IN THE HIGH COURT OF SINDH AT KARACHI

C.P No. D-1650 OF 2020

Present: *Mr. Justice Muhammad Junaid Ghaffar*
Mr. Justice Agha Faisal

Petitioner:	**Gas & Oil Ltd. Pakistan Through Mr. Abdul Moiz Jafferi, Advocate.**
Respondents No. 3 to 5:	**Collector, Model Customs Collectorate of Preventive & others through Mr. Khalid Rajpar, Advocate.**
Federation of Pakistan:	**Through Mr. Muhammad Ahmar, Asstt. Attorney General.**

1. *For hearing of Misc. No. 7512/2020.*
2. *For hearing of main case.*

Date of hearing: **16.10.2020.**

Date of Judgment: **29.10.2020.**

J U D G M E N T

Muhammad Junaid Ghaffar J.- Through this Petition, the Petitioner has sought the following reliefs: -

(i) Declare that the act of Respondents to malafidely delay and refuse the process, payment of duties including customs duty, petroleum levy etc., and release of the imported goods under the Petitioner's pending ex-Bond GD Nos.1142 dated 29.02.2020, ex-Bond GD Nos.1147 dated 29.02.2020, ex-Bond GD Nos.1141 dated 29.02.2020 and ex-Bond GD Nos.1145 dated 29.02.2020, and to apply the rate of duty as applicable on the date of manifestation i.e. 29.02.2020 under Section 30 of the Customs Act, 1969, on the above true Goods Declaration filed by the Petitioner under Section 104 of the Customs Act, 1969, without assigning any plausible justification/show cause notice amounts to illegal detention of the imported goods and therefore an act in abuse and in excess of authority, and therefore without lawful authority and in violation of the fundamental rights of the Petitioner protected under the Constitution of Pakistan and therefore, without jurisdiction, illegal and void.

(ii) Direct the Respondents to process the payment of duties including customs duty, petroleum levy etc and release of the imported goods under ex-Bond GD Nos.1142 dated 29.02.2020, ex-Bond GD Nos.1147 dated 29.02.2020, ex-Bond GD Nos.1141 dated 29.02.2020 and ex-Bond GD Nos.1145 dated 29.02.2020, and to apply the rate of duty as applicable on the date of manifestation i.e. 29.02.2020 under Section 30 of the Customs Act, 1969, on the above true Goods Declaration filed by the Petitioner under Section 104 of the Customs Act, 1969 in accordance with the law;

(iii) Direct the Respondents to release the goods of the Petitioner provisionally till the pendency of the instant Petition;

(iv) Restrain the Respondents from misapplying the provisions of Section 30 read with Section 104 of the Customs Act, 1969.

(v) Grant such other relief as this Honourable Court deems just and proper in the facts and circumstances of this cases.

2. Precisely, the facts, as stated appear to be that the Petitioner imported a consignment of Motor Spirit consisting of 31,444 M. Tons which was allowed Into Bonding in the warehouse by the Customs as per practice against various Goods Declarations ("GDs") and thereafter, Ex-bond Bills of Entries were filed and till the date of filing of this Petition, 21,561 M. Tons has been released, whereas, the remaining quantity is being withheld and the Customs Department is demanding certain additional amount of petroleum levy pursuant to Notification dated 01.03.2020.

3. Learned Counsel for the Petitioner submits that the Ex-Bond GDs in respect of the balance quantity of goods detained were filed on 29.02.2020, and immediately Pay Orders were prepared on 02.03.2020; but the duty was not accepted by the department on the ground that petroleum levy has been increased w.e.f. 01.03.2020; that in terms of Section 30 of the Customs Act, 1969 ("**Act**"), once a machine number was assigned on 29.02.2020, the amount of duties payable crystalized for (7) seven days and as soon as the pay order was presented, the department ought to have accepted the duties as well as petroleum levy on the rate applicable on 29.02.2020; that the delay has been caused by the Customs Department to burden the Petitioner with the increased amount of petroleum levy; that in terms of Section 3A(2)(3) of the Petroleum Products Surcharges Ordinance, 1961 ("**1961 Ordinance**") in respect of imported petroleum products, the petroleum levy has to be collected in the same manner as an import duty under the Customs Act, 1969; the rate of petroleum levy on the goods is question is the one prevailing before 29.2.2020; therefore, the impugned action and demand is illegal and liable to be set-aside.

4. On the other hand, learned Counsel for the respondents has seriously disputed the factual assertion of the Petitioner as to approaching them with pay orders before time; that in terms of

Section 30 read with Section 104 of the Act, the amount is to be paid on the basis of the rate prevalent at the relevant time and not by virtue of the date of filing of GD; that insofar as petroleum levy is concerned per learned Counsel all along the oil marketing companies have been paying the petroleum levy on the prescribed rates prevalent at the time of making payment as and when they are increased or reduced by the Government and none has objected except the Petitioner; that the Petitioner in the past, has even paid such levy without objection; hence no case is made out.

5. We have heard both the learned Counsel and perused the record. It is the case of the Petitioner that 5 GDs for Ex-bonding of goods were filed on 29.02.2020 and machine number was allotted and perhaps to that effect there is no dispute. The petitioners case is that pay orders were prepared and an attempt was made for payment of duty and taxes on 02.03.2020; but respondents refused to accept the same on the ground that since petroleum levy stood increased w.e.f. 01.03.2020 from Rs.19.75/ Liter to Rs.23.45 / Liter; therefore, they are required to pay such enhanced petroleum levy. The case of the Petitioner is that since GD's were filed on 29.2.2020, whereas, the levy was increased on 1.3.2020; hence, by virtue of section 30 of the Act, they are not liable to pay the enhanced rate of petroleum levy.

6. Perusal of the relevant[1] provision reflects that the rate of duty applicable on any imported goods shall be the rate of duty in force in case of goods cleared from a warehouse under Section 104 on the date on which a goods declaration for clearance of such goods is manifested under that section. It is further provided[2] (being relevant here) that in respect of the goods for clearance of which a goods declaration has been manifested and the duty is not paid within seven days of the goods declaration being manifested, the rate of duty applicable shall be the rate of duty on the date on which the duty is actually paid. It is not in dispute that though the GD's were filed on 29.2.2020; however, till filing of this petition the

---

[1] **[30. Date of determination of rate of import duty.** - The rate of duty applicable to any imported goods shall be the rate of duty in force;

(b) in the case of goods cleared from a warehouse under section 104, on the date on which a goods declaration for clearance of such goods is manifested under that section:

[2] 2nd proviso thereof

duty and taxes were not paid and petitioners case is that it was refused, whereas, respondents case is that they never approached them. This factual matrix of the case apparently cannot be decided by us in this petition. However, on legal plane precisely the case of the Petitioner is that by virtue of Section 30 read with Section 104 ibid when Ex-bond GDs in question were filed on 29.02.2020; the rate of customs duty, including that of petroleum levy, was crystalized (and remained valid for 7 days) inasmuch as the liability of the Petitioner was determined. Here, the dispute is only in respect of petroleum levy and not of the customs duty. Therefore, according to the petitioner it was the rate of petroleum levy as was in force on 29.02.2020 which is to be paid and not the one effective from 01.03.2020, when it was increased from Rs.19.75 per liter to 23.45 per liter. Though there is no dispute insofar as the customs duty and other taxes are concerned; however, the question would be that whether the petroleum levy can be equated or termed as a customs duty specified under the First Schedule to Act so as to attract application of s.30 read with s.104 ibid as contended. On import of goods, the customs duty is levied at such rates as are prescribed in the First Schedule to the Customs Act in terms of Section 18 of the Customs Act, 1969. Customs duty is a duty under the First Schedule of the Act, whereas, Petroleum levy *per se* is not a customs duty itself and merely for the reason that it is being collected in the same manner as a customs duty pursuant to Section 3A(2) (a)[3] & (3) of the 1961 Ordinance, would not make it a customs duty by itself. The power and authority to collect any levy including a petroleum levy by implication and applicability of the provisions of the Customs would not *ipso facto* make such levy a customs duty by itself. The law in this regard is now well settled pursuant to various judgments of this Court in the context of collection of sales tax and income tax chargeable under the Sales Tax Act and the Income Tax Ordinance, by the Customs Authorities under the Act.

[3] (2) Subject to any rules made under this Ordinance, the Petroleum Levy shall be collected..(a) in respect of imported petroleum products, in the same manner as an imported duty payable under the Custom Act 1969 is collected; and

(3) The provisions of the Customs Act 1969 (IV of 1969), or, as the case may be, the provisions of the Federal Excise Act, 2005 shall, so far as may be, apply to the levy, collection and refund of the Petroleum levy.

7. In the case reported as[4] the petitioner, imported Tallow from Sydney for which letters of Credit, were opened on 18-6-1988 and Bills of Entry were filed on 10-8-1988. At that time, Tallow, covered by PCT Heading 15.02-A, was exempt from Sales Tax, however, vide Notification dated 26-6-1988, issued under section 7 of the Sales Tax Act, 1951, it was withdrawn introducing Sales Tax at 12-1/2%. It was contended that on its making firm commitments and making disbursements through Letters of Credit dated 18-6-1988, vested rights had come into being and Notification dated 26-6-1988 could not be applied so as to take away such vested rights. Reliance was placed on[5]. Department placed reliance on[6] where construing the insertion of section 31-A in the Customs Act, 1969, it was observed that by introducing such provision the legislature intended to offset the effect of the decision of[7], which, as a result, stood negatived. It was further urged that section 3(5) of the Sales Tax Act, 1951, in relation to recovery of Sales Tax, applies the provisions of the Customs Act, pursuant whereto the operative part of the Customs Act has become applicable in the context of Sales Tax, as well, thereby also involving the operation of the newly inserted section 31-A in the Customs Act to the levy of Sales Tax under the Sales Tax Act; hence, no vested right in relation to Sales Tax also can be claimed such as one that may be hit by section 31-A of the Customs Act, 1969. However, the contention was repelled by the learned Division Bench in the following terms: -

> "4. There is little to argue on the point that the Sales Tax Act of 1951 and the Customs Act of 1969, though taxing statutes, operate in different fields. To our minds what section 3(5) of the Sales Tax Act, 1951, achieves is the introduction of machinery operating under the Customs Act to realizations under the Sales Tax Act, as well. There is a clear distinction between charging provisions of a statute and the machinery part thereof. *It is axiomatic that mode and manner of recovery does not alter the nature of a tax nor can a tax be introduced or imposed by implication. We are clear in our minds that it is only payability which is covered by section 3(5) of the Sales Tax Act and not the imposition or levy of Sales Tax, which is provided for elsewhere in the Sales Tax Act itself*. Merely, because of the invocation of section 3(5) of the Sales Tax Act and the application of the Customs Act, 1969, pursuant thereto Sales Tax is not divested of its inherent attributes and does not become Customs duty and, therefore, the introduction of section 31-A in

[4] 1990 PTD 29 (Crescent Pak. Industries (Pvt.) Limited v. Government of Pakistan and others).
[5] Al- Samrez Enterprise v. The Federation of Pakistan (1986 SCMR 1917)
and Punjab Steel Ltd. v. Deputy Collector of Customs (PLD 1989 Lah. 237)
[6] Yasin Sons (P L D 1989 Kar. 361)
[7] Al- Samrez Enterprise (supra)

> the Customs Act, cannot take away vested rights under the Sales Tax Act and does not make any difference whatever on that score."

8. A learned Division Bench of this Court[8] has also dealt with the same issue as to the charging provisions and the machinery provisions under the relevant Acts and applicability of the Customs Act by implication. In that case the petitioners relying upon the exemptions from Excise Duty under S.R.O. 454(1)/96, dated 13.6.1996 imported Raw Cotton and upon arrival on various dates claimed exemptions on the excise duty at import stage which was denied on the basis that the abovementioned S.R.O. was superseded vide S.R.O: No. Nil(I)/99, dated 16.9.1999. It was argued on behalf of the petitioners that principle of promissory estoppel and vested rights would still apply as letters of credit were opened before the withdrawal of exemption by placing reliance on[9] for the proposition that although vested rights acquired from the date of opening of a letter of credit may have been affected by the insertion of section 31-A in the Customs Act, 1969, as far as Customs duty is concerned; however, section 31-A cannot be made applicable to the Central Excise Act so as to destroy vested rights claimed on the basis of exemptions granted under such letters of credit in relation to central excise duty at import stage. Department opposed such proposition and contended that as section 31-A of the Customs Act has been made applicable to the Central Excises Act by virtue of the fifth proviso to rule 9 of the Central Excises Rules, the exemption is no more available after 16.9.1999 when the same was withdrawn and the petitioners' case is fully covered by the decision[10]. The relevance of this judgment is in that the provision for collection of Excise Duty is similar to that of collection of petroleum levy under consideration. The Bench agreed with contention of the petitioners and was pleased to hold as under: -

> "3. This brings us to the controversy at hand. The question, which requires determination is whether there is any provision in the central excise law which would be comparable to section 31-A of the Customs Act or which would make the latter applicable to central excise duty. Raja M. Iqbal, the learned counsel appearing for the respondent No. 2 has invited reference to the fifth proviso to rule 9 of the Central Excise Rules, 1944 which prescribes the time and manner of payment of central excise duty at import stage as follows: --

[8] 2002 PTD 121 (Kohinoor Textile v. Federation of Pakistan)
[9] M.Y. Electronic Industries (Pvt.) Ltd. v. Government of Pakistan (1998 SCMR 1404)
[10] M.Y. Electronic (supra)

"Provided further that the duty in respect of goods imported into Pakistan shall be charged and collected in the same manner and at the same time as if it were a duty of customs payable under the Customs Act, 1969 (IV of 1969)."

It is correct that the key difference between section 3(5) of the Sales Tax Act, 1951 and the fifth proviso to rule 98 of the Central Excise Rules, 1944 is that the former had only prescribed the machinery of the Customs Act to sales tax by employing the expression, `payable' whereas the latter has purported to prescribe both the charging and machinery provisions of the Customs Act to central excise duty by using the words "charged and collected". As already stated above, in Crescent Pak Industries as approved by M.Y. Electronics the reason for not extending section 31-A of the Customs Act to sales tax was that section 3(5) of Sales Tax Act did not contain a charging provision, if the same reasoning is applied here to central excise the result may prima facie, appear to be different since in terms of the fifth proviso to rule 9 of the Central Excise Rules not only the `collection' but also the 'charge' of the Customs Act has been made applicable.. This being so, the real question would then be as to whether a charge could be created by delegated legislation through the rule-making process: The more fundamental question would also be as to whether the power to create a charge can at all be delegated as in the present case.

4. Section 37 of the Central Excises Act empowers the Central Board of Revenue to make rules so as to carry out the purpose of the Act. Section 37 (2) in turn prescribes a number of items for which the rules could be made, without of course limiting the general rule making power for those items which are not so mentioned therein. The delegation thus, is only for assessment or collection, but no for the creation or imposition of a charge: The terms 'assessment' points out to the process of ascertaining adjusting or determining the amount of tax payable (see Punjab Cables V. Government of Pakistan PLD 1989 Lah. 121); whereas the term 'charge denotes the very imposition or levy of the tax (see Friends Sons v. Deputy Collector PLD 1989 Lah, 337). *Similarly, 'collection'. means the very process of recovery of the tax In other words for any tax or in any taxing statute there are three stages; firstly, the imposition or creation of the very tax or levy known as the `charge'. The provisions which deal with the latter are called the charging sections. Secondly, the quantification of the tax of levy which is called 'assessment' and thirdly, the recovery of the levy or tax is called 'collection'. The latter two are the machinery provisions, which are contained in the machinery sections of the statute*.

5. In the present case the delegation conferred through section 37(2)(i) of the Central Excises Act on the Central Board of Revenue is only with regard to 'assessment' and collection and not imposition or 'charge' of the duty. In striking contrast, the Central Board of Revenue in notifying the fifth proviso to rule 9 of the Central Excise Rules has travelled for beyond the delegation conferred upon it since the said proviso has been extended to the creation of a charge' alongwith 'collection'. In other words, the C.B.R. under section 37 has riot been given the power to introduce the charge. The fact that section 31-A of the Customs Act introduces a new charge and is not merely a machinery provision seems settled from Crescent Industries and M.Y. Electronics. It is equally settled law that rules made under delegation of powers cannot go beyond the mandate conferred by the parent statute see Malik Muhammad Din v. Trustees of the Port of Karachi (PLD 1966 Kar. 518) and Chairman, Railway Board v. Wahabuddin sons (PLD 1990 SC 1034). The use of the word 'charge' in the fifth proviso to Rule 9 of the Central Excise Rules is thus ultra vires the power conferred on the C.B.R. under section 37(2)(1) of the Central Excises Act, Raja Muhammad Iqbal has contended that section 37(2) of the Central Excises Act only lists out the items recommended for rule making and such items are not exhaustive since the said section 37(2) expressly provides that the rules could be made in respect of the items mentioned

> without prejudice to the generality of the foregoing power i.e., to make rules generally. On the strength of this argument the learned counsel for the respondent has contended that even if the delegation to introduce the 'charge' cannot be spelt out from section 37(2)(1), such power is implicit from the general rule-making power conferred through section 37(2) and the opening words of section 37(2). A short answer to this argument is that even if the subject or items of rule-making mentioned in section '37(2) are not exhaustive, the general rule-making power has to be read as ejusdem generis with the items or subject listed in section 37(2). As already pointed out 'assessment and collection' on one hand are completely opposed to 'charge'. The two are not ejusdem generis by any stretch of imagination. Thus the general rule-making power delegated under section 37 cannot be extended to creation of a charge. I would in fact go a step further. Even if section 37, hypothetically speaking had delegated to the F C.B.R. the power to introduce a charge or a levy, the said delegation would be bad since it is now pretty much settled that the power to impose or introduce a tax, levy or a fee is only legislative functions which cannot be delegated (see M. Afzal & Sons v. Federation of Pakistan PLD 1977 Lah. 1327). In this manner the term 'charge' used in the fifth proviso of rule 9 of the Central Excise Rules is read down and found to be unenforceable (for the powers of the Court to read in and read down provisions of a statute, see Abdul Rahim v. U.B.L. PLD 1997 Kar. 62."

9. Another learned Division Bench of this Court[11] dealt with this issue in an appeal under section 196 of Act, wherein the appellant imported certain finished goods against an exemption certificate issued by the Commissioner of Income Tax Peshawar, in respect of Grey Cloth under subsection (5) of section 50 of the Income Tax Ordinance, 1979, ("1979 Ordinance") and after release of goods the Customs Authorities also alleged evasion of customs duty and sales tax also but appeal was confined to the issue pertaining to the deduction of advance Income Tax under section 50(5) of the 1979 Ordinance; a show-cause notice was served, appellant replied, an Order was passed against the appellant, impugned before the hierarchy and finally before this Court, whereby the appeal was admitted for regular hearing on the question of law that "*Whether or not the learned Appellate Tribunal has erred in holding that the Customs Authorities have been vested with powers of Income Tax Officers and are also authorized to take action under the Customs Act, 1969, to recover the arrears, if any, of advance tax liable to be deducted under section 50(5) of the Income Tax Ordinance, 1979"* and it has been held as under:-

> "A perusal of the provisions contained in section 50(5) of the Ordinance and section 202 of the Customs Act, ***shows that the Collector of Customs has been empowered to collect the advance income-tax under subsection (5) of section 50 of the Ordinance, at the time of import of goods at the rates specified in the First Schedule to the Ordinance, in the same manner and at the same time as the customs duty and tax is to be collected in the same***

[11] 2004 PTD 801 Al Haj Industrial Corporation (Pvt) Limited v Collector of Customs (Appraisement)

> ***manner as customs duty***, the recovery thereof can be made under section 202 of the Customs Act. In the judgments cited above, it already stands decided ***that merely by providing the manner and time of collection of tax under any tax enactment, the nature of the tax shall not be changed, meaning thereby that if the advance tax under section 50(5) of the Ordinance can be collected as customs duty and can be recovered by the customs officials under section 202 of the Customs Act, it will not change the nature of tax and the income-tax shall not become the customs duty***. We fully subscribe to the views held earlier by this Court in the judgments cited above, that the collection of tax and assessment are not one and the same. ***The power to collect the advance income-tax under section 50(5) of the Ordinance by the Collector of Customs, shall not have the effect of converting the income-tax into customs duty*** and consequently the customs official shall be empowered by virtue of the provisions contained in the Income Tax Ordinance and the Customs Act, merely to collect the determined amount of tax and shall not have the Authority to resort to the chargeability or assessment of a tax. Likewise when the income-tax shall not be changed into customs duty, the applicability, of section 156 of the Customs Act, shall be excluded as a logical conclusion."

10. Finally in the case reported as[12] and upheld in[13] an issue arose before learned Division Bench of this Court in somewhat similar circumstances, wherein, the petitioner imported a Motorboat and claimed concession from customs duty and sales tax under S.R.O. 212(I)/91 dated 14.03.1991. The Motorboat arrived in Pakistan on 15.02.1996 and on the same date, the Goods Declaration was filed and before final processing of the Goods Declaration on 06.04.1996, the exemption of sales tax was withdrawn and Customs department imposed sales tax at the rate of 15%, which was then impugned before this Court. The learned Division Bench, after going through the relevant provisions of the Customs Act including Section 30 and Section 79 as well as Section 5 of the Sales Tax Act, 1990 including subsection 6 thereof, came to the following conclusion: -

> "A perusal of the above provisions contained in sections 30 and 79 of the Customs Act, 1969 and the judgment of this Court in the case of Abbas Steel Industries Ltd., (supra) shows that the proposition of law stands settled that for the purpose of determination of the rate of import duty under the Customs Act, the relevant date is the presentation of Bill of Entry for home consumption under section 79 of the Customs Act. However, second proviso was added to section 30 of the Customs Act by Finance Ordinance, 1979 pertaining to the Bill of Entry under section 104 of the Customs Act, providing that if the duty is not paid within seven days of the Bill of Entry being presented, the value and rate of duty applicable would be the date on which the duty is actually paid. There is no ambiguity in this proviso, that, it is applicable to the Bill of Entry presented under section 104 of the Customs Act, 1969 only and was not applicable to the Bill of Entry presented under section 79 of the Customs Act. The position of law

[12] 2004 PTD 901 (Messers Hashwani Hotels Limited government of Pakistan and 5 others)
[13] 2007 SCMR 1131

prevailing for the purpose of sales tax shall be discussed by us presently. ***However, it is not the end of matter for the reason that the question for consideration before us, pertains to the sales tax and not to the customs duty. Although it is provided in section 6 of the Sales Tax Act, that the tax in respect of goods imported into Pakistan shall be charged and paid in the same manner and at the same time as if it were a duty of customs payable under the Customs Act, 1969, but this provision shall not change the nature of tax and 'therefore, except the provisions pertaining to the collection of sales tax no other provision in the Customs Act, is attracted and particularly the provisions pertaining to the assessment or exemption of sales tax shall still be dealt with under the provisions of the Sales Tax Act***...."

Respectfully following the ratio of the above judgments, we are of the view that the issue under consideration pertained to the exemption under the Sales Tax Act and a-simple question of collection of the sales tax as customs duty is not involved, ***therefore the provisions contained in this behalf in the Sales Tax Act, 1990, pertaining to the chargeability and rate of tax, shall be applicable as in force at the time of import in this case***....."

11. There is another judgement of the learned Lahore High Court[14] in respect of short levy and recovery of petroleum levy. In that case the payment of petroleum levy in terms of s.3(A)(2)(b) of the 1961 Ordinance, at manufacturing stage was made after the due date and department then issued notices under the Central Excise Act, 1944, which governs the collection of levy at manufacturing stage in the same manner as customs duty at the import stage. After the departmental proceedings, the Appellate Tribunal held that since the levy is collected along with and in the same manner as excise duty, therefore, late payment surcharge as envisaged in s. 3-B of the Central Excise Act, would be payable. The learned Lahore High Court repelled such reasoning on the ground that mere mode of collection of levy along with Central Excise Duty would not make all the provisions of the Central Excise Act applicable on the petroleum levy itself which has to be governed under the 1961 Ordinance only.

12. Therefore, in view of the settled proposition of law as above, merely for the reason that by virtue of machinery provisions in the 1961 Ordinance, petroleum levy is being collected in the same manner as the Customs Duty, it will not make the levy as a customs duty, and the provisions of the Act as they are applicable

[14] **(2005 PTD 2392) PAK-ARAB REFINERY LTD. V SUPERINTENDENT, CUSTOMS AND CENTRAL EXCISE**

on a customs duty, including the crystallization of the rate of duty in terms of section 30 ibid; would not ipso facto apply on rate of petroleum levy which shall still be governed under the 1961 Ordinance. In the present case the controversy is only to the extent that when the GD's were filed on 29.2.220, the rate of duty was fixed for 7 days in terms of s.30 read with s.104 of the Act; however, the rate of petroleum levy would be the one which is prevailing at the time of making of actual payment of the same which in the instant matter would have been the rate on 2.3.2020 when according to the Petitioner itself the pay orders were prepared and presented and not the one which was prevailing prior to 29.2.2020.

13. Before parting we may observe that though not relied or referred to in the arguments by the departments Counsel; however, in their comments reference has been made to some opinion of Ministry of Law, Justice and Parliamentary Affairs dated 21.6.2011, whereby, it has been advised that petroleum levy is recoverable at the time of physical / actual removal of goods from the Bonded Warehouse. Though it is settled law that such an opinion is definitely not binding nor has any legal force; but even otherwise on perusal of the same it appears that the same is against the very basis of the law under consideration. The same appears to have been issued on the basis of two judgments[15]; however, perusal of these two judgments clearly reflects that any reliance on them is misplaced. In both these cases the issue was in respect of removal of bonded goods from Customs warehouse without even filing of GDs and payment of duty, and in that context it was held that in such situation the rate of duty and taxes would be the one applicable at the time of removal of goods and without reference to the filing date of any GD. If reliance would still be placed on these two judgments in respect of all duties to be paid on warehoused goods, then perhaps we may say that it would be against the very spirit and purpose of the Act and its relevant provisions. In our view the applicable rate of petroleum levy pursuant to the 1961 Ordinance as of today would be the one notified by the Government at the time of making payment of the

[15] Saira Industries v Collector of Customs (2002 CLC 616) & National Construction Company Ltd. V Government of Pakistan (PLD 1989 Karachi 174)

customs duty with the department and not otherwise. If the intention is as pleaded in the comments and even on the advice of Ministry of Law, then perhaps an amendment is to be carried out in the 1961 Ordinance first to cater to it. In section 3A(2) of the 1961 Ordinance, it is clearly provided that petroleum levy shall be collected in respect of imports in the same manner a customs duty is collected.

14. In view of hereinabove facts and circumstances of this case, we are unable to agree with the contention of the learned Counsel for the Petitioners that the petroleum levy is in fact a customs duty and on filing of goods declaration on 29.02.2020, any vested right accrued to the Petitioner or for that matter the rate of petroleum levy was crystalized and remained valid for 7 days as is the case of the customs duty for a GD filed under s.104 of the Act. We are of the considered view that the petroleum levy is to be charged and paid on the basis of Notification issued by the Ministry of Petroleum, Government of Pakistan from time to time and its applicability and determination has no nexus with filing of GD (except the mode and manner of its collection and payment) if any, or for that matter with fixation of rate of customs duty pursuant to filing of Goods Declaration under Section 30 of the Customs Act, 1969. The petroleum levy is to be charged / levied and paid at the rate(s) as notified under the 1961 Ordinance and as prevalent at the time of actual payment of the same along with Customs Duty.

15. Accordingly, the petition is meritless and is hereby dismissed.

Dated: 29.10.2020

Judge

Judge

Ayaz