IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1084 of 2015

Engro Elengy Terminal (Pvt. Ltd. ---------- Plaintiff

Versus

Federation of Pakistan & others ---------- Defendants

Date of hearing: **26.02.2016**

Date of judgment: **26.05.2016**

Plaintiff: **Through Mr. Makhdoom Ali Khan Advocate.**

Defendants: **Through Mr. Sohail Muzaffar Advocate along with Mrs. Masooda Siraj Advocates assisted by Mr. Nayyar Shafiq Additional Collector. Mr. Adnan Qadoos Shaikh Assistant Collector. Mr. Tariq Aziz Principal Appraiser. Mr. Asad Aleem Principal Appraiser Law. Mr. Liaquat Ali Principal Appraiser.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Permanent Injunction, wherein, the plaintiff has sought the following relief(s):-

i) Declare the levy of customs duty and advance income tax on the import of the FSRU by the plaintiff is illegal and of no legal effect.

ii) Declare that no customs duty, sales tax or advance income tax is payable on the import of the FSRU.

iii) Declare that the Impugned Assessment and impugned order are illegal, void ab-initio and of no legal effect.

iv) Permanently restrain the defendants, their officers an assigns, from jointly and severally and directly or indirectly, taking any adverse action against the plaintiff or the FSRU pursuant to the Impugned Assessment (Annex T), including but not limited to seizing or detaining the FSRU or from impending, hampering or interfering with its operations in any manner whatsoever, or from disconnecting it from the on land facilities or preventing it from sailing away from or returning to Karachi as an LNG carrier or from receiving LNG ships and unloading LNG or supplying regasified gas to Suit Southern Gas Company Limited.

2. Briefly the facts as stated are that the plaintiff is a 100% owned subsidiary of M/s Elengy Terminal Pakistan Limited incorporated to establish and operate a terminal for the handling, regasification, storage, treatment and processing of Liquefied Natural Gas (**"LNG"**) and Re-gasified Liquefied Natural Gas (**"RLNG"**) for which the plaintiff has obtained license from Oil & Gas Regulator Authority. It is further stated that in order to overcome the gas shortage in the country the Federal Government through its designated coordination entity namely Interstate Gas Systems (Pvt.) Limited ("**ISGS**") issued a tender notice for a Fast Track LNG Import Terminal on 7.8.2013 wherein, one of the key conditions of the tender was fast track nature of the project, whereby, a very short period of 335 days was provided from the date of Terminal Services Agreement to the date of first delivery of Gas. According to the plaintiff the only feasible solution for supply of gas in such a short period of time was to arrange a floating storage regasification unit (**"FSRU"**), whereas, this was also acknowledged in the presentation made by ISGS to the potential bidders. The plaintiff accordingly submitted a bid for setting up an LNG terminal based on utilization of FSRU as an integral part of such terminal and the bid of the plaintiff was accepted and a letter of intent dated 26.11.2013 was issued by Sui Southern Gas Company Limited (**"SSGC"**) on behalf of the Federal Government. On acceptance of the bid, the plaintiff entered into an Operation and Services Agreement dated 30.4.2014 with SSGC and a Time Charter Party and LNG Storage and Regasification Agreement dated 18.6.2014 as novated by the Deed of Novation dated 26.1.2015 with M/s Excelerate Energy Development DMC, a company incorporated under the laws of Dubai. It is further stated that earlier the Federal Government through Ministry of Petroleum and Natural Resources moved a summary before the Economic Coordination Committee of the Federal Cabinet ("**ECC**") dated 4.4.2012 for providing a level playing field to LNG Terminal Operation and pursuant to decision of ECC, SRO 678(I)/2004 dated 7.8.2004 ("**678**") as amended by SRO 571(I)/2005 dated 6.6.2005 ("**571**") were issued. The plaintiff thereafter chartered the FSRU for a period for 15 years under the Time Charter Party Agreement, by relying on the exemption approved by ECC and completed the project within the time permitted under the agreement, however, a letter dated 21.3.2015 was issued by Deputy Collector of Customs to the plaintiff informing that the import of FSRU

will be treated as a regular import for which a goods declaration should be filed.

3. It is further stated that in terms of the services agreement, the plaintiff was supposed to be provided LNG for regasification, however, the Federal Government had not been able to reach an agreement on the price of LNG to be imported from Qatar, and therefore, no LNG was imported, whereafter, Pakistan State Oil on behalf of the Federal Government requested for the FSRU in question to be used as LNG carrier for five consignments of LNG and the first consignment of LNG birthed on 26.3.2015 at the plaintiff's terminal at Port Qasim. The FSRU went back to bring back more consignments and completed its last voyage for import of LNG on 14.6.2015. In response to the defendants letter dated 21.3.2015, explanation was given by the plaintiff through its letter(s) dated 22.3.2015, 9.4.2015 and 10.4.2015. It is further stated that though the FSRU was used as an LNG carrier at the request of Federal Government through PSO, however, the Customs Authorities refused to allow the FSRU to leave the Country and forced the plaintiff into providing an indemnity bond, corporate guarantee and an undertaking for the release of FSRU. In the meantime, on 3.4.2015 the Ministry of Petroleum and Natural Resources moved another summary to ECC by seeking further exemptions for LNG terminal operators and after approval of the summary another SRO 337(I)/2015 was issued on 22.4.2015, ("**337**")whereby, SRO 678 was amended. It is the case of the plaintiff that pursuant to such amendment as well as in terms of SRO 678 as un-amended, the plaintiff is entitled for exemption from the whole of the customs duty and sales tax. Insofar as the exemption from advance income tax payable at the import stage is concerned, it is the case of the plaintiff that in view of SRO 947(I)/2008 dated 5.9.2008, (**"947"**)the plaintiff on 19.2.2015 applied to the Commissioner, Inland Revenue, for issuance of exemption certificate in respect of payment of advance income tax under Section 148 of the Income Tax Ordinance, 2001 ("**Ordinance, 2001**") and the request of the plaintiff was rejected vide order dated 24.3.2015. Being aggrieved, the plaintiff preferred a revision application under Section 122B of the Ordinance, 2001 to the Chief Commissioner Inland Revenue, on 31.3.2015, however, on 19.6.2015 the Chief Commissioner Inland Revenue also dismissed the revision application by upholding the order of Commissioner Inland Revenue. Such order has been impugned through instant Suit as well. It is further

stated that on 26.6.2015 plaintiff once again received instruction from the Federal Government through PSO that since no agreement has been reached for the import of LNG from Qatar till date, therefore, the FSRU is further required to transport LNG from Qatar. Thereafter the plaintiff approached the Collector of Customs seeking no objection but such request was not entertained and the plaintiff was verbally directed to file a goods declaration, whereafter, the Plaintiff filed Goods Declaration claiming exemption from payment of customs duty and sales tax under SRO 678 by providing a corporate guarantee valid for two years for exempt duties and taxes as required under Condition (vii) and also claimed exemption from payment of any advance income tax under SRO 947 and so also under Finance Act, 2015. However, Such claim of the plaintiff was rejected and the plaintiff was called upon to pay 5% customs duty and 5.5.% as advance income tax, whereas, the exemption from sales tax was accepted and accordingly granted. Such demand of asking for payment of duties and advance income tax has been impugned through instant Suit.

4. Learned Counsel for the plaintiff has contended that insofar as FSRU is concerned, it has been procured by the plaintiff on a time charter agreement for 15 years, whereas, the agreement itself in Clause 17.3(d) provides that FSRU must sail out twice during the "Term" for dry-docking as according to the learned Counsel, FSRU is not a permanent and fixed vessel on ground, but it requires movement for repairs and inspection. Per learned Counsel this for all purposes is a temporary import which is covered under SRO 678 [condition (vii)] and is exempt from the levy of customs duties, sales tax and advance income tax. He has further submitted that various clauses of the agreement of time charter provides that in case of movement of FSRU, its inability to work further, it can also be replaced by another FSRU and for such purposes it may have to sail out of Karachi several times. He has further submitted that demand/levy of 5% duty and 5.5.% advance income tax by the defendants under clause (2) and 2(a) of SRO 678 is without any lawful authority and jurisdiction, whereas, the FSRU imported by the plaintiff is covered under the definition of machinery and equipment and since it is on a temporary import basis, the same is entitled for exemption under condition (vii) of SRO 678, whereas, a period of two years of the temporary import has not yet materialized, and therefore, any demand of customs duties and or advance income tax by the defendants is without

jurisdiction besides being unjustified. He has further submitted without prejudice that even the period of two years for temporary import is extendable by the Collector of Customs from time to time, if the importer has a definite contract, whereas, the plaintiff has a definite contract of charter party as referred to hereinabove. Learned Counsel has further contended that even if the Collector of Customs refuses to extend the corporate guarantee after two years, it will not immediately lead to any demand of duties and taxes as the dispute would arise under condition (vi) of SRO 678 and would have to be resolved accordingly. He has further submitted that insertion of clause 2(a) through, amendment vide SRO 337 was only clarificatory in nature and its object was not to curtail or limit the exemption already available under SRO 678. In nutshell per learned Counsel, insofar as exemption from customs duty is concerned, even otherwise and in absence of clause 2(a) the plaintiff is entitled to exemption from the whole of customs duty under clause 2 read with condition (vii) of SRO 678, whereas, in the alternative and without prejudice, he has further submitted that in the event of a dispute the defendants were obligated to clear the goods and refer the matter for decision by the Collector of Customs as provided in condition (iv) of SRO 678, and therefore, the demand by the Customs authorities at this stage of the proceedings is premature.

5. As to the issue of exemption from advance income tax, learned Counsel has contended that SRO 947 has exempted the plaintiff from advance income tax on imports upon fulfilling the conditions, whereas, the claim of such exemption under SRO 947 became an academic exercise, when the budgetary proposals came in the public domain through Finance Bill 2015, whereby, it was provided that there would be a five years Income Tax holiday, through insertion of item No. (141) in Part I of the Second Schedule to the Ordinance, 2001 and such proposed amendment was passed and was incorporated in the Ordinance, 2001 w.e.f. 1.7.2015, which provides that profits gained by LNG Terminal Operators would be exempt for a period of 5 years beginning from the date when commercial production commences. Per learned Counsel Finance Act for any year, which comes into effect on 1st July is applicable to the tax year that has just ended on 30th June of the same year, and therefore, the Finance Act, 2015 and its provision would be applicable to the plaintiff's tax year for 2015 which ended on 30.6.2015. He has further contended that admittedly no income tax is due for tax year 2015

on the plaintiff's income as the liability for that year is zero and therefore, the plaintiff is not required to pay any advance income tax for that year as demanded by the defendants, as otherwise if such tax is collected it would become repayable and refundable to the plaintiff and would only lead and subject the plaintiff to the bureaucratic hassle to deposit the tax and then seek refund of the same. Per learned Counsel even in terms of SRO 947 the defendants had unlawfully denied the issuance of exemption certificate by misinterpreting clause (v) of the said SRO and therefore, the plaintiff is not liable to pay any advance tax. As to the bar of jurisdiction under Section 217 of the Customs Act 1969, the learned Counsel submitted that such bar cannot protect an action which is without jurisdiction, illegal or malafide as in such situation the Suit is always maintainable before a Civil Court under section 9 CPC. He has further contended that even the plaintiff has no alternate remedy as neither any proper assessment order was passed against the plaintiff nor any reasons were assigned while refusing the exemption being claimed by the plaintiff, and therefore, the plaintiff was never in a position to avail any alternate remedy under the hierarchy of Customs department as contended by the learned Counsel for the defendants. In support of his contentions he has relied upon the cases reported as *Collector of Customs (Appraisement) Karachi Vs. Fauji Fertilizer Co. Ltd. (PLD 2005 SC 577), Moro Textile Mills Ltd. Vs. CBR(2007 PTD 60), D.G. Khan Cement Company Ltd Vs. Customs Appraisement, Customs House Karachi (2003 PTD 986), Muhammad Amin Muhammad Bashir Limited Vs. Government of Pakistan (2015 SCMR 637), Secretary Ministry of Health, Government of Pakistan Vs. Dr. Rehana Hameed and others (2010 SCMR 511), Star Textile Mills Ltd. Vs. Pakistan (1999 MLD 3001), Pad field and others Vs. Minister of Agriculture, Fisheries and Food and others (1968) 1 All E.R. 694, Collector of Sales Tax and Central Excise (Enforcement) and another Vs. Mega Tech (Pvt.) Ltd. (2005 SCMR 1166), Master Foam (Pvt.) Ltd Vs. Government of Pakistan and others (PLD 2005 SC 373), Abdul Hamid Vs. the State (PLD 1963 Karachi 363), Dreamland Cinema, Multan Vs. Commissioner of Income Tax, Lahore (PLD 1977 Lahore 292), Rehman Corporation, Hyderabad Vs. the Income Tax Officer, Mirpurkhas (1985 PTD 787), CIR Zone-II Chief Tax office, Multan Vs. Mrs. Ambreen Fawad Co. Pak Arab Fertilizer Ltd. Multan (2014 PTD 320), Bennion on Statutory Interpretation, Fifth Edition at page 188, Government of Pakistan Vs. Saif Textile Mills Ltd. (2003 PTD 355), Ihsan-ur-Rehman Vs. Najma Parveen (PLD 1986 SC 14), Excise and Taxation Officer Karachi Vs. Burmah Shell Storage and Distribution Company of Pakistan Ltd. (1993 SCMR 338), Muhammad Javed Vs. The State (1993 SCMR 1619), Shahnawaz (Pvt.) Ltd. Vs. Pakistan (2011 PTD 1558), Radhashyam*

Agarwala Vs. The Commissioner of Income Tax East Pakistan (1960 PTD 371), Evershine Paints (Eastern) Ltd. Vs. Commissioner of Income Tax (1995 PTD 614), Lone Cold Storage Vs. Revenue Officer, LEPCO (2010 PTD 2502), Commissioner Income Tax Vs. Absetos Cement Industries Ltd. / Commissioner Income Tax Vs. Habib ?Sugar Mills Ltd. (1993 PTD 343), Indus Jute Mills Vs. Government of Pakistan (2009 PTD 1473), Nishat Dairy Vs. Commissioner Inland Revenue (2013 PTD 1883), Lone Cold Storage Vs. Revenue Officer, LEPCO (2010 PTD 2502), Riaz Bottlers Pvt. Ltd. Vs. Lahore Electric Supply Company (2010 PTD 1295), Union Bank Ltd. Vs. Federation of Pakistan (1998 PTD 2116), Pakistan International Airlines Corporation Vs. Pakistan & others (2015 PTD 245), Shujabad Agro Industries Vs. Collector of Customs (2014 PTD 1963), Karachi Electric Supply Corporation Vs. Federal Board of Revenue (2013 PTD 851), Shell Pakistan Ltd. Vs. Federation of Pakistan (1999 YLR 166), Central Board of Revenue Vs. Saleem Impex (1999 YLR 190), Saleem Impex Vs. Central Board of Revenue (1999 MLD 1728), Asia petroleum Limited Vs. Federation of Pakistan (1999 PTD 1313), Tri-Star Industries Vs. The Commissioner of Income Tax (1998 PTD 3923), K.G. Traders Vs. Deputy Collector of Customs (PLD 1997 Karachi 541), Abbasia Cooperative Bank Vs. Hakeem Hafiz Muhammad Ghous (PLD 1997 SC 3), Usman Panjwani Vs. Government of Sindh (1996 CLC 311), Samiullah Vs. Fazle Malik (PLD 1996 SC 827), Syed Raunaq Raza Vs. Province of Sindh (1994 CLC 317), Hyderabad Municipal Corporation Vs. Fateh Jeans (1991 MLD 284), Karim Dad Vs. Arif Ali (PLD 1978 Lahore 679), Hamid Hussain Vs. Government of West Pakistan (1974 SCMR 356), Muhammad Jamil Asghar Vs. The Improvement Trust (PLD 1965 SC 698), Abdul Rauf Vs. Abdul Hamid Khan (PLD 1965 SC 671), Fecto Cement Limited Vs. The Collector of Customs Appraisement and another (1994 MLD 1136).

6. On the other hand the learned Counsel appearing on behalf of defendants No. 3, 4 and 5 (Collector of Customs, Port Qasim) has at the very outset raised an objection as to maintainability of this Suit by contending that there is a complete bar under Section 217 of the Customs Act, 1969, whereas, even otherwise the plaintiff ought to have availed the alternate remedy as contemplated under Section 193 and 194(A) of the Customs Act, 1969. As to the merits of the case, learned Counsel has contended that FSRU is in fact a vessel classifiable under HS Code 8901.2000 attracting statutory customs duty @ 10%, sales tax @ 17% and Income Tax @ 5.5%, whereas, the plaintiff on arrival of its vessel never filed a goods declaration until the plaintiff was compelled to do so. Per learned Counsel the plaintiff filed a goods declaration on 27.6.2015 by claiming full exemption from duties and taxes under condition (vii) of SRO 678, and such exemption being inadmissible was denied as condition (vii) very

clearly states that only goods falling under clauses 1, 2 and 3 of SRO 678 qualify for benefit under this condition, while clause 2(a) which is more appropriately attracted to the case of the Plaintiff, is nowhere mentioned in this condition, and resultantly the import of FSRU is subject to customs duty @ 5% and advance income tax at 5.5.% whereas, the whole of sales tax is exempted. He has further contended that the goods declaration was accordingly assessed by the defendants under Section 80 of the Customs Act, 1969 and the plaintiff was directed to pay the assessed duties against which the plaintiff ought to have filed an appeal under Section 193 of the Customs Act instead of filing the present Suit. He has further submitted that the import in question is not of a temporary nature and the plaintiff has itself stated that it has an agreement for 15 years and therefore, even if FSRU is to be sent for repairs, its import for the purposes of exemption cannot be treated as on temporary basis. Insofar as denial of exemption from advance income tax is concerned, learned Counsel has contended that the plaintiff was required to provide an exemption certificate issued by the Inland Revenue Authorities which the plaintiff has failed to do so, and therefore, the Customs department has assessed the advance tax under Section 148 of the Ordinance 2001. In support of his contention he has relied upon the cases reported as *Ghani and Tayub (Pvt.) Ltd. Karachi Vs. Federation of Pakistan and 2 others (2010 PTD 817), M/s Shadman Cotton Mills Ltd. Vs. Federation of Pakistan and another (2009 PTD 193), Government of Baluchistan, CWPP&H Department and others Vs. Nawabzada Mir Tariq Hussain Khan Magsi and others (2010 SCMR 115), West Pakistan Tanks Terminal (Pvt.) Ltd. Vs. Collector (Appraisement) (2007 SCMR 1318), M/s Abdul Wahid Abdul Majid Vs. Government of Pakistan and others (1993 SCMR 17), Abbasia Cooperative Bank (Now Punjab Provincial Cooperative Bank Ltd. and another Vs. Hakeem Hafiz Muhammad Ghaus and 5 others (PLD 1997 SC 3), Messrs Paramount Spinning Mills Ltd. Vs. Customs, Sales Tax and Central Excise Appellate Tribunal and another (2012 SCMR 1860), Collector of Customs Karachi and others Vs. Messrs Haji Ismail Co. and others (2015 SCMR 1383)* and order dated 25.1.2012, of the Hon'ble Supreme Court in the case of *Ghani & Tayyub (Private) Limited Vs. Federation of Pakistan & Others (Civil Petition No. 832-K & 833-K of 2011).*

7. On 18.1.2016 at the joint request of both the learned Counsel, the following legal issues were framed as they had submitted that parties do not wish to lead any evidence as the legal controversy can be decided on the basis of documents available on record, whereas, defendant Nos. 6&7 have chosen to remain absent despite service.

1) Whether the Suit is maintainable?

2) Whether a remedy was available to the plaintiff under Section 193 of the Customs Act, 1969 in the form of an appeal before the Collector (Appeals)?

3) Whether the plaintiff is exempt from payment of any customs duty on the import of the Floating Storage Regasification Unit under Clause (2a) read with condition (vii) of SRO 678(I) of 2004?

4) Whether the plaintiff was exempt from payment of any advance income tax on the import of the Floating Storage Regasification Unit in view of the instruction of Clause (141) in Para 1 to the 2nd Schedule to the Income Tax Ordinance, 2001 through the Finance Act 2015?

5) Whether the plaintiff was exempt from payment of any advance tax on the import of the Floating Storage Regasification Unit under SRO 947(I) of 2008?

6) What should the decree be?

Issue No.1 & 2:

8. Insofar as these two issues are concerned, there are two aspects of the matter and therefore both these issues have been taken up together. First is that whether the Suit is maintainable and not barred under Section 217 of Customs Act, 1969 and second, as to whether the plaintiff ought to have availed the alternate remedy as provided under the Customs Act 1969. Insofar as the question of alternate remedy is concerned, by now it is a settled proposition that normally a party is not allowed to seek relief directly either through the Civil Court or the Court exercising Constitutional jurisdiction and must avail the alternate remedy as provided in law. This is a matter under the special law i.e. Customs Act, 1969 which provides a complete mechanism for assessment of goods declaration by the officers of the Customs (See S.80), as well as adjudication of the cases by quasi-judicial officers (See S.179) and appellate authority i.e. Collector of Customs (Appeals) (See S.193) and thereafter a further appeal before the Customs Appellate Tribunal (See S.194A) and finally a reference application before the High Court (See S.196). The relevant provision governing the assessment proceedings are Sections 79 and 80 of the Customs Act, whereas, the

appeal (1st appeal) is provided under Section 193 of the Customs Act, 1969. It would be advantageous to refer to the provisions of Sections 79, 80 and 193 of the Customs Act which reads as under:-

"**79. Declaration and assessment for home consumption or warehousing:-** (1) The owner of any imported goods shall make entry of such goods for home consumption or warehousing or for any other approved purposes, within fifteen days of the arrival of the goods, by:-

(a) filing a true declaration of goods, giving therein complete and correct particulars of such goods, duly supported by commercial invoice, bill of lading or airway bill, packing list or any other document required for clearance of such goods in such form and manner as the Board may prescribe; and

(b) assessing and paying his liability of duty, taxes and other charges thereon, in case of a registered user of the Customs Computerized System;

Provided that if, in case of used goods, before filing of goods declaration, the owner makes a request to an officer of customs not below the rank of an Additional Collector that he is unable, for want of full information, to make a correct and complete declaration of the goods, then such officer subject to such conditions as he may deem fit, may permit the owner to examine the goods and thereafter make entry of such goods by filing a goods declaration after having assessed and paid his liabilities of duties, taxes and other charges:

Provided further that no goods declaration shall be filed prior to ten days of the expected time of arrival of the vessel.

(2) If an officer, not below the rank of Additional Collector of Customs, is satisfied that the rate of customs duty is not adversely affected and that there was no intention to defraud, he may, in exceptional circumstances and for reasons to be recorded in writing, permit, substitution of a goods declaration for home consumption for a goods declaration for warehousing or vice versa.

(3) An officer of Customs, not below the rank of Assistant Collector of Customs, may in case of goods requiring immediate release allow release thereof prior to presentation of a goods declaration subject to such conditions and restrictions as may be prescribed by the Board.

80. Checking of goods declaration by the Customs:-(1) On the receipt of goods declaration under section 79, an officer of Customs shall satisfy himself regarding the correctness of the particulars of imports, including declaration, assessment, and in case of the Customs Computerized System, payment of duty, taxes and other charges thereon.

(2) An officer of Customs may examine any goods that he may deem necessary at any time after the import of the goods into the country and may requisition relevant documents, as and when and in the manner deemed appropriate, during or after release of the goods by Customs;

(3) If during the checking of goods declaration, it is found that any statement in such declaration or document or any information so furnished is not correct in respect of any matter relating to the assessment, the goods shall, without prejudice to any other action which may be taken under this Act, be reassessed to duty, taxes and other charges levied thereon.

(4) In case of the Customs Computerized System, goods may be examined only on the basis of computerized selectivity criteria.

(5) The Collector may, either condone the examination or defer the examination of imported goods or class of goods and cause it to be performed at a designated place as he deems fit and proper either on the request of the importer or otherwise.

193. Appeals to Collector (Appeals):- (1) Any person including an officer of Customs aggrieved by any decision or order passed under Sections 33, 79, 80 and 179 by an officer of Customs below the rank of Additional Collector may prefer appeal to the Collector (Appeals) within thirty days of the date of communication to him of such decision or order:-

Provided that an appeal preferred after the expiry of thirty days may be admitted by the Collector (Appeals) if he is satisfied that the appellant has sufficient cause for not preferring the appeal within that period.

(2) An appeal under this section shall be in such form and shall be verified in such manner as may be prescribed by rules made in this behalf.

(3) An appeal made under this Act shall be accompanied by a fee of one thousand rupees to be paid in the manner that may be prescribed by the Board."

9. In terms of Section 79 thereof the owner of any imported goods has to file a true declaration giving therein complete and correct particulars of its imported goods, duly supported by commercial invoice, bill of lading and other relevant documents and by assessing and paying his liability of duty and taxes, in case of a registered user of the Customs Computerized System. Upon filing of such goods declaration, the officer of Customs under Section 80 of the Act has to satisfy himself regarding the correctness of the particulars of import including declaration, assessment and in case of the computerized customs system payment of duties and taxes and other charges thereon. The officer is further authorized to examine any goods he may deem necessary at any time after the import of the goods into the country; and may requisition relevant documents as and when in the manner deemed appropriate during or after release of the goods by the Customs. It is further provided under Section 80 ibid that if during the checking of goods declaration, it is found that any statement in such declaration or document or any information so furnished is not correct in respect of any matter relating to the assessment, the goods shall, without prejudice to any other action which may be taken under this Act, be reassessed to duty, taxes and other charges levied thereon. Perusal of these two provisions reflect that after the goods declaration has been filed by an importer, the officer of Customs is required to check the goods declaration and make an assessment thereon. The practice prevailing in the department is that normally the exercise of assessment is carried out by the officer of the Customs on the basis of goods declaration and if the officer is satisfied

from the given particulars on the goods declaration, he accepts the same and makes the assessment by directing importer to pay the duties and taxes accordingly, whereas, if he intends to disagree with the claim of the importer as to the classification of the goods and or claim of exemption or for that matter, value, the assessing officer makes an appropriate assessment which he thinks correct by striking down the exemption claimed and makes the assessment in his own hand writing and returns / refers the goods declaration to the importer for payment of duties and taxes. Presently in most of the cases, the computerized system is in vogue, and therefore, the completion / assessment of Goods Declaration is made through computer portal and the Importer or his Agent is communicated the instructions / directions through a message in their Inbox. In both these circumstances, the assessing officer normally does not pass any reasoned order and mostly makes the assessment which he deems fit and correct in the circumstances. The question, therefore, arises that if the importer is dissatisfied with such assessment, what is the next recourse available to him. Is he required to file appeal under Section 193 of the Customs Act against such assessment order which has been made on the bill of entry, or through the computer system by a message in the Inbox, or if so advised, can the importer approach directly the High Court either under the Constitutional Jurisdiction or by filing a Civil Suit under Section 9 CPC. This is the question which needs to be decided in this matter that whether the importer is always required to avail the alternate remedy or can have recourse to other options. Though admittedly under Section 193 of the Customs Act it has been provided that any person including an officer of customs aggrieved by any *decision* or *order* passed under Sections 33, 79, 80 and 179 by an officer of Customs below the rank of Additional Collector of Customs may prefer appeal to the Collector (Appeals) within thirty days of the date of communication to him of such decision or order. Insofar as the present controversy is concerned, Section 33 and 179 are not relevant and therefore, need not be addressed. In the instant matter the Goods Declaration has been processed under the manual system (Pg:749) perusal whereof reflects that the Appraising Officer / Principal Appraiser has made assessment of the same by striking off the exemption claimed on behalf of the plaintiff by charging 5% duty and 5.5% Income Tax with further endorsement *"Assessed under SRO 678(I)/04 clause 2A"*. Therefore, the moot question is, whether the assessment made on the face of goods

declaration or through a message in the Inbox can be equated with *order* or *decision* against which an appeal can be filed in terms of Section 193 of the Customs Act. As discussed hereinabove, and even otherwise it is not in dispute that while making such assessment the officer of customs does not give any sort of reason(s) or decision for having passed such an order. It is by now a settled proposition that any order which has been passed by an authority, the same firstly must be by an authority having jurisdiction in the matter, and secondly the order must be a reasoned order. Clause 24A of the General Clauses Act 1897 provides as under:-

> **"24-A. Exercise of power under enactments.**---(1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and to the advancement of the purposes of the enactment.
>
> (2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially."

10. Perusal of the aforesaid provision reflects that firstly the authority who is empowered to pass any order under any enactment must exercise such power reasonably, fairly, justly and to the advancement of the purposes of the enactment, and secondly, the authority, officer or person making an order under the powers conferred by or under any enactment shall so far as necessary or appropriate, give reasons for making the order and shall provide a copy of the order to the person affected prejudicially. Therefore, for an order to sustain, even otherwise, these two preconditions must be satisfied. There is a plethora of case law on the subject that when an order has been passed without fulfilling the mandate of Section 24-A of the General Clauses Act 1897, such order is a nullity in the eyes of law. In the case of ***M/s. Airport Support Services Vs. The Airport Manager Quaid Azam International Airport, Karachi*** (**1998 SCMR 2268**) the Hon'ble Supreme Court while dilating upon Section 24-A of General Clauses Act, 1897 has been pleased to observe that the rule is founded on the premise that public functionaries must act fairly, equitably and reasonably without element of discrimination, and deviations if any, in substance can be corrected through appropriate orders by the Courts while exercising jurisdiction under Article 199 of the Constitution. It has been further observed that the order or direction so far as necessary or appropriate must reflect reasons for its making or

issuance, and where the same is lacking an affected person may demand the necessary reasons which in response should be furnished.

Similarly in the case of ***Muhammad Amin Muhammad Bashir Limited Vs. Government of Pakistan*** (**2015 SCMR 630**) the Hon'ble Supreme Court while following an earlier decision in the case of ***Amanullah Khan and Others V. The Federal Government of Pakistan Through Secretary, Ministry of Finance, Islamabad and Others*** (**PLD 1990 SC 1092**) subsequently cited with approval in ***Abid Hasan V. PIAC*** (**2005 SCMR 25**) has reiterated the same by holding that *when the legislature confers such powers on the executive it must be deemed to have assumed that the power would be, firstly, exercised in good faith, secondly, for the advancement of the objects of the legislation, and, thirdly in a reasonable manner. Section 24A of the General Clauses Act, 1897, reiterates the principle that statutory power is to be exercised "reasonably, fairly, justly and for the advancement of the purposes of the enactment" and further clarifies that an executive authority must give reasons for its decision. Any action by an executive authority which is violative of these principles is liable to be struck down. No other view is permissible.* In the case of ***Capital Development Authority Vs. Shaheen Farooq*** (**2007 SCMR 1328**) it has been observed by the Hon'ble Supreme Court that *all orders passed and acts performed by State / Public functionaries adversely affecting anyone must be in writing.*

11. In the instant matter the position which emerges after the discussion hereinabove is that in fact there is no order in field which could have been assailed by the plaintiff by taking recourse to the alternate remedy of appeal under Section 193 of the Customs Act. It is only the endorsement or assessment made by the assessing officer on the face of the goods declaration, which is in field. It does not provide any reasoning as to why the exemption has been refused and neither any supporting reasons are available on record which can be appealed thereof. Even the appellate authority cannot decide the appeal in absence of a proper and reasoned order as provided under Section 24-A of the General Clauses Act. For availing an alternate remedy there must be an order in clear and express terms detailing out the reasons and justification for passing such adverse order which seriously prejudices the importer. It is trite law that the authority deciding any matter must discuss the issue and give reasoning, and thereafter either accept the claim of the party, or reject it with cogent reasons. If not, then such order cannot be termed as an order in accordance with law being in violation of Section 24A of General Clauses Act, 1897.

12. The law as to availing alternate remedy is also by now settled by the Hon'ble Supreme Court as well as by this Court in a number of judgments, whereby, it has been held that though normally the Courts are not inclined to exercise Constitutional jurisdiction in matters of fiscal nature, wherein complete mechanism of alternate remedy in the form of quasi-judicial forums like Commissioners / Collectors of (Appeals) and Appellate Tribunals have been provided under the respective special laws concerning such fiscal matters. However, in the case of ***Julian Hoshang Dinshaw Trust Vs. Income Tax Officer*** (**1992 SCMR 250**), the Hon'ble Supreme Court has been pleased to observe *that such rule is not absolute and Constitutional jurisdiction can be exercised in appropriate cases, involving fiscal rights and on the allegations of misapplication of law or abuse of power stepped into examine whether or not public functionary concerned acted in accordance with the powers conferred on him by the statute*. Similarly, in the case of ***Khalid Mehmood Vs. Collector of Customs*** (**1999 SCMR 1881**), the Hon'ble Supreme Court has held that *of such alternative remedies also there are some, which would still leave the jurisdiction of the High Court virtually unaffected, if the order complained of, is so patently illegal, void and wanting in jurisdiction that any further recourse to or prolongation of the alternative remedy may only be counterproductive and, by invocation of Article 199 the mischief can forthwith be nipped in the bud.* Therefore, in view of hereinabove facts and circumstances of this case, insofar as issue No. 2 to the extent of availing alternate remedy is concerned, in the facts and circumstances of the case, I am of the view that in absence of a reasoned and a speaking assessment order, the Suit of the plaintiff is competent as the plaintiff could not have availed the alternate remedy by way of filing an appeal under Section 193 of the Customs Act 1969.

13. The second aspect (Issue No.1) as to the maintainability of a Suit before a Civil Court is in relation to the bar contained in Section 217 of the Customs Act, 1969 which reads as under:-

> **"217. Protection of action taken under the Act.-31** [(1) No suit, prosecution or other legal proceeding shall lie against the 8[Federal Government] or any public servant for anything which is done or intended to be done in good faith in pursuance of this Act or the rules 32[and notwithstanding anything in any other law for the time being in force no investigation or enquiry shall be undertaken or initiated by any governmental agency against any officer or official for anything done in his official capacity under this Act, rules, instructions or directions made or issued thereunder without the prior approval of the 31a[Board]].
>
> [(2) No suit shall be brought in any civil court to set aside or modify any order passed, any assessment made, any tax levied, any penalty imposed or collection of any tax made under this Act.]"

14. Perusal of the aforesaid Section reflects that no Suit, prosecution or other legal proceeding shall lie against the Federal Government or any public servant for anything which is done or intended to be done in good faith in pursuance of this Act or the rules and under sub-section (2) it has been further provided that no Suit shall be brought in any Civil Court to set aside or modify any order passed, any assessment made, any tax levied, any penalty imposed or collection of any tax made under this Act. However, as would be discussed later in this judgment, such rule is not absolute and there are exceptions to it. Section 217 of the Customs Act, 1969 has come under scrutiny in a number of cases before learned Single Judges as well as Division Benches of this Court. The first is the famous case of ***K.G. Traders Vs. Deputy Collector of Customs*** *(***PLD 1997 Karachi 541***)*, wherein, a learned Single Judge of this Court (late Justice Sabihuddin Ahmed as his lordship then was), after a detailed discussion on this issue has been pleased to hold as under:-

> Pg: 547.
>
> With profound respect I must say that the contention is patently misconceived. It is well established that provisions barring jurisdiction of Civil Courts in terms similar to the above quoted provisions of the Customs Act are only attracted when the impugned action is found to be within four corners of that statute under which it is taken and does not suffer from taint, malafide or absence of jurisdiction. One may refer to two judgments of the Honorable Supreme Court in the case of Abdul Rauf V. Abdul Hameed Khan (PLD 1965 SC 671) and Muhammad Jameel Asghar V. Lahore Improvement Trust (PLD 1965 SC 698).
>
> Pg: 548.
>
> 13. Syed Tariq Ali attempted to argue that while the impugned action might be questionable in the Constitutional jurisdiction. This contention I am afraid is also untenable. It is indeed true that in the original civil jurisdiction the powers exercised by this Court are not wider than those exercised by ordinary Civil Courts under the CPC. Nevertheless all the above precedents relate to the jurisdiction of Civil Courts and are founded upon the principle that a Court of general jurisdiction has plenary power to resolve all disputes of a civil nature unless barred by any law and provisions of special law purporting to take away their jurisdiction ought to be strictly construed.
>
> 13-A. The distinction sought to be drawn by Mr. S. Tariq Ali between the provisions of subsection (I) and subsection (2) of section 217 of the Customs Act for the purpose of contending that the latter provision was inserted to place an absolute bar on the jurisdiction of a Civil Court is equally unfounded. In my view, the obvious distinction is that while clause (I) purports to confer a personal indemnity to custom officials against being sued for their actions taken in good faith, clause (2) seeks to bar the jurisdiction of Courts to entertain suits questioning orders passed under the Act or the Rules. However, it has been consistently held that a malafide order or one without jurisdiction is a fraud on the law and can never be assumed to have been passed under a particular statue. Therefore, a plea as to bar of jurisdiction could only be sustained if it could be shown that the impugned order was passed in the bona fide exercise of powers conferred by the Customs Act or Rules and not otherwise. (Emphasis supplied)

15. The aforesaid judgment was assailed by the department through an appeal bearing HCA No. 213 of 1997 (***Collector of Customs Appraisement and others Vs. K.G. Traders and others***) before a learned Division Bench of this Court and the judgment of the learned Single Judge on this issue was confirmed by the learned Division Bench vide judgment dated 01.06.1999 in the following manner:-

> "Mr. S. Tariq Ali learned Standing Counsel appearing for the appellant has raised two fold contentions, firstly, that this Court has no jurisdiction in the matter in view of ouster of jurisdiction under the provision of Section 217(2) of Customs Act. Secondly, the respondents could have invoked the extra ordinary jurisdiction of this Court by way of writ petition.
>
> These pleas were also raised before the learned Single Judge and both pleas were not found favorable by the learned Judge, who was of the view that provisions of barring the jurisdiction of Civil Court in terms of provision of Customs Act are only attracted when the impugned action would to be within four corners of the statute under which it is taken and does not suffer from taint malafide or absence of jurisdiction.
>
> 10. Section 217 of the Customs Act containing the bar of the suit can be reproduced as follows:-
>
> > "217. (1) No suit, prosecution or other legal proceeding shall lie against the Federal Government or any public servant for anything which is done or intended to be done in good faith in pursuance of this Act or the rules.
> >
> > (2) No suit shall be brought in any civil court to set aside or modify any order passed, any assessment made, any tax levied, any penalty imposed or collection of any tax made under this Act."
>
> It is now settled that ouster of the jurisdiction can be claimed when the impugned order / action is found to be within four corners of the statute under which it is passed or taken. It is the consistent view of the superior courts that the provisions contained in statute barring the court of general jurisdiction is to be construed very strictly and unless the case falls within letter and spirit of the barring provision it would not be given an affect. Thus the view taken by learned Judge is in conformity with the view of the superior courts and gets support from the dicta given by Supreme Court in case of *Abbasia Cooperative bank Vs. Hakeem Hafiz Hammad Ghous (PLD 1997 SC 3)*, which can be conveniently reproduced as follows:-
>
> > "It is also well settled law that where the jurisdiction of the Civil Court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the civil court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or the action taken by the authority or tribunal was not malafide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a Civil

> Court. As a necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statute which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or malafide or passed in violation of the principles of natural justice, such an order could be challenged before the Civil Court inspite of a provision in the statute barring the jurisdiction of civil court.
>
> 13. This court having civil jurisdiction has plenary powers to resolve all the disputes of civil nature unless barred by any law and provisions of special law purporting to take away the jurisdiction ought to be strictly construed."

16. Similarly in the case of ***Saleem Impex Vs. Central Board of Revenue*** **(1999 MLD 1728)**, another learned Single Judge of this Court by following the dicta laid down in the case of *K.G. Traders (supra)* has been pleased to repel the contention of the department in this regard. This judgment of the learned Single Judge was also assailed by the department in appeal which is reported as ***Central Board of Revenue Vs. Saleem Impex*** **(1999 YLR 190)**, and the learned Division Bench was pleased to upheld the order of the learned Single Judge, though bar of jurisdiction in terms of Section 217(2) of the Customs Act, 1969 was raised on behalf of the department.

17. Thereafter the maintainability of Suit in Customs matters once again came for scrutiny before a learned Single Judge of this Court in the case of ***Saman Diplomatic Bonded Warehouse Proprietorship Concern Vs. Federation of Pakistan and 3 others*** **(2003 P T D 409)**, and after a detailed discussion on such issue the learned Singly Judge was pleased to decree the Suit of the plaintiff in the following terms:-

> 50. In pursuance of the above finding, it is held that the issuance of show cause notice and all subsequent acts in pursuance thereof being without jurisdiction and nullity in law, the plaintiff cannot be asked to have recourse to the forum of appeal provided in the Customs Act. The entire exercise on the part of the defendants in this case being without jurisdiction, the plaintiff has right to invoke the jurisdiction vested in the Civil Court and this Court is fully competent to declare such act as null and void.
>
> 51. Consequent to the above findings, the suit is decreed as prayed. The show cause notice and the order in original in pursuance thereof made by the defendant No. 4, are hereby declared to be without jurisdiction and void. The defendant No. 3 is directed to renew license of the plaintiff forthwith. Defendant No. 1 is also directed to issue the import permit to the plaintiff immediately. The defendant's No. 3 and 4 are directed to allow the plaintiff to continue in bond of the goods and not to charge any penal surcharge from the plaintiff for the custody of the goods in the bond.

18. Once again this judgment of the learned Single Judge was assailed by the department in High Court Appeal in the case reported as ***Federation of Pakistan and others Vs. M/S Saman Diplomatic Bonded***

Warehouse (2004 PTD 1189), and a learned Division Bench of this Court, though had set aside the findings of the learned Single Judge on merits of the case, however, insofar as jurisdiction of the Civil Court under Section 9 CPC is concerned, the learned Division Bench was pleased to hold as under:-

> "In Deputy Collector of Customs (Appraisement) and another (HCA No. 213/1997) [*case of K.G. Traders*], wherein the similar plea was raised by the learned Standing Counsel that this Court has no jurisdiction in the matter in view of ouster of jurisdiction under the provisions of section 217(2) of the Customs Act, such plea was addressed as follows:-
>
> > "It is now settled that ouster of the jurisdiction can be claimed when the impugned order / action is found to be within four corners of the statute under which it is passed or taken. It is the consistent view of the superior courts that the provisions contained in statutes barring the Court of general jurisdiction is to be construed very strictly and unless the case falls within letter and spirit of the barring provision it would not be given an effect. Thus the view taken by learned Judge is in conformity with the view of the superior court and gets support from the dictum given by the Supreme Court in case of Abbasia Cooperative Bank Vs. Hakeem Hafiz Muhammad Ghous (PLD 1997 SC 3).
>
> Her further contention was that once an order passed or action taken under a statute is not within the four corners of that Act, such order / action would be without jurisdiction and she referred the case of Abdul Rauf and others Vs. Abdul Hamid Khan and others (PLD 1995 SC 671) that whatever the phraseology employed, any provision in an enactment saying that orders passed under the enactment or by virtue of the powers conferred by the enactment would not be liable to challenge in a Court of law has reference only to orders passed with jurisdiction. It can be settled as a general rule, without reference to the language used in an enactment, that barring provision like those with which are here concerned apply only to orders passed with jurisdiction. It was further held that the decision of the question whether the Civil Court had jurisdiction the present case would depend on whether the impugned orders are proceedings were without jurisdiction ---------- a mala fide act is by its nature an act without jurisdiction. No Legislature when it grants power to take action or pass an order contemplates a mala fide exercise of power. A mala fide order is a fraud on the statute. It may be explained that a mala fide order means one which is passed not for the purpose contemplated by the enactment granting the power to pass the order, but for some other collateral or ulterior purposes.
>
> The following ratio are deducible from the cases cited at the bar:-
>
> (i) The Civil Courts under section 9 of the Code of Civil Procedure are competent to try all suits of civil nature except those of which their jurisdiction is barred either expressly or by necessary implication.
> (ii) The provisions contained in a statute ousting the jurisdiction of Court of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to.
> (iii) The bar of jurisdiction could never be sustained if it could be shown that the impugned order / action was passed / taken not in bona fide exercise of powers conferred by the Act or the Rule.
> (iv) A mala fide order or one without jurisdiction is a fraud on the law and can never be assumed to have been passed under a particular statute.

(v) Where the jurisdiction of Civil Court is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be shown that the Authority or the Tribunal was validly constituted under the Act and; that the order passed or the action taken by the authority or Tribunal was not mala fide; and that the passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or Tribunal; and that in passing the order of taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the Tribunal would not be immune from being challenged before a Civil Court.

(vi) Whether the Authority or Tribunal acts in violation of provisions of statute which conferred the jurisdiction on its or the order in exercised in lack of jurisdiction or mala fide or passed in violation of principles of natural justice, such order could be challenged before the Civil Court inspite of provisions of statute, barring the jurisdiction of Civil Court.

The perusal of show cause notice reproduced in earlier part of the judgment would show that paras, 1 to 2 thereof are the narration of facts, whereas, para 3 contains grounds for cancellation of license, whereas, para 4 contains the show cause with regard to the cancellation of license only. On the basis of said notice appellant No. 2 simultaneously proceeded with adjudication proceedings as well as cancellation proceedings.

We may point out that pre-requisite for initiation of the adjudication proceeding is the service of statutory notice under section 180 of the Act which requires that no order under this Act shall be passed for the confiscation of any goods or for imposition of any penalty on any person unless the owner of the goods is informed in writing of the grounds on which it is proposed to confiscate the goods or to impose the penalty and the requirement of section is he be given a reasonable opportunity of being heard.

We may also state that the adjudication proceedings and cancellation proceedings are two distinct and separate proceedings. The outcome of the former proceedings could be a ground for imitation of the latte proceedings. The former proceedings by Adjudicating Authority and later by appropriate officer.

The show cause notice for cancellation of license in the instant case was issued with presupposition of proved violation of the provisions of section 32 of the Act, in absence of any finding. The refusal by appellant No. 1 to issue import permit also suffer from the same defect. Therefore, we are of the view that the proceeding imitated on show cause notice dated 18.12.2000 by the Customs is not within the four corners of the Act, therefore, the plea of ouster of jurisdiction is not available to the appellants.

We hereby set aside the finding recorded by learned Single Judge on the material points except the issue of ouster of jurisdiction, therefore, we allow the appeal and set aside the judgment and decree. The appellant would be at liberty to initiate the adjudication proceedings in accordance with law by serving the prerequisite notice under section 180 ibid and conclude the same within three months, once the proceeding is terminated and findings is recorded against the respondent. Further steps may be taken in accordance with law."

19. Once again the issue of jurisdiction vested in a Civil Court and its ouster came for discussion before a Division Bench of this Court in the case of ***Collectorate of Central Excise, Karachi and another Vs. Syed***

Muzakkar Hussain and another **(2006 PTD 219)**, and it was observed as under:-

> "The jurisdiction of the Civil Court can be excluded by the legislature by Special Acts which deal with the special subject but the statutory provision must expressly provide for such exclusion or must necessarily and inevitably lead to such inference. The bar created by the relevant provision of statute excluding jurisdiction of Civil Court cannot operate in cases, where the plea before the Civil Court goes to the root of the matter and would if upheld lead to conclusion that the impugned order is nullity.
>
> Keeping in view the above principle of law pertaining to exclusion of jurisdiction of Civil Court, we proceed to examine whether section 40 of the Central Excise Act, 1994 from the facts of the case excludes jurisdiction of the Civil Court. From a bare perusal of section 40 of the Central Excise Act, 1944 it appears that only such suit cannot be brought in Civil Court in which party is seeking order to set aside or modify any order passed or any assessment of levy, or collection of duty under the Act, whereas, in the suit filed by the respondent No. 1 the show cause notice issued by the appellant was assailed, inter alia on ground that same was issued without any lawful authority, and after expiry of the period of limitation.
>
> If from the facts on the record before the Civil Court without going in detailed investigation, it can be established that very act questioned is without lawful authority and jurisdiction, then instead of asking a party to go under the agony of lengthy departmental proceedings where possibility of getting relief are limited, Civil Court can grant relief to deserving party by holding that the very act is without lawful authority." (Emphasis supplied)

20. In the case of ***The Collector of Customs and another Vs. Abdul Razzak*** **(PLD 1996 Karachi 451)**, another learned Single Judge of this Court on the controversy of jurisdiction of a Civil Court has been pleased to hold as under:-

> "16. As to the bar relating to jurisdiction of the Civil Court, it is admitted that there is no specific provision barring the jurisdiction of the Civil Court and the amendment by insertion of subsection (2) in section 217 of the Customs Act barring jurisdiction of the Civil Court by Act No. VII of 1992 would not govern the present cases in which the cause of action arose in September, 1990 as the amendment would not operate retrospectively. The Civil Court being a Court of ultimate jurisdiction, its jurisdiction being all embracing cannot be ousted by intendment.
>
> 17. In the case of M/S Habib Industries Ltd. Vs. Pakistan through the Collector of Customs, Chittagong PLD 1962 SC 83 dealing with a case under sections 188 and 198 of Sea Customs Act, 1878, Supreme Court repelled the bar of jurisdiction of a Civil Court which cannot be expressed in better words than the Supreme Court itself. Relevant para to page 87 of the report reads as under:-
>
> > "Although the special jurisdiction of the Customs Authorities to deal with the question of assessment of sales tax cannot be doubted, and the machinery provided for the purposes by the Sea Customs Act is elaborate and is expressed so as to achieve finality, yet that finality (section 188) is only to be understood within the limits of the statute and those special provisions cannot by implication have the effect of excluding the general jurisdiction of the Civil Courts, the moreso as the Act itself does not expressly stand in the way of that jurisdiction, but merely, in section 198, prescribes certain conditions subject to which it will be exercised in particular cases."

18. On the other hand, learned counsel for the applicants relied upon a Privy Council judgment in the case of Secretary of State V. Mask & Co. AIR 1940 Privy Council 105 which is a case under section 182 and 188 of Sea Customs Act, 1878. To my mind this judgment does not improve the case pleaded by the applicants as it specifically lays down a rule that the exclusion of jurisdiction of the Civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

19. Learned Counsel also referred to unreported judgment by Syed Haider Ali Pirzada , J. (as he then was) in Revision Applications Nos. 259 and 260 of 1988, decided on 30.4.1989 taking the view that sections 195, 196 and 217 of Customs Act provide a complete code to a person aggrieved to seek redress in case of his grievance by decisions of Customs Authorities. Learned Judge further observed that jurisdiction of Civil Court was thus intended to be excluded. With utmost respects for the view taken in the above case, it may suffice to say that in the said case plaint had been rejected by the trial Court as well as the Appellate Court because no order of assessment had been produced. In view of distinguishable facts of this case, I am not inclined to follow the view taken in the earlier case.

21. In the case of ***Messrs H. A. Rahim & Sons (Pvt.) Ltd. Vs. Province of Sindh and another*** **(2003 CLC 649)**, a learned Single Judge of this Court has been pleased to hold that even challenging the vires of law would be a matter of Civil nature which could come squarely within the parameters of Section 9 CPC by holding as under:-

"7. Issue No. 4 is dealt with first as it touches upon the very maintainability of the present suit. The fundamental objection raised by Mr. Munir ur Rehman, the learned Additional Advocate General representing all the defendants was that validity of laws could not be tested by a Civil Court in Civil Suit filed under section 9 of the CPC. Mr. Munir ur Rehman had argued that the correct remedy for challenging law would be a Constitutional petition under Article 199 of the Constitution. Dr. Muhammad Farogh Naseem, the learned counsel for the plaintiff in response cited a number of judgments and submitted that Civil Courts are the Courts of ultimate jurisdiction and there is no bar in the 1973 Constitution of [sic] the Civil Procedure Code against a Civil Court so as to test the validity of statutes on the touchstone of the Constitution or otherwise. In order to seek further assistance on this point Mr. Ziaul Haq Makhdoom, Advocate was appointed amicus curiae who agreed with the learned counsel for the plaintiff that the present suit as framed and filed, challenging the validity of provisions of statutes is maintainable.

8. I have given serious thought to the issue in question. Section 9 of the CPC very clearly states that a Civil Court has jurisdiction to try all suits of civil nature unless expressly or impliedly barred. Admittedly, there is no bar either in the CPC or in the Constitution with regard to filing or maintainability of a civil suit challenging the vires of law. Also at the same time challenging the vires of law would be a matter of civil nature which would come squarely within he parameters of Section 9 of the CPC.

The above would categorically show that the Federal Court had assumed that a Civil Court possessed the jurisdiction to test the validity of laws in a civil suit and that there was no cavil with this. In another context the judgment of the Federal Court in United Provinces V. Atiqa Begum has

> been approved, applied and followed by our Supreme Court in PIDC V. Pakistan 1992 SCMR 891. Similarly in Syedna Taher v. State of Bombay AIR 1958 SC 253 the Supreme Court of India dismissed an appeal against judgments of the Single and Division Benches of the Bombay High Court which were, inter alia, called upon to consider the validity of provisions of a statute, the same having been raised in a civil suit before the Single Judge. Though on facts, the law was found to be intra vires none of three Courts considered that the Civil Court lacked the jurisdiction to test the validity of laws in a civil suit. It is pertinent to point out that in the present case the civil suit has been filed before the original side of the High Court which is also a Constitutional Court. In Shankar Roy Chowdhry v. HEA Cotton AIR 1925 Cal. 373 it has been correctly observed that a High Court entertaining a suit on its original side is a superior Court of record; and nothing is beyond its jurisdiction unless expressly barred. Seeking support from this judgment it becomes more than obvious that this Court exercising original civil jurisdiction and while entreating civil suits is also a superior Court of record created under the Constitution. Also there is no bar either in the Civil Procedure Code or in the Constitution which prohibits enforcement of the provisions of the Constitution in a civil suit. Even in the aforesaid case of Mirpurkhas Sugar Mills Limited PLD 1987 Karachi 225 similar observations have been made. In terms of Article 203 of the Constitution the power of superintendence and contrails also vested in the High Courts. The High Court while entertaining a civil suit cannot only enforce the provisions of the Civil Procedure Code and Specific Relief Act but it can also enforce provisions of the Constitution including Article 199, being the Court of Superintendence under Article 203. This being so, the High Court in a civil suit has obviously the powers and jurisdiction to test the validity of laws."

22. The jurisdiction conferred on a Civil Court is in fact plenary in nature, and time and again it has been held by this Court having original Civil jurisdiction, as against the other High Courts of the Country, except Islamabad High Court, that under this jurisdiction this Court can not only examine the vires of law / statute, but is equally competent to grant any relief which can be granted by a High Court under its Constitutional jurisdiction. There are even judgments of this Court, wherein, it has been observed that a challenge to any law on the ground that it is inconsistent with the fundamental rights conferred under the Constitution, can also be validly raised in a Civil Suit, as such challenge is not confined only to the Constitutional Jurisdiction of the Court under Article 199 of the Constitution. In the case of ***Mirpurkhas Sugar Mills Ltd. Vs. Consolidated Sugar Mills Ltd. and 3 others*** **(PLD 1987 Karachi 225)**, the Court has observed as follows:-

> "4. In my view, challenge to any law on the ground that it is inconsistent with the Federal Rights conferred by the Constitution can validly be raised in a civil suit that is to say that such challenge is not confined to be made only in a constitutional petition. Article 8 of our Constitution lays down that any law, insofar as it is inconsistent with the rights conferred by Chapter I of Part II of the Constitution (i.e. Fundamental Rights) shall, to the extent of such inconsistency, be void. Constitutional petitions are filed under Article 199 of the Constitution and there is nothing in Article 199 or in any other Article of the Constitution, which

> provides that such a challenge can only be made through a constitutional petition. The point raised by the learned counsel for the defendants Nos. 1 and 2, that the provisions relating to declaration of Reserved Zones by the Cane Commissioner and restricting sale /supply of sugarcane by the cane growers of a reserved area only to the sugar mill, for which such reserved area has been declared, therefore, in my view, can be raised in this suit.

23. Similar view has been taken by another Single Judge of this Court in the case of ***Messrs Bank of Oman Ltd. Vs. Messrs East Trading Co. Ltd. And others*** **(PLD 1987 Karachi 404)** which reads as under:-

> "55.....
> In my humble view, therefore, a High Court under its general jurisdiction conferred on it under or by law and the Constitution may as well exercise such power e.g. this Court under its original Civil Jurisdiction may also enforce the existing law in the light of Article 2-A, as challenge to any law on the ground that it contravenes a provision of the Constitution can validly be made in a civil suit. It is not confined to be made only through a Constitution petition, because there is nothing in Article 199 or any other Article of the Constitution, which provides that such a challenge can be made through Constitution Petition only. Reliance is placed on Mirpurkhas Sugar Mills Limited Vs. Consolidated Sugar Mills Ltd. PLD 1987 Karachi 225. But this exercise will be limited to the laws outside the pale of the Federal Shariat Court.

24. The issue as to maintainability of a Civil Suit under Section 9 CPC and the bar contained in various acts similar to that of Section 217 of the Customs Act, 1969 has also come under scrutiny before the Hon'ble Supreme Court in a number of cases and it would be of relevance to refer to all such cases which are though in respect of various other statutes, but a somewhat similar provision existed in those statutes regarding the bar of a Civil Suit. In the case of ***Mian Muhammad Latif Vs. Province of West Pakistan and another*** **(PLD 1970 SC 180)**, a five Member Bench of the Hon'ble Supreme Court while dealing with the issue in hand has been pleased to observe as under:-

> Pg: 183
>
> It will be noticed that the learned District Judge and the High Court have refused to issue injunction in favour of the appellant on the ground that section 11 of the Sindh Revenue Jurisdiction Act, 1879, is a bar to the suit filed by the appellant in the Court of First Class Sub-Judge, Khairpur. This provision of law reads as under:-
>
> > "No civil Court shall entertain any suit against the Crown on account of any act or omission of any Revenue Officer unless the plaintiff first proves that previously to bringing his suit, he has presented all such appeals

> allowed by the law for the time being in force as, within the period of limitation allowed for brining such suit, it was possible to present:-"

There is no doubt that under it ordinarily a party in revenue mattes should exhaust all his remedies by way of appeal before invoking the aid of the civil Court. But there are different considerations where the allegation of a party is that the impugned order is a nullity in the eye of law. There is ample authority that in such cases the jurisdiction of the civil Court is not barred. This aspect of the question was considered by the Privy Council in the case of Secretary of State v. Mask& Co. [AIR 1940 PC 105]. It was held in that case—

> "It is also well settled that even if jurisdiction is so excluded, the civil Court have jurisdiction to examine into cases where provision of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

In our opinion this well-established principles also applies to the facts of the present case. The allegation of the appellant is that the impugned certificate for various reasons mentioned above is a nullity in the eye of law and has not been passed in accordance with the provision of the relevant law. On the above principle the civil Court have jurisdiction to examine these questions. We would, therefore, hold that the learned Courts below, in these circumstances, were not justified in holding that the appellant's suit was not competent."

25. In the case of ***Abbasia Cooperative Bank (Now Punjab Provincial Cooperative Bank Ltd.) and another Vs. Hakeem Hafiz Muhammad Ghaus and 5 others*** **(PLD 1997 SC 3)**, the following observations of the Hon'ble Supreme Court as to bar of jurisdiction vis-à-vis. Section 9 of CPC is relevant and is as under:-

> "5. The next question which arises for consideration in the cases is, whether the Civil Court was competent to examine the validity of the auction conducted by the authorities? The Civil Court under section 9 of the Code of Civil Procedure are competent to try all suits of civil nature except those of which their jurisdiction is barred either expressly or by necessary implication. It is a well settled principle of interpretation that the provision contained in a statute ousting the jurisdiction of Courts of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to. It is also well settled law that where the jurisdiction of the Civil Court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or the action taken by the authority or tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a Civil Court. As a necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statutes which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order could be challenged before the Civil Court inspite of a provision in the statue barring the jurisdiction of Civil Court."

26. In the case of ***Abdul Rauf and others Vs. Abdul Hamid Khan and others*** **(PLD 1965 SC 671)**, it has been held as follows:-

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Civil Courts have jurisdiction as provided in section 9 of the Civil Procedure Code to try all suits of a civil nature excepting those the trial of which is expressly or impliedly barred. We have already reproduced the grounds of attack on the decree and the award. The substance of those grounds is that the proceedings under the Frontier Crimes Regulation ending in the decree of 15th March 1954, were without jurisdiction. The question as to whether the act of an executive or administrative officer or a quasi-judicial or judicial tribunal is without jurisdiction, illegal and not binding on a party, being a matter of a civil nature, is always to be decided by the Civil Courts except to the extent to which such jurisdiction may have been taken away. The question for consideration before the Court was whether this jurisdiction had been taken away by some provision. On behalf of the appellants reliance had been placed for this ouster of jurisdiction of the Civil Courts on sections 10 and 60 of the Frontier Crimes Regulations. These sections are reproduced below:-

> "10. **Restriction on jurisdiction of Civil Courts.** -- No Civil Court shall take cognizance 'of any claim with respect to which the Deputy Commissioner has proceeded under Section 8, Sub-section (3), clause (a), clause (b) or clause (d).
>
> 60. **Finality of proceedings under Regulation**. Except as therein otherwise provided, no decision, decree, sentence or order given, passed or made, or. act done, under Chapter III, Chapter IV, Chapter V or Chapter VI, shall be called in question in, or set aside by, any Civil or Criminal Court."

Section 10 applies to the preference of a claim in a Civil Court in respect of which claim the Deputy Commissioner has already proceeded under Section 8. In the present suit, a claim had been made as to ownership of certain property. If this claim had already been the subject matter of a reference by the Deputy Commissioner the Civil Court would not on account of section 10 be entitled to go into the merits of the claim. However, the reference under section 8 should be a valid reference and if it be found that the reference itself was without jurisdiction section 10 will not be attracted. Section 60 prevents the Court from calling in question or from setting aside any order passed or any action taken under Chapters III, IV, V and VI of the Frontier Crimes Regulation. However, as in the case of section 10, section 60 will also apply only where an order is passed with jurisdiction. We are quite familiar with the words "under the Act" or "under the Chapter. . . . . " No order is an order passed "under the Act" if it was not passed in exercise of powers granted by the Act and was therefore, without jurisdiction. In a particular Act the words "under the Act" or "under Chapter . . . . " may not appear and words of similar import may be used. But whatever the phraseology employed, any provision in an enactment saying that orders passed under the enactment or by virtue of the powers conferred by the enactment would not be liable to challenge in a Court of law has reference only to orders passed with jurisdiction. Of course it is open to the Legislature to provide that not only acts done under an enactment, but even acts which purport to be done under an enactment will be immune from challenge. Such a provision will however be a very exceptional one, a provision which we are likely to come across only during a national emergency.

The decision of the question whether the Civil Courts had jurisdiction in the present case would depend on whether the impugned orders and proceedings were without jurisdiction. There is in this case an attack on the proceeding on the ground of mala fide too. A mala fide act is by its

> nature an act without jurisdiction. No Legislature when it grants powers to take action or pass an order contemplates a mala fide exercise of power. A mala fide order is a fraud on the statute. It may be explained that a malafide order means one which is passed not for the purpose contemplated by the enactment granting the power to pass the order, but for some other collateral or ulterior purposes.

27. Similar view has been adopted consistently by the Indian Supreme Court in the case of ***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.).**

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.

Issue No. 3:

29. Insofar as merits of the case is concerned, the plaintiff in support of its claim primarily relies upon SRO 678 read with amending SRO 337 and more specifically on clause 2(a) and condition (vii) with reference to clause 1, 2 & 2(a) given in the SRO. The relevant provision under discussion reads as under:-

"Islamabad, the 7th August, 2004

NOTIFICATION
(CUSTOMS/SALES TAX)

S.R.O. 678(I)/2004.- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), and clause (a) of sub-section (2) of section 3 of the Sales Tax Act, 1990, and in supersession of its Notification No. S.R.O. 448(I)/2004, dated the 12th June, 2004, the Federal Government is pleased to exempt,--

(1) machinery, equipment, materials, specialized vehicles or vessels, picks-ups (4x4), helicopters, aircraft, accessories, spares, chemicals and customable, as are not manufactured locally, imported by the Exploration and Production (E&P) Companies, their contractors, sub-contractors and service companies, from customs duty in excess of five per cent ad valorem leviable under the First Schedule to the Customs Act, 1990, on their import and subsequent supply, subject to the conditions specified under the caption "CONDITIONS WITH REFERENCE TO CLAUSES (1), (2)[AND (2(a))],

(2) machinery and equipment, as are not manufactured locally, imported by companies other than Exploration and Production Companies, from custom duty in excess of five per cent ad valorem leviable under the First Schedule to the Customs Act, 1969 (IV of 1969), subject to the conditions specified under the caption "CONDITIONS WITH REFERENCE TO CLAUSES (1), (2)[AND (2(a))],

(2(a)) plant, machinery and equipment, as are not manufactured locally, imported by LNG developers or LNG TO/O, from customs duty as is in excess of 5% ad valorem, leviable under the First Schedule to the Customs Act, 1969 (IV of 1969), and the whole of sales tax, subject to the conditions specified under the caption "CONDITIONS WITH REFERENCE TO CLAUSES (1), (2) and (2(a))],

"Explanation;- For the purposes of this clause, Floating Storage and Regasification Unit shall be deemed to be considered as plant, Machinery and equipment of a Floating LNG Terminal."

CONDITIONS WITH REFERENCE TO CLAUSES (1), (2) [AND (2(a))],

(i) ----------
(ii) ----------
(iii) ----------
(iv) in the event a dispute arises whether any item is entitled to exemption under this notification, the item will be immediately released by the Customs Department against a corporate guarantee valid for a period of nine months, extendable by the concerned Collector of Customs on time to time basis. A certificate from the relevant Regulatory Authority that the item is covered under this notification shall be given due consideration by the Customs Department towards finally resolving the dispute. Disputes regarding the local manufacturing only shall be resolved through the Engineering Development Board;
(v) ----------

(vi) ----------
(a) ---------

(b) ---------
(c) --------
(d) --------

(vii) all petroleum sector companies, corporations and organizations including their contractors and sub-contractors and service companies shall be entitled to import machinery, equipment, helicopters, aircrafts, drilling bits, seismic (on shore or off shore) vessels, drilling rigs, [6 X 6 trucks which fall under PCT heading 87.04] specialized vehicles which fall under PCT heading 87.05 including accessories and spares, [excluding those for current use] that are part of such vehicles and vessels [omitted] for the purpose of construction, erection, exploration and production of petroleum projects on an import-cum-export basis without payment of duties and taxes against a corporate guarantee valid for a period of two years equal to the value of import duties and taxes exempted, extendable by the Collector of Customs on time to time basis, if the importer has a definite contract. Should the goods etc., not be exported on the expiry of the project or transferred with the approval of the Collector of Customs to another petroleum project, or the period of stay has been extended by the Collector of Customs, then the company or their contractors or sub-contractors or service companies, as the case may be, shall be liable to pay duties and taxes chargeable at the time of import as per clause (1), (2) and (3) above.

30. It is the case of the plaintiff that FSRU in question has been temporarily imported and is entitled to be released and utilized without payment of duties and taxes under clause 2(a) read with condition (vii) which provides that all petroleum sector companies shall be entitled to import machinery, equipment including accessories and spares, that are part of such vehicles and vessels for the purpose of construction, erection, exploration and production of petroleum projects on an import-cum-export basis without payment of duties and taxes against a corporate guarantee valid for a period of two years equal to the value of import duties and taxes exempted, extendable by the Collector of Customs on time to time basis, if the importer has a definite contract. It is the case of the plaintiff that instead of being charged with 5% customs duty under clause 2(a), the plaintiff also fulfils condition (vii) as above; therefore, the SRO has to be read in a manner that the plaintiff is not liable to pay any duty and taxes as the import in question is of temporary nature. It is also the case of the plaintiff that the conditions attached to the notification in question also provides that in the event a dispute arises as to whether any item is entitled to exemption or not, it has to be released immediately against a corporate guarantee valid for a period of nine months and upon a certificate from the relevant regulatory authority to the effect that the item in question is covered under the notification has to be given due consideration by the department towards finally resolving the dispute and therefore, even otherwise as per the plaintiff, since there is admittedly a dispute, the impugned demand without resolving it in the manner as provided in SRO 678 is not sustainable.

When the contention of the learned Counsel for the plaintiff vis-à-vis. the exemption and its various clauses provided in SRO 678 are read in juxtaposition, it appears that there are basically three different types of exemptions provided through SRO 678 in clause 1, 2 and 2(a), whereas, under clause 2(a) plant, machinery and equipment imported by LNG developer or LNG TO/O has also been given exemption in excess of 5% Custom duty and whole of sales tax subject to fulfilment of conditions with reference to clauses (1), (2) & 2(a). Though prior to the amending SRO 337 it was only plant, equipment and machinery which was covered under clause 2(a), however, after insertion of the explanation, FSRU was also specifically explained to be deemed to be considered as plant, machinery and equipment of a floating LNG Terminal. Such explanation left no doubt as to whether FSRU was covered under Plant, Machinery and Equipment or not. Therefore FSRU is now covered under the definition of plant, machinery and equipment and there appears to be no dispute in this regard.

31. The only issue is that whether the import in question is fully exempted from duty and taxes specifically under condition (vii), or is chargeable to 5% duty under clause 2(a). It appears that all the three clauses i.e. 1, 2 and 2(a) of SRO 678 provides that the exemption is always subject to the conditions specified under the caption, **"conditions with reference to clause 1, 2 and 2(a)"** and when these conditions with reference to clause 1, 2 and 2(a) are read in juxtaposition, it appears that in clause (vii) full exemption from custom duty is provided only on certain type of machinery, equipment etc. and even 5% duty as chargeable under clause 1, 2 and 2(a) is not payable upon furnishing a corporate guarantee valid for a period of two years. On a methodical examination of condition (vii) it appears that the exemption which is available on import of machinery and equipment etc, shall only be for the purposes of **construction, erection, exploration and production of petroleum projects,** whereas, this purpose is not mentioned or applicable either in clause (1), (2), or 2(a) as discussed earlier. In nutshell it appears that the intention to grant exemption under the said SRO, to the petroleum sector companies, is primarily to the extent of over and above 5% on plant, machinery and equipment as are not manufactured locally, whereas, under clause (vii) it is only limited to such plant and machinery etc. which is imported for the purpose of *construction*, *erection*, *exploration* and *production of petroleum projects*. The same can be imported on a

temporary basis for a period of two years initially without payment of any duty and taxes subject to fulfilment of condition (vii). It is not that each and every plant, machinery and equipment imported by a petroleum sector, corporation or company is exempted from the total levy of customs duty and sales tax under condition (vii) as contended on behalf of the plaintiff. If that be so then perhaps clause 1, 2 and 2(a) are more or less redundant, whereas, it is settled law that no redundancy can be attributed to any legislation or a sub-legislation. The FSRU in question may have been imported on a contract of 15 years and on temporary basis as contended on behalf of the plaintiff (though vehemently objected to by the defendants), however, it appears to be an admitted position that this FSRU is not going to be used for the purpose of *construction, erection, exploration and production of petroleum projects*, and therefore, it cannot be imported on an import cum export basis without paying duty and taxes against a corporate guarantee. Whereas, merely for the reason that is has to be taken out of the Port / Terminal Area, for dry docking or for maintenance or repairs, can hardly be accepted as a justification for treating it to be temporarily imported, notwithstanding that the initial agreement is for 15 years. Therefore, this would only fall under clause 2(a) and would be exempt from customs duty in excess of 5% duty leviable under the First Schedule to the Customs Act, 1969, and from whole of the sales tax.

32. It is also pertinent to mention that in fact the main exemption granted through SRO 678 is under clause 1, 2, & 2(a) which appear to be the controlling clauses viz a viz the exemption granted to the petroleum sector. Under clause (1) the exemption is only available for Exploration and Production (E&P) Companies, whereas, clause 2 is for other than E&P companies and clause 2(a) is specifically for LNG developers or LNG TO/O. On the other hand there are certain conditions [(i) to (vii)] attached to all these clauses which are to be fulfilled while claiming the exemption. This then impliedly means that a petroleum company first has to qualify itself under any one of the clauses out of clause 1, 2, & 2(a), and then fulfil the conditions mentioned at serial No. (i) to (vii). The exemption provided in condition (vii) is not independent of any of the clauses in the SRO. A company seeking exemption under condition (vii) has to first qualify under any of the clauses and fulfil the conditions and seek exemption if otherwise available i.e. the condition of temporary importation and the purpose for which the exemption is available. But

surprisingly there is no reference to clause 2(a) in condition (vii), giving the impression that this condition is not applicable on the imports of a company which is qualified to seek exemption under clause 2(a). This appears to be a conscious omission on the part of the Federal Government. In fact the E&P and other than E&P companies are even entitled to import goods which are locally manufactured by paying customs duty @ 10% in terms of clause (3) of SRO 678, which again is not available to companies / sector covered under clause 2(a). Hence it can be safely held that while granting exemption under clause 2(a) the LNG sector has been dealt with separately from E&P and other than E&P companies and while doing so consciously they have been left out from claiming any exemption under condition (vii) insofar as temporary import is concerned.

33. It is also important to observe, that though the Ministry of Petroleum had moved its summary dated 3.4.2015 [Para 7(iii)] by requesting the ECC for approving Exemption of Custom duty and Sales Tax on lease of FSRU (i.e. temporary import under Customs Statute) for temporary import of FSRU for the lease period i.e. up to 15 years, but admittedly, the ECC in its meeting held on 9.4.2015 did not approved such recommendation in its entirety, and held that FSRU shall be deemed to be considered as plant, machinery and equipment of a floating LNG Terminal and taxes given in LNG policy shall be applied on value of FSRU. The explanation added through SRO 337 pursuant to decision of ECC is clear and express in terms, in that, it has not acceded to the request of Ministry of Petroleum and Natural Resources for treating the FSRU in question as temporarily imported. It is well settled that a strict and literal approach is to be adopted while interpreting fiscal or taxing statutes, and that the Court cannot read into or impute something when the provision of taxing statutes or fiscal notifications are clear. If any authority is needed, then reference may be made to the case of ***Pearl Continental & another Vs. Government of N.W.F.P and others*** (**PLD 2010 SC 1004**) and ***Star Textile Ltd. And 5 others Vs. Government of Sindh through Secretary Excise and Taxation*** (**2002 SCMR 356**). The decision of ECC in respect of Para 7(iii) of the recommendation of Ministry of petroleum appears to be a conscious and well thought decision as the entire petroleum sector had been subjected to levy of 5% advoleram duty on all the imports of plant, machinery & equipment, (except temporary import) and FSRU being classified as plant, machinery and equipment,

notwithstanding that it is a floating / moving Vessel / terminal so to say, has not been regarded as a temporarily imported equipment. Subsequently, consequent to such decision of ECC, Federal Board of Revenue has issued an amending SRO 337 by insertion of an explanation after clause 2(a) as reproduced hereinabove. This explanation leaves no iota of doubt that FSRU has been treated as plant, machinery and equipment of a floating LNG Terminal specifically falling under clause 2(a), of SRO 678 and under no circumstances can be treated as an equipment of temporary nature / import as mentioned and covered under condition (vii) of SRO 678. Therefore, insofar as the controversy as to the payment of customs duty and exemption of sales tax is concerned, Issue No.3 is answered accordingly by holding that the plaintiff is liable to pay customs duty at the rate of 5% as provided in clause 2(a) of SRO 678 and does not qualify under condition (vii) of the SRO, whereas, the levy of sales tax is exempted which is also admitted by the defendants.

Issue Nos. 4 & 5:

34. Coming to Issue No.4 and 5 in respect of exemption from advance income tax, it may be noted that the plaintiff has made an attempt to apply and obtain an exemption certificate which has been regretted by the Commissioner Inland Revenue vide order dated 24.3.2015 against which a revision application was preferred before the Chief Commissioner, Inland Revenue, under Section 122B of the Ordinance, 2001, which also stands dismissed vide order dated 19.6.2015. It appears that in this situation, there is no other remedy left with the plaintiff which could be availed, hence the same has been challenged through instant Suit, whereas, no assistance has been provided on behalf of Inland Revenue Department, despite issuance of summons, therefore, this issue is being decided with the assistance of learned Counsel for the plaintiff and the record available before the Court. The main contention raised by the learned Counsel for the plaintiff in this regard is that since admittedly the plaintiff is exempted from any payment of Income Tax as provided under clause (v) of SRO 947 as well as under clause 141 of part I of Second Schedule to the Ordinance 2001, therefore, it would be an exercise in futility, if the plaintiff pays advance tax at the import stage, whereas, after filing its return since no income tax would be payable, seeks refund of the same. It is the case of the plaintiff that in such a

situation though the plaintiff has not been issued any exemption certificate, but the plaintiff is otherwise not liable to pay any advance income tax being entitled for exemption on import stage.

35. It is noted that when the Impugned order(s) dated 24.3.2015 and 19.6.2015 were passed by the Commissioner as well as Chief Commissioner, Inland Revenue, respectively, the amendment brought through Finance Act, 2015, whereby, while implementing the decision of ECC to grant 5 year Tax Holiday to LNG companies, clause 141 has been inserted in Part-I, to the Second Schedule of the Ordinance, 2001, was not in field and had not taken effect into. The relevant clause inserted through Finance Act, 2015, reads as under:

> [(141)" Profits and gains derived by LNG Terminal Operators and Terminal Owners for a period of five years beginning from the date when commercial productions are commenced."]

The impugned order(s) are only to the extent of interpretation of clause (v) of SRO 947, and to the effect that the plaintiff is not the owner of FSRU in question, hence not entitled for issuance of an exemption certificate. It appears that perhaps SRO 947 is no more in field after deletion of sub section (2) of Section 148 and sub-section (3) of Section 159 of the Ordinance, 2001, through Finance Act, 2015, under which such SRO was issued, as now the Tax Exemptions, if any, are being governed by Ordinance, 2001, itself and not through any Notification / SRO issued by FBR. Moreover and even otherwise, while passing the impugned order(s), only clause (v) of SRO 947 has been considered, whereas, I am of the opinion that clause (viii) of SRO 947 is equally attracted and its applicability needs to be examined as well after the decision of ECC dated 5.4.2012, whereby, the LNG companies and Terminal Operators were declared to be treated at par with E&P companies, as clause (viii) of the SRO provides that provision of Section 148(1) shall not apply to *"petroleum (E&P) companies covered under the Customs and Sales Tax Notification No. SRO 678(I)/2004 dated the 7th August, 2004, except motor vehicles imported by such companies"*. Since the plaintiff has been recognised as a petroleum company in terms of SRO 678, for which exemption from Income Tax is provided in clause (viii) of SRO 947, whereby the provision of Section 148 ibid is not applicable to them, then how come the plaintiff can be left out and discriminated is difficult to understand. Perhaps such aspect of the matter requires consideration by the authorities who have

passed the impugned order(s). Notwithstanding this observation, even otherwise in view of clause 141 of Part-I of Second Schedule to the Ordinance, 2001, the plaintiff and like companies are now exempt from any sort of Income Tax, including minimum tax, and alternate corporate tax. In terms of Section 159 of the Ordinance, 2001, it is provided that where the Commissioner is satisfied that an amount to which Division II (Section 148 fall in Division-II, by virtue of which Collector of Customs is required to deduct advance tax at import stage) or Division III of (Chapter XII) applies, is exempt from tax under this Ordinance, (here clause 141 provides such exemption to the plaintiff), the Commissioner shall upon application in writing by the person issue the person with an exemption certificate or otherwise. There is nothing on record to suggest that the Commissioner has recorded its satisfaction in respect of this provision as to why the Certificate could not be issued to the plaintiff under clause 141 of Part-I of Second Schedule to the Ordinance, 2001. Therefore, it would in the fitness of things if the matter is remanded to the authorities to consider such aspect of the matter and decide the same in view of the observations hereinabove and the change in law. Accordingly, after setting aside impugned order(s) dated 24.3.2015 and 19.6.2015 passed by the Commissioner and Chief Commissioner, Inland Revenue, respectively, the matter is remanded to them for issuance of exemption certificate, after considering the observation made in respect of clause (viii) of SRO 947 if applicable or in the alternative in view of clause 141 of Part-I of Second Schedule of Ordinance, 2001. If the plaintiff is found entitled, then a certificate to that effect shall be issued, and if not then the request of the plaintiff shall be disposed of with a speaking and reasoned order against which the plaintiff may avail remedy in accordance with law, if so advised. This exercise after remand shall be completed within a period of 30 days from the date of announcement of this judgment, and during such period defendants No. 4 & 5 shall not take any coercive measures against the plaintiff to the extent of demand in respect of Advance Income Tax at Import stage in terms of section 148 of the Ordinance 2001.

35. In view of hereinabove discussion, Issue No.1 is answered in the *affirmative* by holding that in the facts and circumstances of this case the Suit is maintainable. Issue No.2 is answered in *negative* by holding that in the given facts no remedy of appeal was available to the plaintiff in absence of any appealable order. Issue No. 3 is answered in *negative* by

holding that Plaintiff is not entitled for complete exemption under condition (vii) and is liable to pay Customs Duty @5% under clause 2(a) of SRO 678. Insofar as Issue Nos. 4 & 5 are concerned, in view of observations / directions contained in Para 34 above, the matter is remanded.

36. The upshot of the above is that the Suit of Plaintiff is dismissed in respect of Issue No.3, whereas, it is remanded to defendant Nos. 6 & 7 in respect of Issue Nos. 4 & 5.

Dated: __.05.2016

J U D G E

ARSHAD/