HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

Customs Reference Application No.31/2015

M/S Al-Haj Enterprises (Pvt) Limited, through its authorized officer
VERSUS
Collector of Customs, Model Customs Collectorate, Islamabad & 3 Others

Applicant by	:	Mr. Asad Raza, Advocate.
Respondents by.	:	Ms. Farah Yasmin Dawood, Advocate.
Date of Hearing	:	02-02-2016.

ATHAR MINALLAH, J.- The applicant has proposed twelve questions of law for our consideration. It is claimed by the applicant that the proposed questions of law arise out of the order dated 26-06-2015, passed by the Customs Appellate Tribunal Bench-II, Islamabad (*hereinafter referred to as the 'Tribunal'*).

2. The facts, in brief, are that the applicant is incorporated under the Companies Ordinance, 1984 and is, *inter alia*, engaged in the business of transporting fuel supplies to military forces stationed in Afghanistan. The fuel supplies are, therefore, exported from Pakistan to Afghanistan and the duties and taxes relating thereto have not been paid. The applicant carries on its business of transportation of petroleum products pursuant to a licence/permit granted by the competent authority under Chapter XXII of the Customs Rules, 2001 (*hereinafter referred to as the 'Rules of 2001'*). The applicant was served with a show cause notice dated 12-04-2013. It was alleged in the show cause notice that during the

course of post exportation audit of the DTRE approval granted to M/s Attock Petroleum Limited, various petroleum products had been found to have been short received at the destination and the said shortage was in excess of one percent of the invoiced quantity. The applicant, as a licensee/permit holder carrier was, therefore, called upon to explain as to why the duties and taxes involved in respect of the alleged shortage in excess of 1% may not be recovered, along with penalties, surcharge, etc. The applicant submitted a written reply dated 23-04-2014. The Collector of Customs (Adjudication), after affording an opportunity of hearing to the applicant, passed Order-in-Original No.57/2015 dated 28-03-2014. The show cause notice was confirmed and the applicant was held liable to pay an amount of Rs.6.070 million along with the default surcharge. The applicant preferred an appeal before the learned Tribunal. The appeal of the applicant was partially accepted and the amount of duties and taxes determined by the learned Collector of Customs (Adjudication) was reduced to Rs.3.622 million. The Order-in-Original dated 28-03-2014 was, therefore, accordingly modified.

3. The learned counsel appearing on behalf of the applicant has contended that; the impugned order is not sustainable in the light of section 194-B(1) of the Customs Act 1969 (*hereinafter referred to as the 'Act of 1969'*); it is mandatory for the learned Tribunal to decide the appeal within sixty days; admittedly, the appeal was not decided within the specified time; the learned Tribunal passed the impugned order dated 26-06-2015 on the basis of the reconciliation report dated 11-12-2014; the Reconciliation Committee had made observations regarding the claim relating to the destruction of two vehicles *en route,* but the same was not taken into consideration; the failure on the part of the learned Tribunal to

advert to this question makes it a case of remand; the Rules of 2001, particularly Rule 566 thereof, does not contemplate the recovery of duties and taxes in the case of petroleum products if the reduction in volume is due to natural reasons; Rule 566 envisages 'tampering' or 'pilferage' or 'theft' or 'damage' caused *en route*; non-delivery of goods to the consignee in Afghanistan is not included as a ground in Rule 566; the expression 'damage' used in Rule 566 cannot be interpreted in isolation; the Collector of Customs (Adjudication) had decided the matter beyond the allegations mentioned in the show cause notice; there is no liability on the part of the applicant; section 110 of the Act of 1969 provides for condonation and the same was not taken into consideration either by the learned Tribunal or the Collector (Adjudication); the statutory provisions shall prevail over delegated legislation; section 110 of the Act of 1969 will, therefore, prevail; section 32 of the Act of 1969 is not attracted in the instant case.

4. The learned counsel appearing on behalf of the Department, on the other hand, has argued that; the applicant has been granted the licence/permit under the Rules of 2001 as a carrier for transporting petroleum products; the licensee/permit holder is bound by the terms and conditions of the licence/permit read with the Rules of 2001; section 110 of the Act of 1969 is attracted in case of licences issued under section 12 or 13 of the Act of 1969; the scheme of the Rules of 2001 relating to the export of petroleum products to Afghanistan in the context of the obligations and responsibilities of a licensed carrier are distinct and separate; the provisions of section 194-B(1) are directory in nature.

5. The learned counsels have been heard and the record perused with their able assistance.

6. In order to answer the questions proposed in the instant application, it would be advantageous to examine the relevant provisions of the Act of 1969 and the Rules of 2001. Admittedly, M/s Attock Petroleum Limited has been granted the facility of 'Duty and Tax Remission for Export' (*hereinafter referred to as the 'DTRE'*) under sub-chapter 7 of the Rules of 2001. The latter exports petroleum products from Pakistan to Afghanistan, and the said supplies are made through land routes by carriers who are granted a license/permit under the Rules of 2001. The said supplies are meant for the use of the International Security Assistance Force (*hereinafter referred to as the 'ISAF'*) or the Defence Energy Support Centre (*hereinafter referred to as the 'DESC'*) based in Afghanistan. It is further noted that the duties and taxes chargeable on the petroleum products transported by the applicant have neither been levied nor paid. It is for this reason that a special procedure and terms and conditions for transporting the petroleum products has been prescribed, so as to protect the revenue. Chapter XXII of the Rules of 2001 exclusively deals with the transport of POL products to Afghanistan and, *inter alia*, prescribes the eligibility criteria for the granting of a licence or permit. The obligations of a licensee/permit holder and the terms and conditions relating thereto have been elaborately described in the Chapter. As would be explained latter, the licence/permit granted to a carrier under Chapter XXII of the Rules of 2001 is distinct and separate from a licence issued under section 12 or 13 of the Act of 1969.

7. Section 2 (t) of the Act of 1969 defines a 'warehouse' as any place appointed or licensed under section 12 or 13 ibid'. Section 2(u) defines a 'warehouse station' as a place declared as a warehousing station under section 11. Section 12 empowers the Collector of Customs to appoint or license public warehouses at any warehousing station wherein dutiable goods may be deposited without payment of duties and taxes. Likewise, under section 13, the latter may license private warehouses for the purposes of depositing dutiable goods without payment of duties and taxes. In a public warehouse any person authorised in this regard may keep dutiable goods without payment of duties and taxes whereas a private warehouse is restricted to goods owned by the licensee. Chapter IX of the Act of 1969 prescribes the procedure and the terms and conditions in relation to a warehouse appointed or licensed either under section 12 or 13. Section 110 provides for the determination and payment of duties and taxes if the warehouse goods are found to be deficient in quantity. It empowers the Collector of Customs to order that no duty and taxes shall be charged in relation to the goods found deficient, provided that the latter is satisfied that such deficiency is on account of natural loss. However, this power is circumscribed to such goods which have been specified by the Federal Board of Revenue (*hereinafter referred to as the 'Board'*) in a notification published in the official gazette. Section 110, or rather the entire Chapter IX of the Act of 1969, is exclusively in the context of a public warehouse or a private warehouse appointed or licensed under section 12 or 13 of the Act of 1969. The carriers licensed or granted a permit under Chapter XXII of the Rules of 2001 are, therefore, regulated through distinct provisions, having no relevance to the licenses granted under section 12 or 13 of the Act of 1969. The object

and purpose of granting a license or permit under the Rules of 2001 is altogether different from a license issued under section 12 or 13 of the Act of 1969.

8. Chapter XXII of the Rules of 2001 exclusively deals with the transport of POL products to Afghanistan. Rule 557(b) defines 'Application-Cum-Transport Permit' as meaning the application and the authorization granted pursuant thereto by the Collector of Origination for export and transport of POL products to Afghanistan. Clause (d) defines a 'carrier', clause (e) and (f) 'Collector of Clearance' and 'Collector of Origination' respectively. Clause (g) defines conveyance and transport unit while 'goods' are defined in clause (i) as meaning 'POL products meant for export to Afghanistan. Clause (h) defines Export to Afghanistan as meaning export meant for ISAF or DESC based in Afghanistan. Clause (j) defines the Licensing Authority as meaning the Collector of Origination. It is, therefore, obvious that a special procedure has been prescribed for POL products exported to Afghanistan for the exclusive supply to ISAF and other forces based in Afghanistan. The transportation of the goods can only be made by such a 'carrier' which has been authorized by the Collector of Origination in this regard. Rule 558 prescribes the specification of transport units and conveyances. Rule 559 provides for the procedure and conditions in respect of a carrier granted a license under the Rules. Rule 560 describes the duties and responsibilities of the carrier. Rules 561 to 569 envisage the procedure and terms and conditions for the purposes of transporting POL products to Afghanistan, and the liability imposed on a transport carrier which has been granted a permit. Sub-Rule (4) of Rule 564 is reproduced as follows.-

> " **564. Clearance of goods for export at the exporting station.-**
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> (4) In case there is any variation of more than one percent in the quantity declared in the Permit under rule 563 and the one endorsed or certified by the ISAF or, as the case may be, DESC, action under appropriate provisions of the Customs Act, 1969 (IV of 1969), the Sales Tax Act, 1990 and other laws applicable shall be initiated against the carrier and other persons found involved. "

Rule 566 contemplates eventualities which would make a carrier liable or responsible in respect of the duties and taxes and loss or reduction in volume of the POL products delivered under the Rules for transportation to Afghanistan. It is noted that a carrier is under an obligation to inform the Collector of Origination within three days from the date of any pilferage or theft or damage caused en route.

9. Rules 557 to 569, when read together, clearly show that an exhaustive procedure has been prescribed in the case of transport of petroleum products to Afghanistan. The permit granted to a carrier is a licence/permit to carry the goods from the oil exporting company or the refinery, as the case may be, without payment of duties and taxes. Such exportation of POL products is only restricted to the supplies made to the ISAF or other forces specified in Rule 557(h) of the Rules of 2001. The terms and conditions of the permit granted to a carrier, and the conditions specified in Chapter XXII, besides being mandatory are binding on a carrier. A carrier cannot claim to have been appointed or licensed as a 'warehouse' either under section 12 or 13 of the Act of 1969. Chapter XXII of the Rules of 2001 has a specific purpose and envisages a restricted role for a carrier which has been granted a permit by the Collector of Origination. The carrier accepts the terms and conditions as prescribed under the Rules of 2001 and the license/permit granted there under. The

carrier, therefore, at the time of submitting an application under Chapter XXII of the Rules of 2001 is most obviously aware of the obligations and liabilities imposed or incurred there under. The carrier knows that it would be bound by the terms and conditions specified in the Rules and the license or permit. Besides the consequence arising from the eventualities contemplated under Rule 566, the licensee/permit holder is exclusively responsible and liable for any variation of more than 1%, regardless of whether the said variation is en route or is found at the point of destination. The carrier takes upon itself the obligation of transporting the POL products strictly according to the conditions imposed under the Rules of 2001, particularly undertaking the responsibility of delivering the quantity of POL products at less than 1% variation at the point of destination. Sub-Rule (4) of Rule 564 has been reproduced above. It unambiguously provides that in case there is any variation of more than one percent in the quantity declared in the permit under Rule 563 and the one endorsed or certified by the ISAF or, as the case may be, the DESC, then besides the payment of duties and taxes to the extent of such deficiency, the carrier also makes itself liable to action under the appropriate provisions of the Act of 1969, the Sales Tax Act 1990 and other laws. It is further implicit in the rule that it is the obligation of the carrier to inform the Collector of Origination regarding the endorsement made on behalf of the ISAF at the time the products are delivered. It may also be clarified that Rule 566 relates to a break down or accident *en route* and does not cover an eventuality when the goods received by the ISAF are endorsed or certified by the latter confirming variation of more than one percent of the quantity declared in the permit issued under Rule 563. As a corollary, a variation of more than one percent in the quantity

declared in the permit, therefore, becomes the liability of the carrier. Moreover, if such a variation is not reported by the carrier to the concerned Collector of Origination, then the former makes itself liable to proceedings under section 32 of the Act of 1969, besides the payment of duties and taxes involved in the shortage which is in excess of 1%.

10. In the instant case, the applicant admittedly had transported POL products to Afghanistan under Chapter XXII of the Rules of 2001. The variation of more than one percent is also not disputed by the applicant. It is evident from the pleadings of the applicant before the Adjudicating Authority as well as the learned Tribunal that though the variation of more than one percent stands admitted, but it claims as not being liable for reasons which are not in consonance with the Rules of 2001. There is no force in the argument advanced by the learned counsel for the applicant that the Reconciliation Committee had referred to two vehicles which had broken down *en route* and, therefore, the same should have been taken into consideration by the learned Tribunal. Even if it is assumed that vehicles had broken down *en route*, then it was the obligation of the applicant to have informed the Collector of Origination for necessary orders within three days as contemplated under Rule 566 of the Rules of 2001. We have carefully gone through the reply submitted by the applicant before the Collector (Adjudication) and the memo of appeal filed before the learned Tribunal. The applicant had never raised such a plea. Even if such a plea had been raised, the applicant would still have been liable to pay the duties and taxes. The Reconciliation Committee had rightly observed that it was not within its mandate to make any determination regarding the belated claim of the applicant regarding the two vehicles which it claims to have broken down. The learned Tribunal

had constituted the Reconciliation Committee so as to determine the factual aspects of the case. The reconciled figures, other than the two vehicles, are also not disputed by the applicant. The allegations were intelligibly mentioned in the show cause notice. The argument that the adjudicating officer had gone beyond the show cause notice is misconceived. The show cause notice had merely informed the applicant regarding the variation of more than one percent and the same has not been disputed at any stage by the applicant.

11. Next is the question regarding section 194-B of the Act of 1969. The first proviso to section 194-B is as follows.-

> *"Provided that the appeal shall be decided within sixty days of filing the appeal or within such extended period as the Tribunal may, for reasons to be recorded in writing, fix:"*

12. The question for our determination relates to the consequences in case the appeal is not decided within the limitation provided in the above proviso. In other words, the question is whether the limitation for passing an order within the specified time is mandatory or directory? It has been consistently held by the august Supreme Court that the determination of whether a provision is mandatory or directory largely depends upon the intention and language in which the provision is couched. It is, however, settled law that where the consequence of failure to comply with the provision is not mentioned, the provision is directory, and where the consequence is expressly mentioned then the provision is mandatory. Reliance is placed on *"Malik Umar Aslam vs. Mrs. Sumaira Malik and others"*, [2014 SCMR 45], *"Maulana Nur-ul-Haq vs. Ibrahim Khalil"*, [2000 SCMR 1305] *"Ghulam Hassan vs. Jamshaid Ali and others"*

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[2001 SCMR 1001], *"Human Rights Cases Nos.4668 of 2006, 1111 of 2007 and 15283-G of 2010"*, [PLD 2010 SC 759].

13. The liability of the applicant had been adjudged by the Collector (Adjudication). The applicant had exercised its right of appeal before the learned Tribunal against the liability adjudged by the Collector (Adjudication). The liability , therefore, would remain in existence till it has been annulled or set aside by the learned Tribunal by accepting the appeal. If the argument of the learned counsel for the applicant is to be accepted then the effect would be that the liability created under the Order-in-Original will remain in existence, while the right of appeal before the Tribunal would stand extinguished if the appeal is not decided within the specified time. This obviously could not have been the intention of the legislature. Moreover, failure to decide the appeal within the prescribed time can by no stretch of the imagination be treated as having the effect of annulling or setting aside of the Order-in-Original. Such an interpretation would tantamount to reading into the provision something not provided therein. No consequences have been provided for deciding an appeal beyond the time prescribed in the first proviso, as has been reproduced above. We, therefore, hold the provision to be directory in nature rather than being mandatory.

14. In the light of the above discussion, we answer the questions proposed in paragraph 2 of the instant application as follows.-

a) Questions no. i, ii, iv, v, vi, vii and xii are answered in the negative.

b) Questions no. viii & x are answered in the affirmative.

c) Questions no. ix & xi are not relevant in the context of the instant application.

d) Question no. ' iii ' is misconceived since the learned adjudicating officer has not been found to have gone beyond the Show Cause Notice.

15. The judgment of the learned Tribunal dated 26-04-2015, therefore, does not require any interference or modification.

16. The office is directed to send a copy of this order under the seal of this Court to the learned Tribunal, as required under sub-section (5) of section 196 of the Act of 1961.

(NOOR-UL-HAQ N. QURRESHI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 20-04-2016

JUDGE

JUDGE

Approved for reporting.

*Luqman Khan/