# IN THE HIGH COURT OF SINDH AT KARACHI

**Suit No. 41 of 2015**

**Artistic Denim Mills Ltd. ---------- Plaintiff**

**Versus**

**Federal Board of Revenue & others ---------- Defendants**

**Date of hearing:** **08.04.2016**

**Date of judgment:** **15.07.2016**

**Plaintiffs:** **Through M/s Rashid Anwar, Sofia Saeed, Muhammad Hanif Khattana, Ali Mehdi, Ghulamullah, Mehmood Abbas, Ameen - Bandhukda and Iqbal Khurrum Advocates.**

**Defendants:** **Through M/s Amjad Javed Hashmi, Ghulam Haider Shaikh, Kashif Nazeer, Masooda Siraj, Advocates for the Defendants.**
**Mr. Ilyas Ahsan, Appraising Officer, Customs.**

## J U D G M E N T

***Muhammad Junaid Ghaffar, J.*** All Suits as detailed in the Appendix attached herewith are being decided through this common judgment, as they involve a common question of law that as to whether the plaintiffs are entitled for exemption from duties and taxes on the import of Generators in terms of Schedule V of the Customs Act, 1969 and Schedule VI of the Sales Tax Act, 1990.

2. Very briefly the facts as stated are that the plaintiffs are engaged in the business of manufacturing and or export of textile and other products and all of them have imported generating sets for power generation which is being used by them in running their industries and can be more appropriately called as in-house power generation. In some of the matters the generators were imported and were released by the defendants after granting concessionary rate of customs duty and sales tax respectively under the Fifth Schedule of the Customs Act and Sixth

Schedule of the Sales Tax Act, whereas, in other cases when the generators were imported by the plaintiffs they were denied such exemption against which instant Suits were filed by them and by way of interim arrangement the same were ordered to be released by the Court on furnishing surety before the Nazir of this Court. Insofar as the first category of cases is concerned, they are aggrieved by the act of defendants whereby huge demands have been raised against the plaintiffs through a message communicated from the WEBoC system on the basis of a purported clarification dated 5.12.2014 issued by defendant No. 2, whereas, in the other category of cases the plaintiffs have approached this Court for interpretation of the relevant provision of law, including the clarification dated 5.12.2014, as being without lawful authority and jurisdiction.

3. Vide order dated 30.1.2015 and 21.3.2016 by consent of the parties it was agreed that since only a question of law is involved in these Suits, therefore, the parties would not lead any evidence. Accordingly, the following two issues were framed by the Court for adjudication of the controversy in hand:-

> "1) Whether the suits are maintainable?
>
> 2) Whether the plaintiffs are entitled for exemption from duties and taxes on the Import of generating sets, in terms of Schedule V of the Customs Act 1969 and Schedule VI of the Sales Tax Act, 1990?"

4. Mr. Rashid Anwar learned Counsel for the plaintiff in Suit No. 41 of 2015 has argued on behalf of the plaintiffs which have been adopted by other learned Counsel appearing on behalf of other plaintiffs. Learned Counsel has referred to Entry No. 11 to the Fifth Schedule of the Customs Act to contend that such Entry is very clear and requires no further interpretation as the same extends exemption from customs duty in excess of 5% on the import of machinery equipment and spares for power generation through gas, coal, hydel and oil including under construction projects. Per learned Counsel there is no condition attached to this Entry and therefore, nothing could be read into, as is being done by the defendants. Learned Counsel has also referred to impugned clarification dated 5.12.2014 and has contended that by issuing the said clarification the defendant No. 2 has acted beyond jurisdiction inasmuch as it amounts to adding condition(s) which are not available against

Entry No. 11 to the Fifth Schedule of the Customs Act. He has further contended that insofar as exemption of Sales Tax is concerned, similar Entry is available against Serial No. 6 in the Sixth Schedule of the Sales Tax Act, 1990. Learned Counsel has further contended that after abolishment of various Notifications and transformation of all such exemptions through or under the respective Acts including the Customs Act, Sales Tax Act or for that matter the Income Tax Ordinance, FBR is no more competent or authorized to interpret the Acts and or Ordinance. Per learned Counsel it is only within the competence of the legislature to give any such explanation to the Act and or Ordinance. He has further contended that even otherwise it is settled law that the assessing officer while exercising Quasi-judicial functions are not bound by the clarifications issued by FBR. Learned Counsel has further submitted that while interpreting Taxing Statutes nothing could be added nor anything could be read into. He has further submitted that even otherwise insofar as the first category of cases is concerned, after their release it has become a past and closed transaction and no demand can be raised without following the due process of law. Insofar as maintainability of instant Suit is concerned, learned Counsel has contended that since neither any assessment order has been passed nor the plaintiffs have been issued any proper Show Cause Notice before raising the impugned demands, such acts are based on malafides and without jurisdiction, therefore, the same are not protected in terms of Section 217 of the Customs Act, 1969. He has further contended that it is a settled principle of law that Civil Courts are the Courts of ultimate jurisdiction and there is no bar under the law against a Civil Court to test the validity and scope of statutory laws as well as acts of the Government officials unless expressly or impliedly barred. Learned Counsel has contended that since apparently the act impugned before this Court is based on malafide and without jurisdiction, the jurisdiction of the Civil Court is not barred and fully protected. In support of his contentions he has relied upon the cases reported as *M/s Sajid Traders, Lahore and 4 others V M/o Commerce, Government through Secretary Finance and 4 others (2013 PTD 697), Pakistan V. Zeal Pak Cement Factory Ltd. (PTCL 1986 CL 25), Hansraj Gordhandas V. H. H. Dave Assistant Collector of Central Excise and Customs, Surat and others (AIR 1970 SC 755), M/s Bombay Chemical private Limited V. The Collector of Central Excise, Bombay (AIR 1995 SC 1469), M/s Swadeshi Polytex Ltd. V. Collector of Central Excise (AIR 1990 SC 301), M/s Gujarat State Fertilizers Co. V. Collector of Central Excise (AIR 1997 SC 3620), Rakesh Enterprises and another V. Union of*

*|India and another (Writ Petition No. 1808 of 1982), M/s Crescent Textile Mills Ltd. Vs. Federation of Pakistan and others (2001 PTD 3466), M/s Central Insurance Co. and another V. The Central Board of Revenue, Islamabad and others (1993 SCMR 1232), The Central Board of Revenue Islamabad and others V. Sheikh Spinning Mills Limited, Lahore and others (1999 SCMR 1442), The Commissioner of Income Tax East Pakistan, DACCA V. Noor Hussain (PLD 1964 SC 657), Kohinoor Raiwind Mills Ltd. And another V. Central Board of Revenue and 2 others (2000 PTD 3351), Abbasia Cooperative Bank and another V. Hakeem Hafiz Muhammad Ghaus and 5 others (PLD 1997 SC 3), M/s K.G. Traders and another V. Deputy Collector of Customs and 4 others (PLD 1997 Karachi 541), M/S Shujabad Agro Industries (Pvt) Ltd. V. Collector of Customs and 8 others (2014 PTD 1963), M/s H. K. Rahim & Sons (Pvt) Ltd. V. Province of Sindh and another (2003 CLC 649) and Secretary of State V. Mask & Co. (AIR 1940 Privy Council 105).*

5. On the other hand, Mr. Amjad Javed Hashmi Counsel for the defendant / department in Suit No. 102 of 2015 has contended that the plaintiff in this Suit has merely challenged an Executive Order dated 5.12.2014 whereas, the law itself has not been challenged, therefore, the Suit is not maintainable as framed. Learned Counsel has referred to Section 18 of the Customs Act, 1969 by virtue of which Fifth Schedule has been introduced in the Customs Act, and has contended that the exemption available is specifically to various sectors and there are conditions stipulated industry wise in the entire Schedule. Learned Counsel has further contended that insofar as the interpretation of Entry No. 10, 11 and 12 of the Fifth Schedule is concerned, the Court has to take a holistic view and not an observatory view as according to him it is only the power projects specially meant for production and sale of electricity that are entitled for such exemption. Learned Counsel has further contended that no narrow interpretation can be adopted to resolve the present controversy, whereas, instant Suits are otherwise barred under Section 217 of the Customs Act, 1969.

6. Mr. Ghulam Haider Shaikh learned Counsel appearing for defendants in Suit No. 41 of 2015 has adopted the arguments of Mr. Amjad Javed Hashmi and has further contended that insofar as benefit of Serial No. 11 is concerned, the same is only admissible to industrial units who are producing energy / power like projects of Bahria Town and Defence Housing Authority. Per learned Counsel Entry No. 10 and 11 are to be read together and therefore, the conditions attached against Entry

No. 10 are also applicable in respect of Entry No. 11 of the Fifth Schedule of the Customs Act. Learned Counsel has also referred to Section 4(k) of the FBR Act, 2007 and has contended that after implementation of the Act FBR is empowered to issue directions and guidelines in such matters.

7. Mr. Kashif Nazeer learned Counsel appearing for some of the defendants has contended that the explanation appended below Entry No. 12 is only in respect of the said Entry and would not apply in respect of Entry No. 11. Learned Counsel has also referred to Section 217 of the Customs Act by contending that the plaintiff should have availed the alternate remedy, whereas, insofar as the impugned demands are concerned, he has contended that the same have been issued in terms of Section 80(3) of the Customs Act, 1969 for reassessing the goods declaration. The other learned Counsel appearing on behalf of the defendants have adopted the aforesaid arguments.

8. I have heard all the learned Counsel and perused the record. My Issue wise findings are as follows:-

Issue No.1: affirmative

Issue No.2: affirmative

**ISSUE NO. 1**

9. Insofar as maintainability of instant Suits and the bar as contained in Section 217 of the Customs Act, 1979 is concerned, it would suffice to observe that in the first category of cases, wherein the consignments have been released and demands have been raised, no proper Show Cause Notice was ever issued nor the plaintiffs were ever granted any opportunity of being heard. In fact some of the Counsel appearing for the defendants have conceded to the fact that the proper course was to issue Show Cause Notice under Section 32 of the Customs Act, 1969. In the circumstances, it appears to be an academic exercise to ask the plaintiffs to avail any alternate remedy as neither there is any order in field nor the proper course as required in law has been followed. In Law raising such demands is impermissible, hence, without any lawful authority and jurisdiction and therefore, the bar contained under Section 217 of the Customs Act, 1979 would not come into play. Even otherwise insofar as the second category of cases is concerned, the entire case of the

defendants is based on a clarification issued by defendant No. 2 dated 5.12.2014 which is a matter of interpretation of a provision of the Act and therefore, this Court is fully competent to interpret the Act as well as the effect of any such clarification. It may further be noted that the impugned clarification has been issued by the highest forum available under the hierarchy of the Customs Act i.e. FBR and therefore, any further remedy which could have been sought by the plaintiffs would remain illusionary in nature; hence, instant Suits are otherwise maintainable as well.

10. The question of maintainability of Suits and the bar contained in Section 217 of the Customs Act, 1969, recently came for discussion before me in the case of ***Engro Elengy Terminal (Pvt). Ltd. Vs. Federation of Pakistan & Others*** (unreported judgment in **Suit No. 1084 of 2015**), and after a threadbare examination of the relevant provision of the Act, as well as the precedents of the Superior Courts, while upholding the maintainability of Suits under the Customs Act and other fiscal laws, I have held as under:-

> "28. In view of hereinabove discussion and consistent view of the Hon'ble Supreme Court as well as of this Court in various judgments as discussed in the preceding Paragraphs, it can be safely held that it is by now a settled principle that exclusion of jurisdiction of a Civil Court under Section 9 Civil Procedure Code is not to be readily inferred, whereas, such exclusion can only be inferred where the statute under discussion itself gives finality to the order of the lower authority on which it confers jurisdiction and provides for adequate alternate remedy to do what the Court normally do in such matters. It is also settled by now that even if the statute excludes conferring any jurisdiction on a Civil Court, such provision does not excludes situations where the authority vested with such jurisdiction has not complied with or has not acted in conformity with the fundamental principles of judicial procedure. If any such order is not in compliance with the mandate of the statute and the fundamental principles of judicial procedure, then the Court can come to a conclusion that such order is in excess of jurisdiction. Hence a Civil Suit under Section 9 CPC would be maintainable whenever the order impugned is in excess of jurisdiction or tainted with malafide and has been passed outside the ambit of the Act in question itself. In the instant matter the defendants despite having authority and jurisdiction, have failed to pass any assessment order as contemplated under Section 80 of the Act, ibid, and therefore, the bar contained in Section 217(2) of the Customs Act, 1969, would not be applicable, as firstly, there is no assessment order in field so to say, and secondly, such act of the defendants is outside the ambit and is beyond the mandate of the Act, hence, the bar of jurisdiction would not apply and a Civil Court can take cognizance of the matter under Section 9 CPC. Accordingly Issue No 1 is answered in affirmative by holding that the Suit is maintainable."

11. The aforesaid view is amply supported by the cases reported as ***Julian Hoshang Dinshaw Trust Vs. Income Tax Officer (1992 SCMR 250), Khalid Mehmood Vs. Collector of Customs (1999 SCMR 1881), K.G. Traders Vs. Deputy Collector of Customs (PLD 1997 Karachi 541), upheld in Collector of Customs Appraisement and others Vs. K.G. Traders and others (HCA No. 213 of 1997), Saleem Impex Vs. Central Board of Revenue (1999 MLD 1728), Central Board of Revenue Vs. Saleem Impex (1999 YLR 190), Saman Diplomatic Bonded Warehouse Proprietorship Concern Vs. Federation of Pakistan and 3 others (2003 P T D 409), Federation of Pakistan and others Vs. M/S Saman Diplomatic Bonded Warehouse (2004 PTD 1189), Collectorate of Central Excise, Karachi and another Vs. Syed Muzakkar Hussain and another (2006 PTD 219), The Collector of Customs and another Vs. Abdul Razzak (PLD 1996 Karachi 451), Messrs H. A. Rahim & Sons (Pvt.) Ltd. Vs. Province of Sindh and another (2003 CLC 649), Mirpurkhas Sugar Mills Ltd. Vs. Consolidated Sugar Mills Ltd. and 3 others (PLD 1987 Karachi 225), Messrs Bank of Oman Ltd. Vs. Messrs East Trading Co. Ltd. And others (PLD 1987 Karachi 404), Mian Muhammad Latif Vs. Province of West Pakistan and another (PLD 1970 SC 180), Abbasia Cooperative Bank (Now Punjab Provincial Cooperative Bank Ltd.) and another Vs. Hakeem Hafiz Muhammad Ghaus and 5 others (PLD 1997 SC 3), Abdul Rauf and others Vs. Abdul Hamid Khan and others (PLD 1965 SC 671), Union of India v. Tarachand Gupta & Bros. (AIR 1971 SC 1558) and Mafatlal Industries Ltd. Vs. Union of India* **1999 (89) E.L.T. 247(S.C.).**

12. Accordingly issue No. 1 is answered in the affirmative by holding that instant Suits are maintainable before this Court.

**ISSUE NO. 2**

13. Insofar as this issue is concerned, before any further discussion could be made it would be relevant to refer to the relevant Entries of the Fifth Schedule to the Customs Act (Sixth Schedule of the Sales Tax Act has the same wordings and has not been referred to) which require interpretation by this Court and reads as under:-

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| 10. | 1. Machinery, equipment and spares meant for initial installation, balancing, modernization, replacement or | Respective Headings | 5% | (i)This concession shall also be available to primary contractors of the project upon fulfillment of the following conditions, namely:- |

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| | expansion of projects for power generation through oil, gas, coal, wind and wave energy including under construction projects, which entered into an implementation agreement with the Government of Pakistan.<br><br>2. Construction machinery, equipment and specialized vehicles, excluding passenger vehicles, imported on temporary basis as required for the construction of project. | | | (a) the contractor shall submit a copy of the contract or agreement under which he intends to import the goods for the project;<br><br>(b) the chief executive or head of the contracting company shall certify in the prescribed manner and format as per Annex-A that the imported goods are the project's bona fide requirements; and<br><br>(c)the goods shall not be sold or otherwise disposed of without prior approval of the FBR on payment of customs-duties and taxes leviable at the time of import;<br><br>(ii) temporarily imported goods shall be cleared against a security in the form of a post-dated cheque for the differential amount between the statutory rate of customs duty and sales tax and the amount payable under this notification, along with an undertaking to pay the customs duty and sales tax at the statutory rates in case such goods are not re-exported on conclusion of the project. |
| 11. | 1. Machinery, equipment and spares meant for initial installation, balancing, modernization, replacement or expansion of projects for power generation through gas, coal, hydel and oil including under construction projects.<br><br>2. Construction machinery, equipment and specialized vehicles, excluding passenger vehicles, imported on temporary basis as required for the construction of project. | Respective Headings | 5% | do- |
| 12. | 1. Machinery, equipment and spares meant for initial installation, balancing, modernization, replacement or expansion of projects for power generation through nuclear and renewable energy sources like solar, wind, micro-hydel bio-energy, ocean, waste-to-energy and hydrogen cell etc.<br><br>2. Construction machinery, equipment and specialized vehicles, excluding passenger vehicles, imported on temporary basis as required for the construction of project. | Respective Headings | 0% | (i)This concession shall also be available to primary contractors of the project upon fulfillment of the following conditions, namely:-<br><br>(a) the contractor shall submit a copy of the contract or agreement under which he intends to import the goods for the project;<br><br>(b) the chief executive or head of the contracting company shall certify in the prescribed manner and format as per Annex-A that the imported goods are the project's bona fide requirements; and<br><br>(c)the goods shall not be sold or |

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| | Explanation.- The expression "projects for power generation" means any project for generation of electricity whether small, medium or large and whether for supply to the national grid or to any other user or for in house consumption. | | | otherwise disposed of without prior approval of the FBR on payment of customs-duties and taxes leviable at the time of import;<br><br>(ii) temporarily imported goods shall be cleared against a security in the form of a post-dated cheque for the differential amount between the statutory rate of customs duty and sales tax and the amount payable under this notification, along with an undertaking to pay the customs duty and sales tax at the statutory rates in case such goods are not re-exported on conclusion of the project. |

14. Insofar as the case of the plaintiffs is concerned, they have claimed assessment and exemption of their imported power Generating Sets against Serial No. 11 whereas, it is the case of the defendants that such exemption and or entitlement against Serial No. 11 is only permissible for such projects which entered into an implementation agreement with the Government of Pakistan or are producing electricity and selling it to others, but are not using if for in house-consumption. It is their further case that insofar as the explanation attached to Serial No. 12 is concerned, which provides that the expression "**projects for power generation**" means *any project for generation of electricity whether small, medium or large and whether for supply to the national grid or to any other user or for in house consumption*, the same only applies to Entry No. 12 and by no stretch of imagination the same could be termed as an Explanation applicable to Entry No. 11 as well. I am fully in agreement with this aspect of the defendant's case that since the Explanation is appended only with Entry No. 12 to the Fifth Schedule of the Customs Act, the same cannot be read as an Explanation either to Entry No. 10 or Entry No. 11 as the case may be. The explanation is not for the entire 5th Schedule but is only in respect of a specific Entry i.e. No.12. Under no circumstances it can be applied to any other Entry of the Schedule.

15. In pith and substance it is in fact Entry No. 11 which is to be read and interpreted independently in the instant matter. Since the entire case of the defendants is premised on the clarification dated 5.12.2014, hence, it would be appropriate to refer to the impugned clarification dated 5.12.2014 issued by defendant No. 2 and addressed to all the Collectors of Customs which reads as under:-

"Subject: CLARIFICATION REGARDING APPLICATION OF SR. NO. 11 OF FIFTH SCHEDULE TO THE CUSTOMS ACT, 1969 ON IMPORT OF GENERATING SETS OF 1100 KVA OR ABOVE (GAS/DIESEL)

I am directed to refer to the subject cited above and to say that issue has emerged as to whether "generating sets (gas/diesel) of 1100 KVA or above earlier entitled for exemption of whole of customs duty under S. No. 45 of SRO567(I)/2006, dated 5.6.2006 and under PCT 8502.1390 respectively" imported by the units for producing power whose final product is not electricity qualifies under the expression "Projects for Power Generation" as given in S. No. 11 of Fifth Schedule to the Customs Act, 1969.

The issue has been examined. While transposing the SRO567(I)/2006, dated 5.6.2006 to Part-II & III of Fifth Schedule to the Customs Act, 1969 exemption allowed to generating sets of 1100 KVA or above has been withdrawn as a matter of policy. Sr. No. 11(1) of Fifth Schedule to the Customs Act, 1969 allows exemption of customs duty in excess of 5% on import of "machinery, equipment and spares meant for initial installation, balancing, modernization , replacement or expansion of **Projects for Power Generation** through gas, coal, hydel and oil including under construction projects."

In view of foregoing, the Board is pleased to clarify that under Sr. No. 11(1) of Fifth Schedule to the Customs Act, 1969, concessionary rate of 5% customs duty is available to such projects of Power Generation which exclusively produce power as an independent entity. The aforesaid concessionary benefit is not available to power generating machinery (gas/diesel generating sets) to be imported by the units for producing power whose final product is not the electricity."

16. It appears that the said clarification has been issued by defendant No. 2 by referring to SRO 567(I)/2006 dated 5.6.2006 ("567") and its transposition to the Fifth Schedule to the Customs Act, 1969 and it has been observed that while transposing SRO 567 to Part-II & III of the Fifth Schedule to the Customs Act, 1969, exemption allowed to generating sets of 1100 KVA or above has been withdrawn as a *"matter of policy"*. After stating so, the impugned clarification says that *Board is pleased to clarify that under Sr. No. 11(1) of Fifth Schedule to the Customs Act, 1969, concessionary rate of 5% customs duty is available to such projects of Power Generation which exclusively produce power as an independent entity, whereas, the aforesaid concessionary benefit is not available to power generating machinery (gas/diesel generating sets) to be imported by the units for producing power whose final product is not the electricity*. When this clarification is read and understood in juxtaposition with the relevant Entry in question i.e. Entry No. 11 of the Fifth Schedule to the Customs Act, it appears that while issuing the clarification defendant No.2 has made an attempt to import something into the Entry which is not available there. Entry No. 11 very clearly provides that exemption is available in excess of 5% duty to all

sorts of machinery, equipment and spares meant for initial installation, balancing, modernization, replacement or expansion ***of projects for power generation*** through gas, coal, hydel and oil including under construction projects which reflects that such exemption is available to "*projects for power generation*" whereas, the word ***projects for power generation*** has not been defined against this Entry. If the legislature has not given any definition then it is not for defendant No. 2 to provide any such definition of the word *projects for power generation*. It cannot be denied that project for power generation is to generate electricity, irrespective of the fact that whether it is to be supplied to the national grid or to any other private entity or for in-house consumption. This definition / explanation has been provided against Entry No. 12. However, as observed earlier, it does not apply to the Entry in question i.e. Entry No. 11. But this cannot be made basis for leading to a conclusion that the intention of the legislature is that Entry No. 11 is only applicable to the projects for power generation who are selling it either to the national grid or others and not using it for in-house consumption. If there is no restriction provided then adverse inference cannot be drawn in this regard. If the interpretation as advanced on behalf of defendant No.2 is accepted to the effect that any such words can be read into in respect of Entry No. 11, then at the same time, the explanation which is appended with Entry No. 12 can also be read into in favour of the plaintiffs. Since no such clarification and or explanation is appended with Entry No.11, therefore, neither the Court nor FBR / defendants can read into something which is not provided in the Schedule itself.

17. It is also important to note that the legislature has in clear and express terms provided against Entry No.10 that it is only available to *such projects which entered into an implementation agreement with the Government of Pakistan*, and an explanation against Entry No.12 that *"projects for power generation" means any project for generation of electricity whether small, medium or large and whether for supply to the national grid or to any other user or for in house consumption.* Now if any attempt is made to read any of these conditions and or explanation(s) against Entry No.11, then the other Entries i.e. 10 & 12 would become redundant, and it is settled law that no redundancy is to be attributed to the legislature. Therefore, the argument so advanced on behalf of defendants in this regard also fails.

18. It has not been disputed before the Court that the Machinery and Equipment imported by the plaintiffs is for "power generation", but according to them the exemption is only available to those "projects of power generation" who have set up such projects with the intention to sell electricity to others, but not for in house consumption. This to my mind is nothing but imaginary. The Court fails to understand as to from where this restriction has been imported into the Entry in question. If the intention would have been so, the legislature would have added such condition and or restriction in the Entry itself, or an explanation to that effect. This has not been done and the defendants through impugned clarification dated 5.12.2014 have made an attempt to legislate which is not permissible. Even otherwise a power generation project or a **power station**, also referred to as a **generating station**, **power plant**, **powerhouse**, or **generating plant**, is an industrial facility for the generation of electric power. Most power stations contain one or more generators, a rotating machine that converts mechanical power into electrical power. The relative motion between a magnetic field and a conductor creates an electrical current. The energy source harnessed to turn the generator varies widely. Most power stations in the world burn fossil fuels such as coal, oil, and natural gas to generate electricity. Others use nuclear power, but there is an increasing use of cleaner renewable sources such as solar, wind, wave and hydroelectric. (see https://en.wikipedia.org/wiki/Power_station). All that a power generating unit does is to produce electricity; either it is used for others or for in house consumption. Even a smaller generating unit installed at a residential premise is a project for power generation. Such installation is always independent in nature and has got nothing to do with the Machinery installed in a factory for any other purpose. The set-up of a power generating unit is independent of all such other installations. Hence it has no nexus with the issue that whether such electricity is being sold to others or is being used for in house consumption, at least insofar as Entry No.11 is concerned.

19. The cardinal principle of Interpretation is that the statute is to be interpreted by gathering the intention of the legislature from the plain reading of the words used, which also includes and means that attention should be paid to what has been said and so also to what has not been. It is trite law that neither Courts nor anybody else (including FBR) is competent to add words to a Statute / Act or for that matter a Schedule

(which is also a part of the Act). It is always regarded as contrary to all rules of construction(s) to read words into an Act unless it is absolutely necessary to do so (which is not the case here). Similarly the Courts cannot and must not reframe the legislation (except however, reading it down as and when needed) for the very good reason that it has no power to legislate. The principle of "Casus Omissus" is squarely applicable here, that a matter which should have been, but has not been provided for in a statute cannot be supplied by Courts, as to do so will be legislation and not construction, [**Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co. Ltd., *AIR 1933 PC 63*]**. A Casus Omissus can, in no case, be supplied by the Court of law as that would amount to altering the provision, [**Nadeem Ahmed Advocate v. Federation of Pakistan *2013 SCMR 1062***]. Moreover, in interpreting a penal or taxing statute the Courts must look to the words of the statute and interpret them in the light of what is clearly expressed. It cannot imply anything which is not expressed; it cannot import provisions in the statute so as to support assumed deficiency, [**Collector of Customs (Appraisement) v. Abdul Majeed Khan & Others *1977 SCMR 371***]

20. Therefore, it is held that insofar as Entry No.11 and the clarification dated 5.12.2014 are concerned, there is no restriction or condition attached thereto, that such exemption would only be available to those power generation projects which exclusively produce power as an independent entity and is not available to power generating machinery (gas/diesel generating sets) to be imported by the units for producing power whose final product is not the electricity. Further neither there is any ambiguity in transposition of SRO 567 to the 5th Schedule of the Customs Act, 1969 and to the 6th Schedule to the Sales Tax Act, 1990, nor does this appear to be any case of "Policy" matter as contended on behalf of FBR in the impugned clarification. The Schedule and its Entry No.11 are clear and express in terms and does not require any further dilation in this regard. As a consequence impugned clarification dated 5.12.2014 cannot sustain and is hereby set aside.

21. In view of hereinabove facts and circumstances, issue No. 2 is answered in the affirmative by holding that the plaintiffs are entitled for exemption of duty and sales tax in terms of Entry No.11 of Schedule V of the Customs Act 1969 and Serial No. 6 of Schedule VI of the Sales Tax Act, 1990 as a consequence thereof insofar as the cases in which demand(s) have been raised after release of consignment(s), the same are

hereby set aside. Whereas, insofar as the second category of cases is concerned, in which the consignments have been released on the orders of this Court, Nazir is directed to discharge and release the differential amount secured either by way of Bank Guarantee and or Pay Order or any other security to the respective plaintiffs after proper identification and verification.

22. All Suits stand decreed in favour of the plaintiffs by answering issue No. 1 & 2 in the affirmative.

Dated: 15.07.2016

J U D G E

ARSHAD/

IN THE HIGH COURT OF SINDH, KARACHI

SUIT NO. 41/2015

(and connected Suits)

APPENDIX: LIST OF CASES

| S. No. | Case No. & Year | Parties |
|---|---|---|
| 1. | Suit 42/2015 | Rizwan Enterprises v. Federal Board of Revenue & Others |
| 2. | Suit 43/2015 | M/s. Maksons Textiles (Pvt.) Ltd v. Federal Board of Revenue |
| 3. | Suit 44/2015 | M/s. Naveena Industries Ltd. v. Federal Board of Revenue & Others |
| 4. | Suit 45/2015 | Artistic Fabric Mills (Pvt.) Ltd. v. Federal Board of Revenue & Others |
| 5. | Suit 60/2015 | Indus Lyallpur Limited v. Federal Board of Revenue & Others |
| 6. | Suit 102/2015 | M/s. Monnoowal Textile Mills v. Federal Board of Revenue & Others |
| 7. | Suit 164/2015 | M/s. Khas Textile Mills Ltd. v. Federal Board of Revenue & Others |
| 8. | Suit 217/2015 | M/s Indus Dyeing & Manufacturing Co. Ltd. v. Federal Board of Revenue & Others |
| 9. | Suit 659/2015 | M/s. Crescent Fibers Mills Ltd. Federal Board of Revenue & Others |
| 10. | Suit 714/2015 | M/s. Al-Hamd Corporation (Pvt.) Ltd. v. Federal Board of Revenue & Others |
| 11. | Suit 892/2015 | Artistic Apparels (Pvt.) Ltd. v. Board of Revenue & Others |
| 12. | Suit 977/2015 | M/s. Crescent Fibers Mills Ltd. Federal Board of Revenue & Others |
| 13. | Suit 34/2016 | M/s. Mekotx (Pvt.) Ltd. v. Federal Board of Revenue & Others |
| 14. | Suit 37/2016 | Artistic Fabric Mills (Pvt.) Ltd. v. Federal Board of Revenue & Others |
| 15. | Suit 39/2016 | M/s. Zaman Textile Mills Ltd. v. Federal Board of Revenue & Others |
| 16. | Suit 169/2016 | Al-Karam Towel Industries (Pvt.) Ltd. v. Federation of Pakistan & Others |
| 17. | Suit 369/2016 | M/s. Kassim Textile (Pvt.) Ltd. v. Federal Board of Revenue & Others |
| 18. | Suit 807/2016 | M/s. Siddiq Sons Ltd. v. Federal Board of Revenue & Others |