

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

Before Mr. Talib Zia, Member Judicial-II, Karachi.
Mr. Muhammad Nazim Saleem, Member Technical-II, Karachi.

Customs Appeal No.K.1117/2014

M/s. Waterlink Pakistan (Pvt.) Ltd.,
4-A, Kehkashan Town Houses,
Clifton, Block-5, Karachi.

2. Capt. Ghulam Mustafa
S/o Muhammad Hussain,
Managing Director,
M/s. Waterlink Pakistan (Pvt.) Ltd.
3. Rizwan yousuf
S/o Muhammad Yousuf,
Manager,
M/s. Waterlink Pakistan (Pvt.) Ltd.
4. Muhammad Rizwan Ishaq
S/o Muhammad Ishaq,
Assistant Manager,
M/s (OPS) KPY R/o House No.Y-25/2,
19 East Street Phase-I, DHA, Karachi.
5. Muhammad Rafecq Shahzad
S/o Muhammad Hashim,
Office Boy,
M/s. Waterlink Pakistan (Pvt.) Ltd.

ATTESTED



Qaiser Ali
S/o Abdul Sattar,
Supervisor,
M/s. Waterlink Pakistan (Pvt.) Ltd.

Appellants

Versus

Collector of Customs (Adjudication-I),
Customs House, Karachi.

2. D.G of Afghan Transit Trade,
Customs House, Karachi.
3. Collector of Customs,
MCC (Preventive),
Port Muhammad Bin Qasim, Karachi.

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4. Shabir Ahmed,
(Preventive Officer),
Customs House,
Karachi.

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Respondents

2. Customs Appeal No.K.1559/2014

Satrah Khan S/o Khaloo Khan.
Owner of Vehicle No.TLQ-857,
Resident of Dakha Khel, Landi Kotal.
Tehsil Landi Kotal,
Distt. Khyber Agency.

Appellant

Versus

1. The Collector of Customs (MCC). Preventive,
Customs House. Karachi
2. The Collector of Customs (MCC) Appraisalment-West,
Customs House, Karachi.
3. The Directorate of Intelligence.
Anti smuggling Organization (ASO).
West Wharf. Karachi.

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Respondents

Appellants Represented By:

1. Mr. Pervaiz Iqbal Kasi, Advocate (M's. Waterlink Pakistan)
2. Ms. Naureen Naz, Advocate (Satrah Khan),
3. Mr. Imran Iqbal. Advocate (Intervener for Khushal Khan),

Respondents Represented By:

1. Mr. Parvaiz Ahmed, Advocate with Malik Safdar,
Preventive Officer. (MCC Preventive Karachi).
2. Mr. Shahid Dasti, Appraising Officer (MCC Appraisalment
(West), Karachi).
3. Mr. Altaf Ali Chandio, Appraising Officer (Directorate
General. Transit Trade, Karachi).

ATTESTED

Date of Hearing :

20.06.2016

Date of Order :

30.07.2016

ORDER

Mr. Muhammad Nazim Saleem, Member Technical-II, Karachi: This order disposes of Customs Appeals Nos.K-1117/2014 & K-1559/2014 and Misc. Application dated 02.02.2016 filed under Rule No.1 of Order-I of Civil Procedure Code (Acts of 1908) for

Joining as party/appellant in Appeal No.K.1559 of 2014 filed against Order-IN-Original No.77/2014-15 dated 29.08.2014 passed by the Collector of Customs (Adjudication-I), Karachi. Both the appeals involve identical issues of law and facts besides these cases were decided at adjudication stage through a single Order-In-Original No.77/2014-15 dated 20.01.2014. In view of aforementioned position, the same were heard together and are being disposed off simultaneously through this common order in the light of judgment of the Hon'ble High Court of Sindh in Customs Reference No.157 of 2008 - S.M.Naqi s/o Syed Muhammad Hussain, Karachi vs. Collector of Customs (Adjudication-I) and others.

2. Brief facts of the case are that in the year 2012, an MOU was signed between the US Government and the Pakistan Government for handling military cargo to and from Pakistan. SDDC (Department of Defense) USA nominated Ferrell Lines and Waterlink Pakistan (Pvt) Ltd for providing logistical support services for transit of military cargo through Pakistan. The contract to handle the US Military cargo (Non-classified) was assigned by Ferrell Lines to Waterlink Pakistan (Pvt.) Ltd vide e-mail dated 25.08.2013 for export from Afghanistan via Pakistan through Chaman and Port Qasim Customs Stations. The Cargo Manifest No.US/EXP/338/13 dated 30.09.2013 was filed with AC/DC Chaman by the US Consulate GD at Customs Station Chaman was filed by the Clearing Agent Tariq Enterprises. The Waterlink Pakistan (Pvt.) Ltd arranged truck/trawler No.TLG.778 through the Karachi Market broker for transport of container No.USAU-1742645 and USAU=1525824. After completion of all the formalities in terms of CGO 10/2012, the trawler/truck started its journey in November, 2013 and reached IC-3 Terminal at Port Qasim, Karachi on 13.11.2013 i.e. within time frame of 15 days specified in Rule 11 (viii) of CGO 10/2012. The containers arrived at IC-3 Terminal did not enter for export. On enquiry by the staff of Waterlink Pakistan (Pvt.) Ltd.. it came to light that the contents / material inside the container No. USAU-1525824 did not match the declared description. Waterlink Pakistan (Pvt.) Ltd vide its letter dated 18.11.2013 requested Deputy Collector Customs for examination of the impugned container to ascertain the factual position. The US Consulate vide their letter dated 20.11.2013 addressed to Deputy Collector of Customs requested to conduct a joint inspection under supervision of Customs.



In another similar case of pilferage of Afghan transit goods, a FIR No.139/2013 was lodged on 07.12.2013 with the Police Station Bin Qasim, Karachi. The police under Interim Challan dated 31.12.2013 had reported to have busted the gang and the investigation revealed that the same gangsters have also made thefts in other Afghan transit containers including the container loaded on truck /trailer No.TLG-778 in connivance with the concerned driver. Accordingly, an FIR No.6/2014 dated 17.01.2014 was lodged against the driver and other involved. The position was also brought to the notice of Customs authorities vide letter dated 04.02.2014 of Waterlink Pakistan (Pvt.) Ltd. The respondent company had reported the matter on 18.11.2013 to the Customs authority as well as lodged FIR at PS Bin Qasim, Karachi resulting significant progress whereby busted gang of around 13 racketeers, whereas the custom authority conducted examination after about 04 months i.e. on 25.03.2014 in presence of the representative of M/s. Waterlink Pakistan (Pvt.) Ltd and others. The container No.USAU-1742645 was found intact, the goods i.e. auto parts of heavy duty vehicles were found in accordance with the declaration whereas in Container No.USAU-1525824 soil filled in bags was found stuffed in full container. A show cause notice has been issued to M/s. Waterlink Pakistan (Pvt.) Ltd. For recovery of duty and taxes and for violation of various provisions of law disregarding the fact that pilferage / theft had been made by the gangsters in collusion with the driver of the Trailer as un-earthed by the Police vide Charge Sheet No.9/2014 dated 02.07.2014. The said container was loaded on Trailer TLG-778 which belonged to other Bonded Carrier/probably M/s. Freight Solution allowed by the Customs. Therefore primarily the driver of the Trailer and the Bonded Carrier were responsible for safe transportation of the cargo. since the occurrence was beyond the limits of the respondent company and had no role whatsoever in the alleged pilferage/theft and violations.

The case was adjudicated by the learned Additional Collector of Customs (Adjudication-II), Karachi who passed the Order-In-Original No.77/2014-15 dated 20.01.2015. The operative part of the order is as under:

"I have examined the case record and have considered the written as well as verbal arguments put forth by the respondent and departmental representative. The contention of the department is that while the transit goods were enroute to IC 3 terminal at Port Qasim, container no USAU-1525824 loaded on vehicle no TLG-778 has been pilfered.

Thus, according to the particulars in Form A No. 178 the name of the bonded Carrier has been mentioned as M/s. Waterlink Pakistan (Pvt) Ltd. The department has further referred to Rule 9 of CGO 10/2012 and Bonded Carrier Licensing Rules under chapter XXV of Customs Rules and has demanded for recovery of duty/taxes leviable on pilfered goods besides penal action against the bonded carrier and clearing agent. The departmental representative produced copy of Order in Original No 7/2014-15 wherein huge penalty has been imposed upon M/s. Waterlink Pakistan (Pvt) Ltd for pilferage of transit cargo in another case. The departmental representative submitted that the respondents have not approached this forum with clean hands and they have a history of engaging in such malpractices.

On the other hand, the respondent, M/s. Waterlink Pakistan (Pvt.) Ltd has taken the plea that they are not the bonded carrier in this case. The respondent has submitted that the contract to handle US military cargo (Non-Classified) was assigned by Ferrel Lines to M/s Waterlink Pakistan (Pvt.) Ltd vide email dated 25.08.2013 for export from Afghanistan via Pakistan through Chaman and Port Qasim Customs Stations. They have stated that M/s. Waterlink Pakistan (Pvt) Ltd arranged trawler No.TLG-778 through Karachi Market broker for transport of container no USAU-1742645 and USAU-1525824. Once they came to know that the containers have not been cleared for export they approached the Directorate of Transit Trade vide letter dated 18.11.2013 with the request to examine the containers. The contents of the letter dated 18.11.2013 are reproduced hereunder for reference:

"We would like to draw your attention with above subject shipment that arrived at IC 3 on dated 13.11.2013 vide container no USAU-1525824/20 and presently they are held up at IC 3 after the scanning process. We have been informed by IC 3 staff that contents / material inside the subject container is mismatched and they have forwarded the information which is in contradiction to the packing list pasted on container for further action to US military.

In the light of the above development, we hereby request you officially as per order CGO-10 to please conduct physical examination of the subject container and get the exact picture conclusion, as it has created tremendous doubts about the whole shipment, transported from origin Kandahar Afghanistan through point of entry Chaman Pakistan and now having reached at the point of exit Port Qasim Karachi Pakistan.

Your kind and quick response would enable us to determine the fault/negligence and identification of the culprits (driver and other associates) which would then help us to take appropriate legal action against them so as to determine the responsibility / liability if any".

In continuance of this letter M/s Waterlink Pakistan (Pvt) Ltd again approached the Directorate of Transit Trade vide letter dated 04.02.2014. The contents of the same are reproduce hereunder for reference:

"Kindly refer to our earlier letter dated 18.11.2013 on the subject noted above. Further it is to inform that during investigation of case FIR 193/2013 of PS Bin Qasim, as per Interim Charge Sheet (annex A), the police made significant progress, one of the three arrested accused persons namely Meharban Shah under interrogation report disclosed had committed pilferage from different containers including loaded on TLG-778 inclusion with its driver namely Mohammad Hanif. The Police also busted a gang who inclusion with the concerned drivers of the Trailers had committed pilferage of cargo from the containers during transit by diverting the trailers to a particular yard/premises at new Saeedabad District Mitvari, that also included the pilferage of cargo in



the subject mentioned container loaded on trailer No. TLG-778. Therefore the police also had recommended for the registration of further cases.

Consequently a case FIR No.06/2014 dated 17.01.2014 at PS Bin Qasim has been registered against the driver Mohammad Hanif and others (annex B). Further investigation is in process."

The authorized representative submitted that the particulars in Form A No. 178 showing M/s Waterlink Pakistan (Pvt) Ltd as bonded carrier have been wrongly filled in by the respective office. Since the Trailer No. TLG-778 is not registered in their name and belongs to another bonded carrier M/s. Freight Solutions. Furthermore, the authorized representative submitted that section 2(s) of the Customs Act, 1969 has been invoked in the Show Cause Notice which entails confiscation of goods so no demand for recovery of duty/taxes can be made.

During hearing, the authorized representative was asked to provide any documentary evidence to substantiate his claim that the transport used in this case has been hired by them and belongs to another carrier, however, he reiterated the argument that they arranged the vehicle through a broker. Thus, their stance that they are not the bonded carrier cannot be accepted given the fact that their name is clearly available in Form A No 178. Furthermore, the police authorities have recorded the statement of manager logistics of M/s Water link Pakistan (Pvt.) Ltd in charge sheet no 91/2014 where he has categorically stated that they have arranged trawler no TLG-778 from local market to transport transit goods and no reference whatsoever has been made to any other bonded carrier. Even in the correspondence of the respondents with the Directorate of Transit Trade (Reproduced above) no reference has been made that the respondents are not bonded carrier. For arguments sake, if one accepts their contention that they are not bonded carrier of the consignment in question, no document has been placed on record wherein they have made any effort to get form A no 178 (showing their name as bonded carrier) corrected. The Directorate of Transit Trade should however, investigate as to how the goods were allowed to be carried on trailer No. TLG-778 when it was not registered in the name of the carrier and fix responsibility for such lapse.

Since the goods have been pilfered during transit, the provisions of Section 2(s) of Customs Act, 1969 are attracted and as such the arguments of the respondent that Section 2(s) is not applicable is not valid. Now let us examine the provisions of Bonded Carrier Licensing Rules issued under Customs Rules 2001 and CGO 10 of 1969. For ease of reference the relevant provisions are reproduced hereunder:

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Rule 329(1): Responsibility of the carrier:- Prior to submission of application for transshipment the carrier shall satisfy himself that the actual description, quantity and weight of the goods under transshipment are as per declaration in the IGM of the vessel. In case any mis-declaration or substitution is found at subsequent stage, the carrier shall be held responsible under Section 32 and 121 of the Act.

Rule 484: Violation of rules: Where any violation of act or rules made there under including these rules is detected during the transit of cargo from port of entry to port of exit, the carrier shall, in addition to any other action as is envisaged in the said Act or the rules, be liable to pay the duty and taxes as may be leviable on such cargo.

Provided that no punitive action shall be taken against the carrier without affording the carrier an opportunity of being heard.

The relevant clauses of CGO 10 of 2012 are reproduced hereunder:

- Clause 9 (IX):- The transportation of the cargo from the Port of entry to the Port of exit in a safe and secure manner shall be the responsibility of the concerned authorized carrier.
- Clause 11 (IV):- If the goods are found missing, stolen or remove due to any reason penal action shall be taken against the concerned persons including the carrier, authorized agent and focal person along with recovery of the duty and taxes involved in accordance with the provisions of Customs Act, 1969.

A plain reading of the afore-stated provisions makes it clear that the carrier is responsible for safe transportation of the goods from the port of entry to the port of exit and if any pilferage takes place he is liable to pay duty / taxes leviable thereon. Since in his case pilferage has been established through physical examination of goods, the carrier M/s Waterlink Pakistan (Pvt.) Ltd has failed to safely transport goods from port of entry to port of exit thus, they are liable to pay duty/taxes leviable on the pilfered goods.

In the light of the facts narrated above, the charges leveled in the Show Cause Notice stand established. M/s. Waterlink Pakistan Ltd being bonded carrier is liable to pay duty and taxes amounting to Rs.21,88,224/- (Customs Duty amounting to Rs.1,115,100/-, Sales Tax amounting to rs.817,209/- and Income Tax of Rs.255,915/-) on the pilfered goods in terms of Rule 484 of the Customs Rules read with section 32(1), 32(A) of the Customs Act, 1969. Besides a penalty of Rs.63,72,000/- (equivalent to the value of goods) is also imposed upon them under section 156(1), (8), (14), (64) of the Customs Act, 1969. No order as to the confiscation of container No.US4U-1525827 and trailer No.TLG-778 is made since the same have not been seized by the detecting agency under Section 168 of the Customs Act, 1969, however, department is advised to prepare proper seizure-cum-contravention reports in future. A penalty of Rs.500,000/- (Rupees Five Hundred Thousand Only) is levied on the clearing agent M/s.Tariq Enterprises, Ram Chand Bazar Chaman, Quetta as he filed GD knowingly that the trailer No.778 is not registered in the name of the bonded carrier under Section 156(1), (8), (14), (14A), (47), (63) & (64) of the Customs Act, 1969.

4. The Appellants feeling aggrieved filed appeals before this Tribunal on the grounds as under:

ATTESTED



That the respondent has passed the impugned order-in-original contrary to the facts of the case and law and as such the same is not maintainable at law.

That M/s Waterlink Pakistan (Pvt.) Ltd had not submitted any carrier manifest on behalf of subject vehicle at the port of entry to the Customs. Goods Declaration (GD) was out of charge of the Customs on Truck No.TLG-778 purportedly registered with M/s. Freight Solution, as the bonded carrier. It was the primary responsibility of relevant Customs staff at the point of entry to scrutinize the documents properly along with other SOP's, set forth under DGO 10/2012. Therefore, in this case the responsibility for safe transit of cargo cannot be attributed to the appellant company. As per the SOP/terms and condition of the Licensing, the bonded Carrier / Freight Solution had understanding/responsibilities for safe transportation of the cargo hence, the said bonded carrier and truck driver/owner were responsible for nay pilferage occurring during transit on this truck. The entire show cause notice is based on this

fundamentally incorrect assumption that M/s. Waterlink Pakistan (Pvt.) Ltd was the bonded carrier of Truck No.TLG-778 in the impugned case. The show cause notice as well as the impugned Order-in-Original is liable to be quashed on this ground alone, otherwise the Customs authority should produce the relevant record of licensing showing enlistment of bonded carrier relating to the said Truck No.TLG-778.

The two containers loaded on the trailer contained transit goods meant for transit to USA via Port Muhammad Bin Qasim at Karachi. The goods stuffed in the two containers were diverted to a place at New Saeedabad, District Mityari Interior Sindh by the drivers, where one of the two containers was pilfered/stolen and replaced with mud/sand bags to account for weight of the stolen goods. Thus, the transit goods pilfered/stolen at New Saeedabad as per investigation of police cases viz FIR No.193/2013, 04/2014 and 06/2014, whereby 13 gangster have been sent up for prosecution before the Court of Law.

That from the police investigation it has been established that a gang of 13 racketeers was involved in pilfering the cargo as evident from Final Charge Sheets, charge framed by the Honorable 3rd Additional Session Judge, Malir, Karachi and the written arguments filed by the police investigator before the Court in bail application No.1944 of 2014 in respect of police cases viz 06/14 and others and none of the employees of M/s. Waterlink Pakistan (Pvt.) Ltd was involved in the act of pilferage.

That the confession of the driver of vehicle No.TLG-778 is a clear evidence that the pilferage was not done by the appellant. Thus, the acts of purportedly M/s. Freight Solution and driver are clear evidence/the Customs record of licensing to prove that purportedly M/s. Freight Solution was the real bonded carrier.

That as regards the name of M/s. Waterlink Pakistan (Pvt.) Ltd mentioned on "Form A No.1788", it is clarified that the "Form-A is a "Sealing Form" which contains requisite information to be duly signed by the "Sealing Agency i.e. Customs". The appellant / as well as US Consulate did not authorize M/s. Tariq Enterprises under authorization letter submitted to AC/DC customs at Port of Entry for any act in connection with this consignment/containers. Hence, appellant is not responsible for any wrongful entry made in Form-A. Neither the appellant nor the US Consulate authorized/requested the AC/DC Customs at port of entry for the authorization of M/s. Tariq Enterprises. Hence, appellant is not responsible for any wrongful entry made in Form-A. The filling and signing of Form-A is not an act of the appellant whosoever filled in such wrong entry, it was imperative for the Customs to check the veracity/true status of the carrier before signing the sealing documents.

That normally entries in the Form-A are filled in carelessly with unauthentic information. Here we would like to put on record a sample Form-A which has been filled in with the CHAL Nos. of Clearing Agents instead of mentioning the name of bonded carrier. This vividly proves the stance of the appellant that merely putting name of the appellant in the Carrier column of Form-A does not make them responsible. The customs authority has to prove the actual bonded carrier by producing the relevant record of licensing. Therefore, holding the appellant responsible merely on this ground of Form-A is unlawful and unjust.

Importantly the Customs authority, before fixing responsibilities upon the appellant company, had to refer / produce the relevant record of licensing, in order to determine the actual bonded carrier of the involved trailer TLG-778. The safe and secure transportation of the cargo was the responsibility of the bonded carrier as envisaged in Para-9(ix) of CGO-10.

In the instant case the containers were transported on Trailer No.TLG-778, which belonged to purportedly M/s. Freight Solution. This fact can be verified with the information available with the customs licensing authority or the Assistant Collector, Import Section in terms of Rule-



329(5) of Customs Rules, 2001. Thus in terms of above provisions of law, the bonded carrier i.e. purportedly M/s. Freight Solution is responsible for the pilferage of the containers.

That the CGO-5 of 2013 dated 9th July, 2013 (Amendment in CGO-10, 2012) Clause-C (IV) provides that:-

- i. "Before the goods are allowed "Gate out" by the terminal operator or the Customs staff as the case may be. they shall be presented to the Customs Containerize Sealing Unit (CCSU) or the Customs sealing staff for affixing of seals and feeding of the seal number and other relevant information in the system. The sealing staff shall verify the installation of tracking device in case of the container as well as on the vehicle and generate the "Transport Note" for handing over the cargo to the carrier."
- ii. Therefore, it was absolute responsibility of the Customs authority at ports of exit/Chaman & Torkham, to check veracity of the carrier as bonded carrier through official data record and proper documentation, before out of charge ensuring transiting the goods through bonded carrier to Karachi for onward shipment.

That in terms of Rule-II (iv) of CGO-10/2012 if the goods are found missing, stolen or removed due to any reason, penal action shall be taken against the concerned person/bonded carrier, driver/owner of the truck and the persons involved in pilferage. The goods were transported on the Customs Bonded carrier purportedly M/s. Freight Solution Truck, but no punitive action has been taken against them. On the contrary a huge penalty (Rs. 6,372,000) has been imposed on M/s. Waterlink Pakistan (Pvt) Ltd along with demand for payment of duty / taxes amounting to Rs.21,88,224/-, although they had neither transported the impugned containers as bonded carrier of trailer No.TLG-778 nor were found involved in the theft / pilferage, carried out at New Saeedabad, District Mityari Interior Sindh as per Final Report of Police in the FIRs No.193/2013. 04/2014 and 06/2014, duly registered with them.

That it was also responsibility of the NLC tracking / monitoring control room to ensure the monitoring of the movement of the consignments loaded on the trucks during transit till its shipments. Such incident should have been detected if the control room was properly monitored / supervised.

That the Rule-327, 328 and 329 of the Customs Rules, 2001 relate to transshipment and are not related to transit trade. Rule-484 of the Customs Rules describes that where violation of Act / Rules is detected during the transit of cargo from the port of entry to the port of exit, the carrier shall, in addition to any other action as envisaged in the said Act, or the Rules, to pay the duty and taxes as may be liable on such cargo. This rule is not applicable to M/s Waterlink Pakistan (Pvt.) Ltd. as they were not the bonded carrier of Truck No. TLG-778 in the transportation of impugned containers. Therefore, no action is warranted against M/s. Waterlink Pakistan (Pvt) Ltd. vide Rule-484 of the Customs Rules, 2001.

That Clause-II(IV) of CGO-10/2012 describes that if the goods are found missing / stolen or removed due to any reason, penal action shall be taken against the concerned person including the carrier, authorized agent and focal person along with recovery of the duty and taxes involved in accordance with the Customs Act, 1969. Here we would like to reiterate that the police has investigated the matter and un-earthed the gang which is responsible for theft/pilferage of transit goods. The action may be taken against the culprits involved in theft/pilferage of the transit goods.



It has already been explained that M/s. Waterlink Pakistan (Pvt) Ltd was not the bonded carrier for transportation of the impugned these transit containers. The containers were transported on the bonded carrier Purportedly M/s. Freight Solution Truck No.TLG-778 and by the drivers / Owner. therefore, M/s. Waterlink Pakistan (Pvt) Ltd. are not liable to pay any duty/taxes on goods pilfered at New Saeedabad District Mityari Interior Sindh. Since no violation of Section-2(S), 16, 32(1), 32A, 128,129 of the Customs Act,1969 and the Rules framed there under was made, therefore, the penalties u/s 156(1) against the appellant cannot be leveled.

That the appellant would like to point out the facts as detailed below:-

- i) It is imperative to establish through the relevant record of customs licensing authority as to who as the bonded carrier as per their enlistment regarding - Trailer No. TLG-778 and fix the responsibilities accordingly.
- ii) The appellant company did not filled affidavit / undertaking regarding trailer in question as required under sub rule (5) of rule 329 read with sub rule (7) of rule 328 of Customs rule 2001.
- iii) The customs authority at port of entry neither required the carrier manifest from the appellant company nor filed the same. The customs authority had to complete such all formalities from the bonded carrier / purportedly M/s. Freight Solution being the bonded carrier with regard to the said trailer used for transiting the impugned goods.
- iv) That the Shipping Bill No.750 dated 30.10.2013 was filed by M/s. Tariq Enterprises, a Customs House Agent, showing the Container Nos. USAU-1742645 and USAU-1525824 to be transported vide Trailer No. TLG-778.
- v) That the reverse of the Shipping Bill has been stamped as "Detail as per Form-A No. 1788 which was prepared and signed by the Customs Officer at the Back and without the knowledge of the appellant wrongly mentioning the name of M/s. Waterlink Pakistan (Pvt.) Ltd. - as Bonded Carrier.
- vi) That no evidence has been brought on record to prove that appellant had acted as Customs House Agent or filed Shipping Bill for the transportation of Container No. USAU-1742645 and USAU-1525824 nor they have acted as Transit Cargo Carrier.
- vii) That the transit cargo vehicle TLG-778 carrying Container No. USAU-1742645 and USAU-1525824 was not carried by M/s. Waterlink Pakistan (Pvt) Ltd but instead by Muhammad Hanif of purportedly M/s. Freight Solutions who is the driver / owner of the Carrier Vehicle TLG-778.

That there is no willful act, negligence or default on the part of M/s. Waterlink Pakistan (Pvt) Ltd. in the process of transit of Container No.USAU-1525824 containing US military cargo stolen at Mityari, New Saeedabad Interior Sindh by the gangsters in connivance with the driver of the truck / trailer No.TLG-778. In FIR No.6/2014 the Police investigated the issue and un-earthed a gang involved in the pilferage/theft of the transit goods. Police also arrested four gangsters, including the driver of the trailer/truck No.TLG-778, and furnished Charge Sheet No.91/2014 in the Court. Police has not implicated M/s. Waterlink Pakistan (Pvt) Ltd. in the pilferage/theft of transit goods. As such the liability of Rs.2,188,224/- of Customs duty and other taxes created against M/s. Waterlink Pakistan (Pvt) Ltd. is liable to be withdrawn.



That the legal provisions invoked in the impugned Order-in-Original are not applicable on the appellant. A brief summary is given below:

i) Violation of Rule 9 of CGO 10 / 2012

There are 11 sub-rules [(i) to (xi)] of Rule 9 of CGO 10 / 2012. Each sub-rule deals with different situation. It is not indicated that which sub-rule(s) has actually been violated. As such allegation being vague is liable to be withdrawn as held in the case reported as 2011 PTD (Trib.) 1978 wherein, the Inland Revenue Appellate Tribunal has held that:

"(b) Sales Tax Act (VII of 1990) —

5. 36— Recovery of tax not levied or short-levied or erroneously refunded - Show-cause notice— Non-citing of relevant subsection of S.36. Sales Tax Act, 1990 — Validity — Where the Adjudicating officer did not invoke subsections of S. 36 of the Sales Tax Act, 1990, the show-cause notice was not only void but also nullity in the eyes of law due to non-citing of subsection (1) or subsection (2) of S.36 of the Sales Tax Act, 1990— Tax authority while issuing the subject notice will have to incorporate the grounds and reasons very clearly and explicitly so that it could be ascertained whether recovery of sales tax was made under subsection (1) or subsection (2) of S.36 of the Sales Tax Act, 1990 — Failure on the part of authority while issuing show-cause notice without mentioning subsections of S.36 of the Sales Tax Act, 1990 would render his order invalid and illegal and against the law — Show-cause notice served upon the taxpayer by the Adjudication Officer was patently illegal and without lawful authority as neither the allegations as specified under subsections (1) and (2) of S.36 of the Sales Tax Act, 1990 were leveled nor even the subsection (1) and subsection (2) of S.36 of the Sales Tax Act, 1990 itself had been invoked in the operative part of the show-cause notice — All orders based thereupon were liable to be set aside — Validity of show-cause notice was fundamental to the assumption of jurisdiction by the revenue authorities to pass the orders — Show-cause notice and subsequent order were held to be patently devoid of jurisdiction and lawful authority by the Appellate Tribunal.

2001 SCMR 838; GST 2004-CL 635; GST 2005 CL 239; Messrs. Inam Packages, Lahore v. Appellate Tribunal. Lahore 2007 PTD 2265 and Assistant Collector Customs and others v. Messrs. "

ATTESTED



All the formalities required for the transit of the containers were fulfilled and Customs allowed the transit permission. The pilferage of the cargo is a criminal offence and the persons who committed the offence are liable to imposition of fine/penalties and return of goods. An innocent person who has performed his duties as per prescribed procedure and is not a party to the commission of offence is not liable to any penal action. M/s. Waterlink Pakistan (Pvt) Ltd. acted promptly as soon as they learnt about the mishap and informed the Customs about the discrepancies as and when it came to their knowledge.

iii. Bonded carrier Licensing Rules under Chapter XXV of the Customs Rules.

Rule No. 638 to 641 of the Customs Rules, 2001 deal with bonded carrier licensing rules. Rule 641 relating to the responsibilities of the bonded carrier has five sub-rules. It has not been indicated in the SCN nor in ONO which rules had been violated by appellant. As such the allegation is liable to set aside as no violation of any rule or sub-rule has been made. since the appellant company was not the bonded carrier of the involved trailer.

iii). Section 16, 32(1), 32A of the Customs Act, 1969.

M/s. Waterlink Pakistan (Pvt) Ltd was neither the bonded carrier of the involved truck nor its staff was party to the pilferage / theft of the transit cargo. They immediately informed the Customs when the matter came to their notice and started inquiry/ investigation. The charge of violations of Section 16, 32(1), 32A of the Act is liable to be withdrawn as no such violations has been made by M/s. Waterlink Pakistan (Pvt) Ltd.

iv). Section-128 and 129 of the Customs Act. 1969.

In terms of Section 128, any goods may be transported from one part of Pakistan to another through any foreign territory, subject to such conditions as may be prescribed by rules for their due arrival at the destination. This situation is not relevant to the case under reference. Similarly, Section 129 relates to the power of the appropriate officer to allow transit of the goods without payment of the duties. No violation of Section 128 or 129 of the Customs Act, 1969 has been made by M/s. Waterlink Pakistan (Pvt) Ltd and as such the charges are liable to be withdrawn.

v). Punishments under various sections and sub-sections of the Acts /procedures.

Since no violation has been made by M/s. Waterlink Pakistan (Pvt) Ltd. and they acted in a lawful manner, the invocation of penal clauses (8), 14, 14A, 47, 63, 64 of Sub-Section (I) of Section 156 of the Customs Act, 1969 read with Section 3(1) of the Import and Export Control Act, 1950 and Import Policy and Procedure Order 2012-2013 are liable to be withdrawn.

In view of the factual and legal position stated above, it is prayed that this honorable Appellate may be pleased to:

- i) Set aside the Show-Cause notice as well as the impugned Order-in-Original arising therefrom being not maintainable under the law.
- ii) Declare that M/s. Waterlink Pakistan (Pvt) Ltd. was not the bonded carrier of Trawler No. TLG-778.
- iii) Declare that the entry in Form "A" No. 1788 showing M/s. Waterlink Pakistan (Pvt.) Ltd. as carrier signed by the Customs sealing staff is incorrect.
- iv) Declare that the appellants did not indulge in any pilferage / theft and hence are not liable to pay Customs duty / taxes and the penalty amount which stands remitted in whole.
- v) Declare that purportedly M/s Freight Solution was the bonded carrier of the Truck No. TLG-778.

ATTESTED



The respondent / Model Collectorate of Customs (Appraisement-West), Karachi
filed para-wise comments on grounds of appeal as under:

That in the instant case goods of incriminating nature were [o:fered em-rite Afghanistan to Port Muhammad Bin Qasim, Karachi for onward destination to USA. In this case goods were not seized, however container which brought the goods from US Military in Afghanistan were seized by MCC-Preventive being piece of evidence as same were being dealt with at the Container Yard of the Appellant with a view to eliminate all possible clues for the enlargement of investigation. as such, FIR was accordingly lodged. In the

circumstances, issue of jurisdiction is nothing to divert kind attention of this Honourable Tribunal from the basic fact of the case which led to the institution judicial as well as quasi-judicial proceedings against all the appellant. While doing so by the Seizing Agency of MCC-Preventive all mandatory requirements were accordingly fulfilled;

That the appellant in the Memo of Appeal admitted their contract with US Military for the transportation of their goods. In the instant case, it is matter of fact and record that three containers reportedly containing US Military goods valued at thousands of US Dollars. It is further matter of record that all the three containers should have been safely transported from Afghanistan to Port Muhammad Bin Qasim for its onward dispatch to USA but on the ace of case record they failed to discharge their contractual obligations;

That truck numbers mentioned in this Para might have not been owned by the appellant but it is absolute fact that containers being of US Military were laden onto it on behalf of M/s. Water Link (Pvt) Limited for its safe transportation. It is further matter of fact as far as available record is concerned that M/s. Tracon Services and M/s. Ehasanuddin & Co. are under contractual obligation to lift the cargo or US Military, Afghanistan as Bonded Carrier while the appellant are the approved Bonded Carrier in this behalf. In the circumstances it can safely be concluded that show cause notice was rightly issued to the appellant M/s. Water Link (Pvt.) Limited and that they participated in the adjudication proceedings and at many occasions adjournments were sought on the pretext of serious illness of Captain Ghulam Mustafa being the Managing Director of the above mentioned Bonded Carrier. For the sake of arguments, if they have no concern with the transportation of three containers in question, subsequent initiation of judicial and quasi-judicial proceedings they were at liberty to seek kind indulgence of Superior Judicial Forums of the country:

That the appellant has attempted to intermingle the concept, meaning and definition of "smuggling" and that as to how they concluded that pilfered/stolen goods were "smuggled". The contentions of the appellant as available in this Para-4 are nothing to save their skin on any pretext, whereas, the customs authorities have acted within the defined boundaries of law and at no stage crossed their limits:

That as submitted herein above that in normal course of functions, show cause notice are based on Contravention Report/Seizure Report for the initiation of adjudication proceedings. Whereas, completion of investigation is the subject matter for the initiation of criminal proceedings, in this case, Interim Challan was submitted by the then Investigating Officer of MCC-Preventive and subsequently it was treated as Final by the then learned Presiding Officer. It is further submitted that investigation of this case is of complex nature, however, on the exploration of it, Supplementary Challan has been submitted in the Honourable trial Court, however, investigation is still underway to finalize it logically:

That it is matter of fact that M/s. Water Link (Pvt.) Limited was under contractual obligation for the safe transportation of US Military cargo irrespective of the fact that vehicles (trucks) were their own or otherwise. Since the above named Bonded Carrier themselves admitted about MOU between US Defence Department and them, therefore, they have rightly been served with show cause notice and orders have also been justifiably passed against them whereby penalty has been imposed upon them for the acts of omission & commission committed by them emerged in the shape of their absolute failure to comply with the provision of the Customs Act, 1969 and Rules framed there-under:



That it is interesting to note that the appellant on one hand state that they were not bonded carrier and on the other hand they seems to be keen interest in monitoring the movement of containers, pilferage thereto and bringing the same into their Container Yard. It is further matter of record that the appellant are well aware about the proceedings/investigation carried out by the concerned Police Stations but they failed to bring on record that as to where the stolen goods have gone even after arresting of 13 gangsters. In the circumstances it can safely be concluded that the appellant on one pretext or others are desirous to save their skin:

That in view submissions made herein above the appellant were under contractual obligation for the safe transportation of US Military cargo within the time period as envisaged under the statutes. It is immaterial to consider that as to whether carrying vehicles were their own or not, however fact for discharging their contractual obligation cannot be denied:

That under the contents of Para-9 the appellant have admitted their nomination to handle the military cargo which give rise to the credence that such contract/nomination should have been arrived at being the M/s. Water Link (Pvt.) Limited as Bonded Carrier as Licensee of Customs. Under such circumstances, the appellant cannot be debarred from the liabilities and responsibilities which they cannot discharged in lawful manners:

That it may be appropriate to submit here that criminal proceedings and adjudication proceedings are altogether different and are independent from each other. It is further matter of fact and law that quasi-judicial proceedings after issuance of show cause notice are to be conducted for its disposal within the time frame as envisaged under the Customs Act, 1969. Under the circumstances the learned Adjudicating authority was not under obligation to wait for the final outcome of investigation, therefore, has discharge his duties within the norms of natural justice:

That the staff members of the appellant, present in their Container Yard at Port Muhammad Bin Qasim at the time when raid was conducted by the staff of ASO/Headquarters, MCC-Preventive were found in unscrewing the doors of containers and playing with it. All of them were prima facie considered as involved in the commission of offence as such they were booked and nominated in the FIR, merits or demerits of which either could only be agitated before the superior judicial forums of the country. Further perusal of submissions made the Para under comments it is found that driver of trailer No.TLC-514 accepted the pilferage of goods at Saeedabad but there is complete silence about recovery of such stolen goods after the matter was investigated by concerned police officials who succeeded in bringing 13 gangsters under the clutches of law:

ATTESTED



That no evidence is made available in support of grudge of ex-employee of with the company, therefore, contention of bringing tools and equipment for opening of rivets is not tenable. The grounds appearing under this Para 12 at (i) to (iv) are not sustainable in the light of submissions made herein above in the preceding paragraphs:

That the appellants were primarily nominated to deal with US military cargo and transport it either through their own vehicle or otherwise. In the circumstances their pleas taken in this Para-13 hold no grounds for their exoneration from the charges/allegations leveled against them:

That for the sake of argument if it may be admitted that the appellants did not act as Bonded Carrier but is established fact that they were nominated to handle with the US military cargo. According to meaning & definition of handling all subsequent arrangements for the transportation of cargo inclusive the arrangement of Bonded Carrier

or use of their own vehicle falls within the definition of "handling the cargo" which fact is undeniable on any pretext;

That it is specifically pointed out that under the opening Para of the Appeal the appellant admitted execution of MOU between them and Department of Defence USA for handling of their goods to/from Afghanistan etc. It is the sole responsibility of handling agent to safeguard the interest of the company or individual on whose behalf he is dealing with such goods. The appellants did not bring on record any document which could debar them from their responsibility from the payment of chargeable duty & taxes. therefore, they are liable to make chargeable duty/taxes on the goods as well payment of penalty imposed upon M/s. Water Link (Pvt.) Limited to the tune of Rs.50,000.000/- and personal penalty imposed upon each individual appearing in the Order-in-Original:

That order-in-original was issued on the basis of requisite information/record and the matter was to be adjudicated within the time frame as stipulated under the Customs Act, 1969 and that proper opportunities were provided to the appellant to defend their case and after proper observation of law, rules & regulations, the order-in-original was passed which is maintainable in the eye of law:

In view of submissions, this Honourable Tribunal may be pleased to dismiss the present appeal without providing any relief to the appellant in the larger interest of justice.

6. The respondent / Directorate General (Transit), Karachi filed cross objections/ counter comments on behalf of respondent as under:

That at the outset it is respectfully submitted that as per Section 195-B of the Customs Act, 1969, no appeal can be entertained until and unless the adjudicated amounts is paid by the appellants or the learned Bench of the Appellate Tribunal may pass an appropriate order to protect the revenue/adjudicated amount. The facts and circumstances of the case are proving that the appellants have not approached the Hon'ble Appellate Tribunal with clean hands and infact acted mala-fidely, therefore, unless the adjudicated amount is paid or an appropriate interim order is passed by the Appellate Tribunal for protection / deposit of the adjudicated amount, the proceeding in the subject matter/appeal would be utility in the eyes of law and would be termed as an extra-ordinary concession/benefit to a person, who approached with unclean hands. It is pertinent to mention here that even the appellant's appeal is not accompanied with an application under Section 195-B of the Act. Therefore, keeping in mind the law settled by the Hon'ble Supreme Court of Pakistan in its reported judgment of West Pakistan Tank Terminal (Pvt.) Ltd (2007 SCMR 1318) and Paramount Spinning Mills (2012 SCMR 1860) the subject appeal is liable to be dismissed on this account alone



That, without prejudice to the above, admittedly it is a case of "pilferage of transit goods en-route", which attracts the provisions of Section 2(s) of the Act. Though admitting this fact, however, the appellants are taking refuge behind their feeble ground that they are neither a bonded carrier nor a clearing agent in the subject case, whereas facts & circumstances of the case and even the appellants' own submissions proved that the appellants statements in this regard are false / incorrect and nothing more than an afterthought a concocted story to save their skin from the anticipated penal action and to avert the liabilities accrued on them due to the en-route pilferage of the transit cargo and failure to adhered to their responsibilities as envisaged in the Rule 90, 101, 389 and Chapter-XXV of the Customs Rules, 2001, read with the provisions of C G O 10/2012. The appellants had, thus, also contravened the provisions of Sections 2(s), 16, 32, 32-A,

128 and 129 of the Act. punishable under clauses (8), (9), (14), (14A), (47), (63), (64) of Section 156(1) of the Act. read with Rule 651 of the Customs Rules, 2001.

That apart from the facts and circumstances of the case, established by the "Adjudication Authority", under Section 179 of the Act, the following submissions of the appellants themselves establishes the falsity of the appellants statements e.g. "they are neither clearing agent nor bonded carrier and have no connection with the cargo's transportation from Chamman to Q.I.C.T. Karachi":-

- a) Admittedly the appellants are sub-contractor of U.S.A. Military's cargo for providing Logistical Support Services for transit through Pakistan (Para(1) of appeal refers) :
- b) The containers were received by the appellants at Chamman- as an authorized representative of the U.S. Army and admittedly arranged truck/trailer through the Karachi Market broker (Para(2) of the reply to SCN submitted by the appellants and statement of their employee / manager before Police are referred). The prescribed Form-A is also showing that the appellants has assumed the responsibility of bonded carrier-cum-customs agent.
- c) Admittedly the appellants are licensed bonded carrier-cum-agent in terms of Rule 90 of the Customs Rules, 2001. This fact is also confirmed by the Consulate General of the U.S.A. vide letter No. USC/EXP/338/13 dated: 30-09-2013,
- d) The statement of the Driver and Manager. Water Link further establishes that the cargo was owned by the appellants as principle representative in Pakistan on behalf of the U.S. Army and as per sub-contractor, thus, they are/were responsible for provision of Logistic Service for them in Pakistan in the capacity of bonded carrier-cum-customs agent. Therefore, keeping in view the provisions of Rules 90, 101, 389, 651 and Chapter-XXV of the Customs Rules, 2001. read with Section 219, 2(s), 32, 32A, 128, 129 and relevant, clauses of Section 156(1) of the Act. The appellants are responsible for pilferage and loss sustained by the Government for such goods, which have been pilfered for consumption in Pakistan.
- e) That admittedly the impugned containers reached at IC-3 Port Qasim on 13-11-2013 and the scanner has detected the pilferage; rather the en-route replacement of the precious goods with the sand bags. The appellants, as a premeditated plan, have stated to have forwarded a letter dated 18-11-2013, with the statement that the IC-3 staff has informed them about mis-match of the cargo. The appellants' this smart move also proves their guilt and refute their statement that they are neither the bonded carrier nor the customs agent. Here question arises when they are not the bonded carrier or the customs agent then as to why the IC-3 staff have made such information to them and under what capacity they approached the Directorate of Transit vide letter dated 18-11-2013 about the said container / cargo ? All the aforesaid concrete evidences and circumstantial evidences are proving, beyond any iota of doubt, that the appellants are the actual culprits / master mind and acted as bonded carrier-cum-customs agents, in terms of Rule 90 of the Customs Rule, 2001. with guilty mind for en-route pilferage of transit cargo, which become dutiable cargo if the same is not transited and pilfered en route for the purpose of home consumption.
- f) That the facts and circumstances of the case are proving that as per Customs Rules, as aforesaid, the filing of F.I.R. against the driver, etc. do not absolve the



bonded carrier from his prime responsibility to safely transport the cargo to its destination and if failed for any reason, then make good the loss sustained by the Government for an admitted act of smuggling through en route pilferage besides making payment of adjudicated amount of penalties.

That in the light of submissions made above and considering the facts & circumstances of the case, as established by the Adjudication Authority, each & every averment, contained in the memo of appeal, except as specifically accepted herein, is denied being incorrect, mis-leading, concocted & contrary to the facts/circumstances of the case and the appellant is put to strict proof thereof.

In the light of submission made above, the facts/grounds submitted above, it is respectfully prayed that this Honourable Customs Appellant Tribunal is prayed to dismiss the subject appeal to enable the respondent departments to recover the adjudicated amount of duties, taxes, penalties, etc. alongwith surcharge, in view of the law settled by the Hon'ble Supreme Court of Pakistan in the case Paramount Spinning Mills (2012 SCMR 1860).

7. The respondent / MCC (Preventive): Karachi filed cross objections/counter comments on behalf of respondent as under:

That the contention of appellants is not admitted being fake and misleading. Facts of the case are that US Consulate General, Karachi authorized M/s. Waterlink Pakistan (Pvt) Ltd for transportation of transit cargo of US forces from Afghanistan to Karachi, specifically mentioned the CGO 10 of 2012, notified by FBR exclusively for transportation of ISAF / NATO cargo to and from Afghanistan. The transportation of such consignments can only be made by a bonded carrier / transport operator licensed under Chapter XXV of Customs Rules 2001. The Deputy Director, Transit Trade Torkham's letter No. 1-5/TST/MISC/NC 25/15/432 dated 06-07-2015 confirms that appellant (M/s. Waterlink Pakistan Pvt. Ltd) being the sole bonded carrier was authorized by the US Consulate General, Karachi vide letter No. USE/EXP/347/13 dated 07-10-2013 for transportation of ISAF/NATO US Military cargo in container No.LMSU-1400780 on vehicle NO.TLQ-857 from Torkham Customs Station to Port Muhammad Bin Qasim, Karachi. It is further added that the appellant had furnished an undertaking to the Deputy Collector, Customs Station Torkham dated 10-10-2013 for safe transportation of the subject consignment from Torkham to Port Muhammad Bin Qasim and concluded that M/s.Waterlink (Pvt) Ltd are the genuine transport operator authorized by US Consulate Karachi for the subject transportation. Following documents provided by the Deputy Director Transit Trade Torkham in this regard:-



Letter from US Consulate General Karachi bearing No. USC/EXP/347/13 dated 07-10-2013 addressed to Collector of Customs Peshawar in terms of CGO 10 of 2012 and authorizing M/s. Waterlink Pakistan (Pvt) Ltd to transport container No. LSMU-1400780 for transit through the territory of Pakistan.

Memorandum issued by department of Army Afghanistan bearing No. DOCKAFI3276FRLN 01 dated 03-10-2013 whereunder the appellant was defined as transporter of goods and details of container number vehicle number etc.

- iii) An undertaking dated 10-10-2013 was filed by appellant to the Deputy Collector at Torkham border for safe transportation of the subject transit goods. In the above said undertaking the appellant undertook that in terms of CGO 10 OF 2012

dated 31-07-2012, they will be liable to pay the leviable duties and taxes in addition to any other proceedings as envisaged under the Customs Act, 1969;

- iv) Letter bearing No.786/Rev/Tor-391/NLC/CCA dated 10-10-2013 from the Officer Commanding, addressed to the OC Torkham Border Terminal (Loading Branch) for issuance of Transit Authorization Permit (TAP) reverse cargo in favor of M/s Waterlink Pakistan (Pvt) Ltd.
- v) Transport Authorization Permit (TAP) bearing number 008866 dated 09-11-2013 issued by Officer Incharge, Central Coordinated Authority Ministry of Defense, indicating the above mentioned container number, vehicle number categorically mentioning that the said container and vehicle belonging to M/s. Waterlink Pakistan (Pvt) Ltd.; and
- vi) Form "A" Serial No. 791 issued by PCCSS Focal Point Exit indicating container number and vehicle number.

Similarly, the Assistant Director, Directorate of Transit Trade Chaman vide letter No. 10-Misc/US/Milt/Non-Comm/2014/10 dated 01-07-2015 provided the copies of the following documents with regard to two containers No.MBIU-8260838 and USAU-2059417 and vehicle No. TLC-514:

- a) Request bearing No.Ref:USC/EXP/338/13 dated 30-09-2013, addressed to the Collector of Customs, MCC Quetta along with enclosure, authorizing M/s. Waterlink Pakistan (Pvt) Ltd as their agent to arrange Custom Clearance and Transportation of US Transit Cargo from Afghanistan.
- b) Letter bearing No.786/Rev:CHM-316/NLC/CCA dated 30-10-2013 issued by Officer Commanding, addressed to the OC Chaman Border Terminal (Loading Branch) for issuance of Transit Authorization Permit (TAP) reverse cargo in favor of appellant (M/s. Waterlink Pakistan (Pvt) Ltd)
- c) Form "A" Serial No. 1787 issued at PCCSS Focal Point Exit on 31-10-2013 indicating container numbers and vehicle number;
- d) Transport Authorization Permit (TAP) bearing numbers 015963 & 015964 dated 04-11-2013 respectively issued by Officer In-charge Central Coordinated Authority, Ministry of Defense, showing containers number MBIU-8260838 and USAU-2059417, vehicle number TLC-514 categorically mentioning that the said containers and vehicle belonging to M/s.Waterlink Pakistan (Pvt) Ltd

ATTESTED



In view of above mentioned facts and circumstances, it has thus been established that the appellants i.e. M/s. Waterlink Pakistan (Pvt) Ltd and others are liable for en-route transportation and pilferage. The lodging of FIR to Police is mere an afterthoughts and an attempt to put the responsibilities to the other's shoulders.

That the contention of the appellants is denied being frivolous and concocted. The prosecution/criminal proceedings and adjudicating proceedings are independent and the decision of one forum cannot affect the other one. The cautious study of the supplementary challan dated 24-12-2014 clearly reveals that M/s. Waterlink Pakistan (Pvt) Ltd is responsible for pilfering as the same was being done in their knowledge. Hence, safe transportation of US Military cargo from Afghanistan to Port Muhammad Bin Qasim, is the prime responsibility of the appellants. However, the plea taken by the appellants revolves around the nucleus point that they have not acted as bonded carrier,

and therefore they are not responsible for en-route pilferage or breach of procedural liabilities for the subject transit of retrograde containers. The FBR vide CGO 10 of 2012 dated 31-07-2012 notified procedure for transit of goods to and from Afghanistan through the territory of Pakistan, whereby only a bonded carrier / transport operator licensed under rule 639 of the Customs Rules 2001 has been authorized to transport the transit of goods. The registration of vehicle to such registered bonded carriers / transport operator is extended under Rule 638, 6399(d), 329(5) and (6) ibid. The provision of rule 328(7) of the Customs Rules, 2001 does not allow the use of vehicle registered with a bonded carrier / transport operator by other bonded carrier / transport operator. Therefore, the FBR vide SRO 54(I)/2013 dated 31-01-2013 has waived the aforesaid condition for transportation of US Military cargo / ISAF transit of consignments from Afghanistan. Hence, registration of vehicles for transporting of retrograde US military or ISAF consignments from Afghanistan through Border Stations of Pakistan down to seaport of Muhammad Bin Qasim, Karachi is not a prerequisite requirement of the notified procedure.

That the contention of the respondents is denied being misleading. The case file was forwarded to the Adjudicating Authority to initiate adjudication proceeding as per law which comprises the copy of FIR and seizure report. The value of goods had been ascertained in FIR dated 07-12-2013 however, the Seizure Report dated 07-12-2013 indicates the value and duty / taxes leviable on the impugned goods, according to which the adjudicating officer worked out the penalty as envisaged in Order-In-Original dated 29-08-2014. There is no legal provision available which nullify the order in original on such basis.

That the contention of appellants is not admitted being frivolous, capricious, fake, concocted, bogus and based on whimsical grounds. Facts of the case are that it has already been submitted herein above that the value / duty and taxes on the impugned goods had been ascertained in the Seizure Report dated 07-12-2013. The penalty imposed in order in original is in accordance with law. The appellants failed to inform the Customs Authorities about the pilfering of impugned goods, they have no authority to conduct the investigation including opening the retrograde container's rivets etc. According to para B of supplementary challan of Investigating Officer the container laden on vehicle registration No TLQ-857 left Jamrud Terminal on 09-11-2013 and reached Hyderabad on 13-11-2013 through Northern Route without any unusual stoppage / prolonged stay en-route. Similarly vehicle No.TLC-514 left Chaman on 04-11-2013 and reached on the Terminal of CLBC Port Qasim without any unusual stoppage/prolonged stay en-route. The investigating Officer further added that "the confirmation provided by NIC is plausible evidence that the containers had reached Hyderabad without any unusual stoppage/prolonged stay en-route. It is pertinent to notice the place of pilfering of goods in the FIR lodged by the Police has been mentioned as New Saeedabad, District Mityari which is situated before Hyderabad and therefore, contrary to the confirmation provided by NLC that the said container had reached Hyderabad without any inordinate delay en-route. Beside that M/s Waterlink Pakistan (Pvt) Ltd failed to provide plausible explanation regarding the delay of container from Hyderabad to onward". An ex-employee of M/s. Waterlink Pakistan (Pvt) Ltd namely Muhammad Naeem Tariq was investigated by the Investigating Officer with the permission of Honorable Court of Judicial Magistrate-5, Malir, Karachi, who was in judicial custody. The aforesaid ex-employee stated that he was an employee of M/s. Waterlink Pakistan (Pvt) Ltd and was responsible for en-route security of the Transit consignments. He admitted that he had been actively involved in pilfering of goods from transit containers which was in the knowledge of his employer. However, due to disputes on account of payment of dues share for the stolen goods he was expelled from the company. He also admitted that subsequently he established the contacts with the field officers of ASO, MCC Preventive.

ATTESTED



Karachi and passed on the information regarding pilfering of goods from the retrograde containers. Hence, under these circumstances, where the management of M/s. Waterlink (Pvt) Ltd. (Appellants) substantially failed to provide valid explanation for the delay in the movement of pilfered containers from Hyderabad to onward, not bringing into the notice of the customs authorities the issue of pilferage, until the said facts were detected by the ASO, MCC Preventive, Custom House, Karachi. The presence of appellant's personnel at the scene along with their associates corroborates felony intention / mens-rea of the appellants. In view of foregoing, it surfaced that the field and management staff of M/s. Waterlink Pakistan (Pvt) Ltd (appellants) were quite aware of the offence of pilfering from retrograde containers. However, para 3 of the Show Cause Notice dated 03-02-2014 says that "the goods value has been taken from commercial invoice / packing list while the goods of containers Nos. USAU-2059417 and MBIU-8260838 had already been removed unlawfully". Hence, the precedent presented by the appellants has no relevance to the instant case. The order in original dated 29-08-2014 is in accordance with law.

That the contention of appellants is denied being incorrect and misleading. The admitted fact of the instant case is that the appellants were caught red handed while committing the offence of pilferage which has been corroborated by supplementary challan dated 24-12-2014 submitted by the investigating officer. According to the statement of above named ex-employee the appellants, he was an employee of M/s. Waterlink Pakistan (Pvt) Ltd and was responsible for en-route security of the Transit consignments. He admitted that he had been actively involved in pilfering of from transit containers which was in the knowledge of employer. However, due to disputes on account of payment of dues share for the stolen goods he was expelled from the company. The statement of said ex-employee of appellants (M/s. Waterlink Pakistan (Pvt) Ltd) is enough to establish the involvement in commission of offence as well as the factor of mense-rea.

The citations presented by the appellants in para 6 of the additional submissions are irrelevant because the facts and circumstances narrated in the reference leading cases are totally different from the instant issue. According to sub para (ix), (x) & xi of CGO 10/2012 dated 31-07-2012 the appellants are responsible for safe transportation of US Military cargo which are reproduced as under: -

- (ix) Transportation of the cargo from the port of entry to the port of exit in a safe and secure manner shall be the responsibility of the concerned authorized carrier.
- (x) In case of any accident, emergency or sabotage on the cargo or transport unit en-route to the port of exit, the authorized carrier shall immediately report the incident to the nearest Collector of Customs under intimation to Collectors of the port of entry and exit, and shall remain to be the custodian of such goods till the transfer of custody under para 10(iv) is effected.



During transportation of transit goods under this CGO, the carrier shall be responsible to comply with the relevant Customs formalities including the provisions of sub-chapter XVI of Chapter XXV of the Customs Rules, 2001, the applicable laws of the country including those relating to laden or axle weight restrictions or specifications and third party insurance.

In the light of aforementioned facts and circumstances, it has been established that the appellants (M/s. Waterlink Pakistan (Pvt) Ltd) is responsible for safe transportation of US Military cargo from Afghanistan to Port Muhammad Bin Qasim in the light of CGO 10/2012 dated 31.07.2012 read with Customs Rules 2001. The Honorable Tribunal is requested to graciously dismiss the appeal of the appellants being devoid of merits.

8. We have heard the Appellant as well as Departmental Representatives of all three respondents namely i) MCC (Preventive), Karachi ii) MCC Appraisement (West), Karachi and iii) Directorate General, Transit Trade, Karachi. We have also perused the relevant record. During hearing on 20.06.2016, the learned counsel of the Appellant produced a copy of Order-IN-Appeal No.1 of 2016 dated 14.06.2016 passed by the learned Chief Collector of Customs, Appraisement (South), Karachi. The operative part of the said order is reproduced hereunder:-

"I have gone through the record of the case, arguments of the defendant licensee and the departmental representative. The defendant's stance that they took the containers to the warehouse just to confirm the information about pilferage enroute by miscreants near Matyari (FIRs No. 193/2013 dated 07.12.2013, 04/2014 dated 16.01.2014 and 06/2014 dated 17.01.2014 were lodged with the Police in this regard). Further that the Preventive Collectorate neither found anything at the time of seizure in their warehouse except empty container nor any tool or handling equipment that could be used for pilferage and thus cause suspicion about the alleged pilferage. The defendant's above position has not been contested by the Departmental Representative. The facts of the case and the circumstances give credence that the charges of pilferage are not established rather the defendants themselves were victim of interception / pilferage by the miscreants. However, the licensee were required under the law to immediately inform the Customs office of departure and office enroute telephonically or electronically regarding the nature of incident, exact time and place of incident which may cause the delay in delivery of goods, but they failed to discharge. Besides moving the containers unauthorizedly to their warehouse, hence, violation to that extent is established. Keeping in view that the appellants were themselves victims of a pilferage enroute by miscreants which made them suffer heavily, therefore a lenient view is taken and a penalty of Rs. 200,000/- (two hundred thousands) is imposed."

9. The study of above Order-IN-Appeal unambiguously confirms that "the charges of pilferage are not established rather the defendants themselves were victim of interception / pilferage by miscreants." We are also inclined to subscribe aforesaid findings of the learned Chief Collector Customs, Appraisement (West), Karachi as the Appellant lodged an F.I.R (No.193/2013) in Police Station Bin Qasim regarding enroute pilferage immediately after the three containers reached Port Qasim in the evening of 06.12.2013. It is important to note that the said F.I.R. was lodged prior to raid by the (Preventive), Karachi. A total number of 13 persons were identified by Police out of which seven (7) persons were arrested. The case is still under trial in the Court of Special Judge (Customs & Taxation), Karachi. The respondent Customs Department has not been able to submit Final Challan in the said Court till today despite lapse of more than 2½ years. Some accused persons are on bail while others are still behind the bar.

ATTESTED



During hearing, the Appellant forcefully raised the issue of jurisdiction. The learned counsel of the Appellant (Mr. Pervaiz Iqbal Kasi) laid tremendous stress on the point that the raid by officials of MCC (Preventive), Karachi at Port Qasim (where the two trailers loaded with three containers had just reached) was beyond their jurisdiction, as such, the whole proceedings are ab initio nullity in the eyes of law. He emphasized that the Directorate General of Transit Trade established in 2012 had exclusive jurisdiction over the issue at hand. It is quite interesting to note here that three independent Directorate/Collectorates of Customs are parties/ respondents in this case namely i) MCC (Preventive), Karachi ii) MCC Appraisalment (West), Karachi and iii) Directorate General Transit Trade, Karachi. They have filed parawise comments on the Memoranda of Appeal filed by the Appellants. As per record, the MCC (Preventive), Karachi conducted raid at Port Qasim in the early morning of 07.12.2015 while the Directorate General Transit Trade has simply filed the parawise comments. There appears no action having taken by the said Directorate General.

10. During hearing on 20.06.2016, the I.O (Mr. Shahid Dasti, A.O of MCC Appraisalment (West), Karachi) was asked to offer comments on the jurisdiction issue. The said officer responded instantaneously, however, in a non-professional manner that the case has been framed by the Customs department and it did not matter as to which Wing/ department of Customs has made out the case. In our view, the issue of jurisdiction carries tremendous significance which can neither be exaggerated nor overlooked. The Superior Courts have taken serious view on taking action beyond the authorized jurisdiction by the Executive authorities. There are a number of instances where actions taken by the government functionaries beyond their prescribed jurisdiction/

hits have been declared void, without any legal effect. SRO 581(I)/2013 dated 07.07.2013 prescribes jurisdiction of different Collectorates of Customs. The said notification defines jurisdiction of MCC (Preventive), Karachi as under:-

"All matters relating to the following within the Civil Districts of Karachi East, Karachi West, Karachi Central, Karachi South, the port of Karachi including Fish Harbour, Karachi Ibrahim Hydery, the Pakistan Customs Wafers, Quaid-e-Azam International Airport (JIAP), Karachi Faisal Airbase, Masroor Airbase.

- (i) Anti-smuggling and all preventive functions in the above mentioned areas.
- (ii) Ship boarding, rummaging and port clearance,
- (iii) Monitoring of ports, airport and terminal gates;
- (iv)upto (xvii).



The study of above jurisdiction confirms that the MCC (Preventive), Karachi had no jurisdiction to conduct raid at Port Qasim. Now, we examine powers/ jurisdiction of the Directorate General of Transit Trade as notified vide SRO 932(I)/2012 dated 01.08.2012. Serial No.2 of the said notification reads as under:-

S.No.	Designation of the officer	Area of territorial/ functional jurisdiction
1.	Director, Directorate of Transit Trade, Karachi	<p>The jurisdiction of this Directorate shall extend to all Customs matters relating to transit and allied functions in respect of the province of Sindh including Port of Karachi, Port Muhammad Bin Qasim, Quaid-e-Azam International Airport, Karachi covering inter alia the following functions and Customs matters:-</p> <ul style="list-style-type: none"> (i) processing, examination, clearance, and allied matters relating to transit goods including bulk oil in transit. (ii) The reconciliation of transit data regarding arrival, clearance and cross-border of transit cargo; (iii) Association in development, updation and enhancement of MIS functions; (iv) Recovery of any adjudged amounts; (v) Licensing of transport operators for transit goods; (vi) Personnel management; (vii) Handling of legal matters arising in consequence of processing, movement and clearance of transit cargo; (viii) Coordination with all stakeholders for operational purposes; (ix) Business process re-engineering. (x) Transit trade facilitation and redressal of complaints, and (xi) Any other function assigned by the Federal Board of Revenue from time to time.

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As above, the Director, Directorate General of Transit Trade, Karachi enjoys complete and clear jurisdiction on all Transit – related and allied matters throughout the province of Sindh including Port Qasim. The encroachment upon the jurisdiction of the Director, Directorate General of Transit Trade, Karachi by the officials of MCC (Preventive), Karachi and inaction on the part of the officers of the Directorate General is incomprehensible.

11. It may not be irrelevant to point out here that a complete monitoring and tracking system to maintain movement of Transit cargo is installed in Customs House, Karachi.

M/s. TPL Tracker Company have been licensed by F.B.R to monitor movement of transit goods to and from Afghanistan. Rules under the title 'Tracking and Monitoring Cargo Rules. 2012' have also been framed by FBR for the purpose and notified vide SRO 413(I)/2012 dated 25.04.2012. These Rules require monitoring of cargo including Transit Cargo on real time basis of a minimum of 3000 containers or trucks from CCR. Rule (4)(b) clearly spells out as under:-

"b) monitoring and tracking of vehicles and containers throughout the journey from Customs point of entry to Customs point of exit on real time basis."

These Rules also envisage establishment of Mobile Enforcement Units in respective Collectorates on shift/ rotation basis (twenty four hours a day and seven days a week). These MEUs are responsible for immediately reacting in case any breach of the prescribed procedure is communicated to them by CCR (Central Control Room) or RCR (Regional Control Room). Quite importantly, these MEUs are in addition to Enforcement Units of the Licensee (operating the Monitoring and Tracking System). Here, the question arises that when the two trailers under reference got diverted from the prescribed route at New Saeedabad, District Matiyari, short of Hyderabad whether any alert was generated by the Monitoring and Tracking System in the central office located in Custom House, Karachi and what action was taken by the Mobile Enforcement Unit of the area (probably located in MCC Hyderabad) of the Directorate General Transit Trade and Enforcement Unit of the Licensee (M/s. TPL Tracker). The relevant record is silent on such an important aspect of the whole episode. The said position reflects not only inefficiency on the part of the Directorate General Transit Trade as well as the Licensee but also raises many questions on their intent. Further question arises as to what measures were taken by

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Collector, MCC (Preventive), Karachi against the above Licensee being convenor of the Licensing Committee in terms of rule 5(2) of the Tracking and Monitoring of Cargo Rules, 2012.

The respondents have miserably failed to justify act of commission on the part of MCC (Preventive), Karachi and act of omission on the part of the Directorate of Transit Trade, Karachi.

12. As mentioned at para 10 above, the Superior Courts of the country have always taken serious cognizance on the issue of exercise of powers beyond jurisdiction by a

government authority. In a recent judgment/ order dated 30.03.2016 in C.P. No.D-47 of 2016, the Division Bench of Hon'ble High Court of Sindh directed the Collectorate of Preventive to hand over possession of a container alongwith the goods to Collectorate of Customs Appraisement (West), Karachi as the same was removed forcibly on the excuse of smuggling while it was lying at port and a request from the importer, seeking permission to re-export the container was under consideration by the MCC Appraisement (West), Karachi. The operative part of the said judgment is reproduced hereunder:-

"Keeping in view the above referred provisions of law, cited notifications and the case-law, we are of the view that the act of Collectorate (Preventive) to remove the container from the possession of the Collectorate (Appraisement) in respect of which proceedings were already initiated and were pending before the latter collectorate, was in excess of jurisdiction entrusted upon Collectorate (Preventive). If there were any leads or intel in respect of the said consignment, the Collectorate (Preventive), instead of blowing them away in the present manner, should have shared them with Collectorate (Appraisement), which is competent to adjudicate upon and decide the fate of the imported consignment on account of being possessed of ample powers of confiscation, seizure, auction, re-export and release of goods under the Customs Act, 1969. Collectorate (Preventive) is hereby directed to handover the possession of the instant container along with the goods therein to Collectorate (Appraisement), which shall adjudicate upon the pending application(s) of the petitioner and decide fate of the goods as per law, keeping in mind the concerns put forward by Collectorate (Preventive)."

13. In view of above position detailed at paras 10 to 12 supra, it has been established beyond any shadow of doubt that the officials of MCC (Preventive), Karachi had no jurisdiction to conduct raid within the premises of Port Qasim, as such, the same is declared to be without jurisdiction and without legal sanctity. As the impugned Order-IN-Original has been issued consequent to illegal action on the part of MCC (Preventive), Karachi, therefore, the same is nullity in the eyes of law. The Hon'ble Supreme Court of Pakistan in PLD 1571 Supreme Court 124 has categorically laid down that "*It is an elementary principle that if a mandatory condition for the exercise of jurisdiction by a Court or tribunal or authority is not fulfilled, then the entire proceedings which follow become illegal and suffer from want of jurisdiction. Any order passed in continuation of these proceedings in appeal or revision equally suffer from illegality and are without jurisdiction. The learned Advocate-General fully supported this view and asked for dismissal of the appeal*". Therefore, the impugned Order-IN-Original is set aside being a void order. The fine and penalties adjudged in the impugned Order-IN-Original are also remitted. Both the appeals are decided in the aforesaid terms.



14. This order is also applicable in Customs Appeal No.K-513/2015 filed by M/s. Waterlink Pakistan (Pvt.) Ltd. against Order-IN-Original No.77 of 2014-15 dated 01.01.2015 as the facts and law points involved in the said case are identical with the instant appeals.



sd/-
(Muhammad Nazim Saleem)
Member Technical-II
Karachi

sd/-
(Tahir Zia)
Member Judicial-II
Karachi

Certified that this order consists of twenty six (26) pages and each page has been dictated and signed by me.

sd/-
(Muhammad Nazim Saleem)
Member Technical-II
Karachi

4-10-1565, dt 6/8/16
GOVERNMENT OF PAKISTAN
CUSTOMS EXCISE & SALES TAX APPELLATE
TRIBUNAL KARACHI BENCH-II

Appeal No.(s)/CM No.(s) 10-1339/14 dated 22/10/14 *46-1117/14*
 1. 17/10- Sahrah Khan @ 46-1117/14
 2. Order-in-original No 77/14-15 dated 22/10/14
 3. Customs Excise Copy #1
 4. Copy forwarded to
 5. M/s. Sahrah Khan @ 46-1117/14
 6. By Ahmed (Cust) to
 7. Collector of Customs *(Key to the West)*
 8. Collector of Sales Tax - Central Excise *(Key to the West)*
 9. Collector of Customs Dept. Registration *127. A-10*
 10. Director General Intelligence & Investigation
 11. Director of Customs

sd/- 6/8/2016
SAJJAD HAIDER
Assistant Registrar
Customs Appellate Tribunal
Karachi
Phone: 9920251 Fax: 9920251