govt., the liability shall be of the purchaser and the same shall be reimbursed by CMA (D.P) to the supplier at actual on production of the documentary prove of its payment duly authenticated. In case of subsequent decrease in taxes and duties levied after opening of the I.T. till signing of the contract and during currency of the contract (i.e. D.P) which may entitle the supplier to claim re-imbursement from the Government the supplier shall be responsible to reimburse the same to CMA (D.P) Rawalpindi under intimation to the purchaser."**

11- In the light of the above clause, it is proved that the appellant and CMA (D.P) enter into contract for supply of HSDO after payment of leviable duty and taxes of all sorts and if the levies is increased between the period of opening of IT and signing of the contract the excess amount has to be paid by the purchaser vice

versa if the existing levy is decreased, the appellant was entitled to claim re-imbursement from the Government for reimbursement to CMA (D.P) Rawalpindi i.e. state. The appellant for the purpose of supply to the Pakistan Navy filed several Good Declaration for export as shown in Annex –A to the show cause notice under Section 131 of the Customs Act, 1969 not under Section 105 or 106 ibid., confirming that the supplies made to Pakistan Navy was duty paid and for the consumptions of their vessels and the said fact stood further substantiated from the form AR1 (meant for duty paid goods) maintained by them and supplied to the respective Collectorate of Federal Excise under the respective provision of the Federal Excise Act, 2001 and Rules and Regulation framed there-under. The appellant subsequently, devised a novel mechanism for avoiding the payment of Petroleum development surcharge, which they had not paid at the time of obtaining clearance under Section 104 of the Customs Act, 1969, adjusted this local sale through form AR-3 on the plea that these sales to Pakistan Navy by him is for their ships proceeding for foreign destination as "provision/ stores ", the term of provision or store is irrelevant to HSDO, which is used for running of the engine and equipments of the vessel akin to the Aircraft of Commercial Airlines, Air Force and Trailer / Tankers proceeding to foreign country, rendering their plea as of no substance instead nullity to the factual aspect of the case. Beside not a single piece of evidence is available on the file and nor was placed by the appellant on the record of the Appellate Tribunal during the lengthy proceeding of hearing, to controvert the leveled allegation through incriminating valid evidence e.g. certification from the Pakistan Navy that HSD was exclusively purchased for their ship leaving for foreign voyage or Goods Declaration filed under Section 105 or 106 ibid or Petroleum Development Surcharge paid by CMA (DP) on the supply to appellant has been refunded to them.

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12- The appellant instead created a process of clever legal fiction by claiming adjustment of the Development surcharge to which he is not entitled under Section 3

of the Ordinance by virtue of the fact that the supply made to Pakistan Navy was not export or provision or store as defined in Section 105 or 106 of the Act and infact were local sale, therefore does not at all fall within the ambit of legal avoidance of tax instead his avoidance of tax by contrivance and the deceitful method turns into evasion, which is not permitted under law. There is a thin line of demarcation distinguishing tax avoidance from tax evasion, both result in dipping into treasury's kitty. The jurists of different countries after years of discussion / deliberation through series of well articulated and skillfully drafted judgments, have reached at an unanimous opinion that the distinction between tax avoidance and tax evasion lies in the legality of a transaction and a deliberate attempt to avoid payment of leviable tax through colorable exercise is tantamount to an illegal act resulting in tax evasion or illegal avoidance, which is not permitted by any standard in the civilized world. In the West Minister case by House of Lords in 1936 a significant departure from the strings through Ramsay Case proved to be a turning point in the interpretation of law and elaborately dealt with in Burmah Oil Co Ltd and reinforced through Furniss Versus Dawson which advocate not to dissect, scan and scrutinize individual transaction in isolation but to consider all these transactions in conjunction and focus on the outcome as a whole. The fall out of the aforesaid three judgments of the House of Lords in Ramsay, Burmah Oil Co. Ltd and Furniss versus Dawsons cases was noted down in other jurisdiction throughout the world. In the hall mark judgment of Mc Dowell and Co Ltd versus Commercial Tax Officer reported as [1985] 154 ITR 148 (SC) India the Supreme Court observed as follows – In the words of Ranganath Mishra JJ:- "Tax Planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is Honourable to avoid the payment of tax by resorting to dubious methods. It is obligatory for every citizen to pay the taxes honestly without resorting to subterfuges". In the words of Chinnappa Ready. J:- "While aggrieved with my brother, Ranganath Mishra. J. in the judgment proposed to be delivered by him, I wish to add a few paragraph particularly

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to supplement what he has said on the "fashionable topic of tax avoidance. My excuse for inflicting this extra opinion is that the ingenious attempt to rationalized and legitimize tax avoidance have always fascinated and abuse me and made me wonder how ready the minds are to adapt themselves and discover excuses to dip into the treasury. The shortest definition of tax avoidance that I have come across is the art of lodging tax without breaking the law. Much legal sophistry and judicial exposition have gone into the attempt to differentiate the concept of tax evasion and tax avoidance and to discover the invisible line suppose to exist which distinguishes one from the others. Tax avoidance, it seems is legal; tax evasion is illegal though initially the law was and I suppose the law still is, "there is no equity about a tax". There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. During the period between the two World War, a theory came to be propounded and developed that it was perfectly open for a person to evade (avoid) income tax, if they could do so legally for sometime it looked as if tax avoidance was even viewed with affection ..... We thing that time has come for us to depart from the West Minister principal as emphactally as British Courts have done and to disassociate our self from the observation of Shah J. and similar observation made elsewhere. The evil consequences of tax avoidance are mani-fold. First there is a substantial loss of much needed public revenue, particularly in a welfare state like ours. Next, there is serious disturbance cause to the economy of the country by the piling up of mountains of black money, directly causing inflation. Then there is "the large hidden laws" to the community (as pointed out by master Sheat Croft in 18 Modern Law Review 209 by some of the best brain in the country being involved in the perpetual war waged between the tax avoider and his expert team of advisors, lawyers and accountants on one side and the tax gatherer and perhaps not so skillful advisor on the other side. Then again there is the "sense of injustice and in equality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it." Last but not the least is the ethics (To be précised, the lack of it) of transferring the burden of tax liability to the shoulder of guideless good citizen from

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those of the "artful dodgers"..... It is neither fair not desirable to aspect the legislature to intervene and take care of every devise and scheme to avoid taxation. It is up to the court to take stock to determine the nature of the new and sophisticated legal devises to avoid tax and consider whether the situation created by the devises could be related to the existing legislation with the aid of its emerging techniques of interpretation as was done in Ramsay, Burmah Oil and Dawson to expose the devises for what they really are and to refuse to give judicial benediction." However, the Indian Supreme Court subsequently in 2002 Azadi Bacho Andolun case didn't agree with the principle laid down in Mc Dowell and Co Ltd Case vs Commercial Tax Officer reported as [1985 1154 ITR 148(SC) India and supported the principle law laid down in West Minister case that "Every man is entitle if he can, to order his affair so that the tax attaching under the appropriate act is less than it otherwise to be." One of the reason for Indian Supreme Court for not subscribing to Mc Dowells judgments lied in the fact that change from the West Minister Principle necessitated a Constitutional Amendment or an Act of Parliament which was earlier overlooked. However, the bottom line of all these case law discussed above revolves around the focal point that colourable dubious and deceitful means / devises if employed result in illegal act amounting to tax evasion as against legal avoidance and which is not permissible. The Hon'ble Supreme court of Pakistan without reference to the above judgment of different jurisdiction has distinguished tax avoidance from tax evasion in its judgments delivered in the case of Regional commissioner Income Tax Company-II, Karachi vs Sultan Ali Jeoffrey reported as 1993 SCMR 266 and has observed that while avoidance of tax by legal method may not amount evasion but the movement avoidance is sought by illegal contrivance-deceitful method and adopting a course not permissible by law turns into evasion. In judgment the term "tax evasion" has been explained as under:

"Evasion with reference to taxation law means to illegally manipulated things in such a manner that the tax payable under law cannot be assesses. Evasion of tax or duty is always in breach of the applicable and binding law. In taxation law, evasion

will mean adoption of such deceitful mechanism and manipulation not permitted by law which may result in reduction or elimination of legal tax liability."

This judgment also refers to the meaning of "Evasion" as given in Stroud's Judicial Dictionary, 4th Edition according to which:-

"Every body agrees that "evade" is capable of being used in two senses (1) which suggest underhand dealing (2) which means nothing more than the intentional avoidance of something disagreeable (Simms v Registrate of Probate 69 LIPC 56).

13- Despite of the above factual position, the advocate of the appellant has place reliance on several reported judgments alike PLD 1970 Supreme Court, 453 Nazir Ahmed vs Pakistan & 11 others, 2002 MLD 130 Union Sports Play Cards Company vs Collector of Customs and another, 1989 SCMR Radhika Corporation & others vs Collector of Customs, the judgments referred as first laid down the law that the customs cannot ignore its construction, whereas the remaining 2 were in regards to departure from existing practice. It is for the appellant to act within the parameter of law and if he at his own indulge in some unlawful act and then took the shelter that it is a precedents and the law should be constructed in accordance with his whims and whishes is not correct as the said construction is not based on the assessment / opinion of the Customs instead he considered his act as correct and fall within the ambit of precedents, this is total absurd. In the instant case of the appellant, there is not an iota of evidence confirming that non payment of Petroleum Development Surcharge by him is due to the existing practice adopted by the Customs, the fact of matter is that he himself adopted the said practice and as such his said act does not fall within the ambit of existing practice, as this was not the practice as he himself paid 153.59 millions during the period of 05.09.2000 to 09.11.2001 against 120 consignments and also starting paying PDL amounting to Rs. 12.09 millions on identical supply to Pakistan Navy confirming that the appellant himself negated his adopted position contrary to law practice. The existing practice has to be supported by the provision of law. If any practice is in derogation of the law that has to be discontinued forthwith. We therefore hold that no question

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of ignoring of departmental construction and departure of existing practice is apparent in the instant case and as such relied upon judgment lend no help being having distinguishable from the case of the appellant. The appellant has also relied upon reported judgment 1992 SCMR 1898 FOP vs Ibrahim Textile Mills, PTCL 2002 CL 1 Assistant Collector of Customs, Dry Port Peshawar and others vs Khyber Electric Lamp and others and alike judgments. In support of his plea that his case fall within the ambit of section 32(3) of the Customs Act, 1969, rendering the show cause notice barred by time and recovery of the non paid PDL stood abate, the said arguments of his is based on misconception and it is of vital importance to reproduce the relevant part of section 32 of the Customs Act, 1969, 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)

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

(3) Where by reason of any inadvertence, error or

misconstruction, any duty or charge has not been levied of has been short levied or has been erroneously refunded. The person liable to the pay any amount on that account shall be served with a notice within (three) years of the relevant date, requiring his to show cause why he should not pay the amount specified in the notice.

Provided that if the recoverable amount in a case is les than one hundred rupees, the customs authorities shall not initiate the aforesaid action

(3A) **********

(4) **********

(5) **********

(5) For the purpose of this action, the expression "relevant date" means –

(a) In any case where duty is not levied, the date on which an order for clearance of good is made;

(b) In case where duty has been erroneously refunded the date of its refund.

14- Upon scrupulous study of the above provision of the customs Act, 1969, for the purpose of limitation under the mischief of this section have been placed in 02 categories. Sub Section (2) is to be read in conjunction with sub Section (1) (a) (b) and it deals with the matter whereby reason of some collusion any duty or charge has not been levied or has been short levied or has been erroneously refunded. The period of limitation prescribed under this section is five years. Which was earlier three years (3) up to 30.06.2000. While in sub Section (3) the period of limitation prescribed is 03 years, which was earlier 06 months upto 30.06.2000 and it covers those matters whereby any reason of any inadvertence error or misconception any duty or charge has not been levied or has been short levied or has been erroneously refunded .

15- The sub Section (3) of 32 speaks about "inadvertence", "error" or

"misconstruction". The deliberate act of the appellant of non paying the PDL least fall within the ambit of any of these words, resultantly, his case does not fall under the ambit of section 32(3) ibid. Perusal of show cause notices show that it contain section 32(1) and 32(2) and the word "evaded payment of development surcharge falsely claiming exemption under SRO 455(I)/96 dated 13.06.1996 and deprived the Government of its legitimate amount of PDL to the tune of Rs. 79,714,028.00." it is on the basis of such allegation that the show cause notices were issued to the appellant under Section 32(1) of the Customs Act, 1969 providing a period of limitation of five years at the relevant time and this is also established and fortified element by the fact that the appellant had collected PDL on the supplied to Pakistan Navy, but the same were not deposited nor appropriated and started clamouring of payment on the basis of different pleas, which was not available to the appellant. Facts floating on the surface of record clearly goes on to prove that it was a deliberate act of the appellant that for evading PDL collected by them from Pakistan Navy and subsequently falsely claim the supplies as duty free provision and store. If for the argument sake the disputed supplies were duty free provision and store admissible under section 106 of the Customs Act, 1969 as claimed by appellant, then he should had filed goods declaration for export under Section 106 of the Customs Act, 1969 and had not collected the same, which he admittedly collected as stood prove from the contract referred in the para supra.

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16- Obviously, for determining the nature of the show cause notice that whether it is issued under sub section (1) and (2) of Section 32 or under Sub Section (3), its contents are to be read as a whole and then on the basis of its substance, it is to be judged that whether it is a show cause under sub section (1) and (2) of Section 32 or otherwise. The respondent in their two identical show cause notices have portrayed the conduct of the appellant as an act to "evade" PDL. This word has its own meaning and connotation as per the Oxford Dictionary of English Language. The word evade refer to an act of a escape from or to avoid specifically by bulling , tricking or eluding and as per Black Law Dictionary, 7th Edition, the tax evasion is

the willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability, and tax evasion is punishable by both Civil and criminal penalties and this is also terms as tax fraud. In the legal parlance looking to the nature of the controversy meaning of this word seems to be even more severely adverse to the conduct of appellant discussed here-in-above by us in para 14 supra.

17- The imposition of penalty may not always be dictated under the protection / shelter of a legal umbrella. In other words the imposition of penalty to perform a statuary obligation or to indulge into glaring, belatent and grave violation of statutory provision is exercised under the relevant provision of law under the doctrine of detoriant punishment. The imposition of penalty need to be exercised judicially keeping in view all the relevant circumstances entailing a particular case. A scrutiny of the case record amply demonstrate that in this case the indulgence of appellants for procurement of ill-gotten gains through non payment of PDL is an act tantamount to contumacious, conscious, deliberate, willful advertent and pre-mitigated. Under non circumstance this case of gross evasion and tax fraud can be equated in the case of procedural lapses minor in consistencies, discrepancies technical frivolities, bona fide mistakes or unforced errors based on forced construction of legal provisions.

18- The appellant had consciously and willfully indulged into the commission of offences through violation of relevant provision of Customs Act, 1969 and Development surcharge Ordinance, 1961 and Rules and Regulation framed there-under in order to acquire illegal, unlawful monitory gain from public exchequer on regular basis through a well thought out and well executed plan. Had the continued and incessant commission of these aforesaid misdeclaration and tax fraud not been unearthed by the respondent no. 2, the public exchequer would have continued to suffer from merciless policy of non paying the PDL at the time of clearance and subsequently claiming adjustment of that through from AR3 by the appellants. despite not entitled warranted as held by us in para supras. We therefore hold that

the officer of original jurisdiction has dealt with the appellant in very sympathetic manner despite not desired in the given circumstances of the case and the gravity of the offences committed by the appellant and even the pitch notified in the respective clauses of Section 156(1) of the Customs act, 1969. Imposed penalty, is rational despite nullity to the punishable clause of section 156(1) of the Customs Act, 1969.

19- In view of the foregoing we are in full agreement with the principles of law laid down in the case law of European Union, British and Indian Jurisprudence and decisions of Supreme Court of Pakistan on illegal avoidance and evasion doctrine. The appellant cannot be allowed to manipulate the provisions of the Customs Act, 1969 and Development Surcharge Ordinance, 1961 to avoid tax (PDL Surcharge) which their competitors, were / are paying faithfully. They cannot be allowed to illegally enrich themselves even being a state enterprise at the cost of government's revenue. The appeals are without merit, hence dismissed.

20- Order passed accordingly.

(Adnan Ahmed)
Member (Judicial-II)
Karachi

(Khalid Mahmood)
Member (Technical-I)
Islamabad

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M.O. 1132 dt 13/8/14.

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