

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 2067 of 2016

M/s. Getz Pharma (Pvt.) Limited-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 2671 of 2016

M/s. ELKO Organization (Pvt.) Ltd.-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 105 of 2017

M/s. Danas Pharmaceutical (Pvt.) Ltd.-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 130 of 2017

Wilshire Laboratories Private Limited-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 1881 of 2016

M/s. Sami Pharmaceuticals
(Pvt.) Limited & others-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 1973 of 2016

M/s. Martin Dow Limited-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 2015 of 2016

M/s. Macter International Limited-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 2159 of 2016

M/s. Frontier Dextrose Private Ltd.-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 1998 of 2016

Barrett Hodgson Pakistan
(Pvt.) Ltd. and another -----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 2135 of 2016

Nabiqasim Industries (Pvt.) Ltd.& others-----Plaintiffs.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 2007 of 2016

M/s. Genix Pharma (Pvt.) Ltd.-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 1074 of 2016

Seatle (Pvt.) Ltd.-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 2165 of 2016

OBS Pakistan (Pvt.) Ltd. and another-----Plaintiffs.
Versus
Federation of Pakistan
& others -----Defendants.

Suit No. 2331 of 2014

The Searle Co. Ltd.-----Plaintiff.
Versus
Federation of Pakistan
& others -----Defendants.

**Dates of hearing: 15.01.2019, 21.02.2019, 12.03.2019,
09.04. 2019 & 16.05.2019.**

Date of Judgment 02.08.2019

Mr. Mohammad Vawda, Advocate for Plaintiff in Suit No.2067/16.
Mr. Ammar Yasir, Advocate for Plaintiff in Suit No.105/2017.
Mr. Abdul Ahad, Advocate for Plaintiffs in Suit No.2331/14,
2165/16, 1074/16, 2135/16, 1998/16, 2015/16, 1073/16 &
1882/16.
Mr. Adnan Motan, Advocate for Plaintiff in Suit No.2159/2016.
Mr. Faiz Ahmed, Advocate for Plaintiff in Suit No.2671/2016.
Mr. Haroon Dugal, Advocate for Plaintiff in Suit No.130/2017.
Mr. Osman A. Hadi, Asstt. Attorney General for Fed. of Pakistan.
Ms. Fozia Rasheed, Advocate for Defendant (PQA) in Suit No.2067,
2159, 2165, 1998, 2015, 2007, 2135 of 2016 and 105 & 130 of
2017.
Dr. Shah Nawaz, Advocate for Defendants in Suit No.2331/14 and
2671/2016.
Mr. Kashif Nazeer, Advocate for Defendants in Suit Nos.1073,
1074, 2067, 2135, 2159, 2015, 2007, 1998 of 2016 and 130, 105
of 2017.
Ms. Masooda Siraj, Advocate for Defendants in Suit No.2067,
2165, 2007, 1998, 2159, 2015 1882 of 2016 and 130/17.
Mr. Mirza Nadeem Taqi, Advocate for Defendant in Suit
Nos.1882/2016 & 2671/16.
Mr. Ghulam Hyder Shaikh, Advocate for Defendants (Collectorate
Preventive) in Suit No.1073, 1074, 2015 of 2016 and 130/2017.
Mr. Muhammad Khalil Dogar, Advocate for Defendants in Suit
No.1073, 1074 of 2016.
Mr. Shahid Ali, Advocate for Defendants/LTU in Suit No.2165/16.
Mr. Iqbal M. Khurram Advocate for Defendants (Appraisement
East) in Suit No.1074, 1073, 2135, 2165, 2159 of 2016.
Mr. Khalid Mehmood Siddiqui, Advocate for Defendant in Suit
Nos.2105, 1998 & 2165 of 2016.
Ms. Sadaf Noor Ellahi, AC (MCC AW).

J U D G M E N T

Muhammad Junaid Ghaffar, J. These are all connected Suits,
wherein, a common legal controversy is involved that as to *whether*
the import of packing material used in the manufacturing of pharmaceutical

products / finished drugs is entitled for exemption from sales tax as a “raw material” in the terms of Entry No.105 of the 6th Schedule to the Sales Tax Act, 1990 (“Act”). Since a legal question is involved, therefore, facts of each Suit are not being discussed, except that all of them have imported various consignments which have been claimed as “*raw material*”, and Customs department has refused to grant exemption from sales tax on all such imports against Entry No.105 of the 6th Schedule to the Act, on the ground that these are “*packing material*” and not entitled for such exemption as it is only available to “*raw materials*”. On various occasions in these Suit(s) ad-interim order(s) were passed for release of all such consignments against appropriate surety / security, including either furnishing of Bank Guarantee with the department / Nazir of this Court, or deposit of the amount with the Nazir of this Court.

2. Mr. Muhammad Vawda, Advocate for Plaintiff in Suit No. 2067/2016 has led the arguments and has contended that through the present Suit, the Plaintiff is claiming that the list of raw materials for the manufacture of pharmaceutical packing products as Annexed with the Plaint falls within the exemption available against Entry No.105 to the 6th Schedule of the Act. Per learned Counsel all of the Plaintiffs raw materials and imports fall within various HS Codes, whereas, Entry No.105 *ibid* is very similar and almost identical to S.R.O.555(I)/2002 issued by Defendant No.1 under Section 13(2) of the Act, and while interpreting S.R.O.555(1)/2002, a learned Single Judge of this Court in the case reported as ***Shazeb Pharmaceutical Industries Ltd., V Federation of Pakistan & Others*** (2015 PTD 1532), has been pleased to hold that the words raw materials for '*the basic*

manufacture of pharmaceutical active ingredients' and *'for manufacture of pharmaceutical products'* should be read disjunctively. Per learned Counsel the Defendants have refused to grant the exemption on the premise that firstly, the Plaintiff's products on which exemption is being sought are not raw materials, and secondly, that the exemption under Entry No.105 does not include raw materials for packaging, whereas, according to him the term '**manufacture**' has been defined in Section 2(16) of the Act, and "**manufacture**" or "**produce**" has been defined to include: process and operations of assembling mixing, cutting, diluting, bottling, packaging, repacking or preparation of goods in any other manner. Therefore, according to him Entry No.105 clearly covers and includes raw material used in the packaging process of pharmaceutical products. Per learned Counsel the Defendants have themselves accepted that the Plaintiffs imported packaging raw materials is in fact 'raw material', whereby, the Input Output Co-efficient Department ("**IOCO**"), has issued certificates to this effect for the purposes of exemption of Customs Duty under 5th Schedule of the Customs Act, 1969; hence, on the same analogy, now, they cannot deny the exemption on this very material for the purposes of Sales Tax. Learned Counsel has then referred to note 1.03 to Chapter 39 of the Customs Tariff and has contended that it clearly states that "Rigid PVC Film (Pharmaceutical Grade) is "Packing Material/Raw Material", and notwithstanding that this exemption is under a different schedule i.e. the 5th Schedule, the packaging material is being defined as a 'raw material' for the use in the manufacture of packaging; hence, the exemption is available under Entry 105 as above. He has further argued that the Drug

Regulatory Authority of Pakistan (“**DRAP**”) has also certified the import of such raw materials for packaging and has never objected as to whether these are raw materials for the use of packaging or whether they are used in the packaging of the Plaintiffs drugs and has referred to all such authorizations and certificates issued by IOCO and DRAP in respect of various packaging materials for the purposes of exemption of Customs Duty under the 5th Schedule *ibid*. In view of such positions, per learned Counsel, the Plaintiff is entitled for exemption from Sales Tax in terms of Entry No.105 *ibid*. In support of his contention, learned Counsel has relied upon the cases of ***Commissioner of Sales Tax v. Crescent Textile Mills Ltd.*** reported as **PLD 1975 Lahore 631**, ***The Commissioner of Income Tax, East Pakistan v. Messrs Ayurvedic Pharmacy (DACCA) Ltd.*** reported as **PLD 1970 Supreme Court 93**, ***The Commissioner of Sales Tax v. Messrs Shaiq Corporation Limited*** reported as **PLD 1986 Supreme Court 731**.

3. Mr. Faiz Ahmed, Advocate, learned Counsel for the Plaintiff in Suit No. 2671/2016, in addition to adopting the arguments of Mr. Muhammad Vawda, has contended that the packaging material imported by the Plaintiff is to manufacture pharmaceutical products and falls within the ambit of “raw materials” which entitles it to exemption from the levy of sales tax by virtue of Entry No.105 of the 6th Schedule. According to him the word "raw materials" is not defined in any of the four Federal Taxation Statutes, and it is settled law that in the absence of any special definitions, ordinary dictionary meanings of the words can be taken as a reference. Per learned Counsel in Black's Law Dictionary 2nd Edition, "raw materials" is defined as basic

substances round in their natural, modified or semi-processed state used as an input to a production process for subsequent modification or transformation into finished goods, whereas, in Chambers 21.4 Century Online Dictionary "raw materials" is defined as "material out of which something is or can be made". Therefore, per Learned Counsel, on the strength of the above, the packaging materials that are imported by the Plaintiffs are used in the process of manufacturing finished pharmaceutical products and as a result, should come within the ambit of "raw materials" and are entitled to exemption at the import stage. According to him the Plaintiffs are not utilizing the said packing material for its own independent use, nor are they selling it in semi- manufactured state; rather, it is being used into the final product that is sold under its own brand name; it forms a material component in the manufacture of pharmaceutical products, and as such, are covered under the ambit of "raw materials". According to him if the final goods that are being sold by the Plaintiffs are exempted from tax; the entire process should be free from the incidence of Sales Tax, unless a contrary intention can be found within the statute. In support he has relied upon the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax East Pakistan v Ayurvedic Pharmacy (Dacca) Limited** (reported as **PLD 1970 SC 93**) wherein the Hon'ble Supreme Court was pleased to hold that if the goods are exempted, they go out of the purview of the Act and unless a contrary intention could be found; it remains outside the scope of levy of tax. He has further referred to the case reported as **Latif Bawany Jute Mills Limited v The Sales Tax Officer Companies Circle I, Dacca** (reported as **1971 PTD 26**).

Alternatively, he has argued that Section 10 of the Act only allows refund of the input tax, if the supplies are zero rated or exported; hence, by virtue of Section 8B and Section 7(2), the sales tax paid at import stage cannot even be adjusted and or refunded and therefore, defeats the purpose of providing exemption on the import of raw materials that is provided by virtue of clause 105 of the 6th Schedule. Per learned Counsel even if it is conceded that the packaging materials are outside the scope of "raw materials" mentioned in Entry 105 and are in fact semi manufacture goods; even then, the levy of sales tax on such goods is not permissible as they are ultimately assimilated into a product whose sale is not recognized as a taxing event in the statute. In support of this contention he has relied on the case reported as **Commissioner of Sales Tax v. M/s. Shaiq Corporation** reported as **PLD 1986 SC 731**.

4. Mr. Ammar Yasser, Advocate for Plaintiff in Suit No. 105/2017 has also adopted the arguments of other learned Counsel and has further submitted that DRAP under the Drug Act, 1976 read with its rules has fixed the Maximum Retail Price (MRP) of the finished products and resultantly, Plaintiff cannot add the additional amount of Sales Tax in the selling price, and therefore, no sales tax is to be paid at the import stage, whereas, it cannot be recovered from the end user after the manufacture and sale of the "finished product". According to him Entry 104 provides exemption from sales tax on a number of items i.e. "Substances registered as drugs under the Drugs Act, 1976 (XXXI of 1976) and medicaments as classifiable under Chapter 30 of the First Schedule to the Customs Act, 1969 (IV of 1969) and it is for the reason that once

an item is registered with DRAP, its price has to be fixed and no sales tax or any other extra taxes can be levied. According to him packaging material, labels and other such material cannot be sold, whereas, the finished pharmaceutical product is also not saleable without being properly packed; hence, the exemption must be granted on this material as well. In support has relied upon the cases of ***Shazeb Pharmaceutical Industries Ltd. through Sultan Mehmood v. Federation of Pakistan through Chairman, Finance Division, Islamabad and 4 others*** reported as **2015 PTD 1532**, ***Sindh Institute of Urology and Transplantation through Authorized Representative v. Federation of Pakistan through Secretary Revenue Division and 4 others*** reported as **[(2017) 116 TAX 487 (H.C. Kar.)]**, ***Muhammad Fayyaz v. Central Excise Authorities*** reported as **1989 CLC 1642**, ***D.G. Khan Cement Company Limited through Deputy Manager Marketing v. Deputy Collector of Customs, Appraisement Group-VII, Custom House, Karachi and another*** reported as **2003 PTD 986**, ***Collector of Customs (Appraisement) Karachi and others v. Fauji Fertilizer Co. Ltd. and others*** reported as **PLD 2005 Supreme Court 577**, ***Glaxo Laboratories of Pakistan Ltd. v. Federation of Pakistan and others*** reported as **PLD 1992 Supreme Court 455**.

5. On the contrary Mr. Kashif Nazeer, Advocate appearing on behalf of the Customs Department has led the arguments on behalf of the Defendants and has contended that packing material is not a raw material for the basic manufacture of pharmaceutical active ingredients as well as pharmaceutical products, whereas, in exemption claims, a strict interpretation has to be adopted.

According to him, the exemption is restricted only to raw materials, and therefore, it cannot be extended to any packing material. Insofar as the argument that since the price of the pharmaceutical products is regulated by DRAP, therefore, no additional sales tax can be paid by the Plaintiffs is concerned, he has contended that there is no nexus in between the Drug Act as well as fixation of prices vis-à-vis any claim of sales tax exemption. Per learned Counsel the packing material is itself a distinct product and cannot be equated or called as a raw material and a pharmaceutical product can be manufactured from the raw material for which necessary exemption has been provided. According to him, if the exemption is restricted to raw materials, then by no implication packing material can be included into what has been excluded by the legislature. He has relied upon the cases of ***Chairman Federal Board of Revenue, Islamabad v. Messrs Al-Technique Corporation of Pakistan Ltd. and others*** reported as **PLD 2017 Supreme Court 99**, ***Hashwani Hotels Limited v. Government of Pakistan*** reported as **2007 SCMR 1131**, ***Messrs Ramna Fittings and Pipe Industries (Pvt.) Ltd. through Director, Lahore v. Collector of Sales Tax Custom House, Lahore*** reported as **2002 PTD 470**, ***Fauji Cement Company Ltd. through Secretary v. Additional Collector, Customs, Central Excise and Sales Tax, Islamabad and another*** reported as **2002 PTD 609**.

6. Dr. Shah Nawaz, learned Counsel appearing for some of the Defendants, in addition to adopting the arguments of Mr. Kashif Nazeer, has contended that raw material is the only product, which has been qualified by the Legislature for exemption purposes,

whereas, raw material is different from packing material, and therefore, the exemption being claimed is inadmissible.

7. Mr. Shahid Ali, Advocate appearing for some of the Defendants has also adopted the arguments of other learned Counsel for the Defendants and has further added that reliance on The Drugs Act is misconceived as it has no overriding effect, whereas, the liability to pay sales tax or not is to be governed independently under Section 3 of the Act, and the law settled by the Superior Courts in respect of interpretation of taxing statutes by no means supports the case of the Plaintiffs as they want this Court to hold that packing material is included in raw materials, which has been purposely excluded / left out by the Legislature. He has relied upon the case of ***Commissioner of Sales Tax v. Crescent Textile Mills Ltd.*** reported as **PLD 1975 Lahore 631, 2007 PTD (Trib.) 2325**, ***Karachi Electric Supply Co. V. American Export*** reported as **PLJ 1975 Kar. 14**, ***Commissioner Inland Revenue Zone-III V. IGI Insurance Company Limited*** reported as **2018 PTD 114** and ***Commissioner Inland Revenue, Zone-III v. Messrs IGI Insurance Company Ltd.*** reported as **2018 PTD 114**.

8. Ms. Fozia Rasheed, Ms. Masooda Siraj, Mr. Mirza Nadeem Taqi, Mr. Ghulam Hyder Shaikh, Mr. Muhammad Khalil Dogar, Mr. Iqbal M. Khurram Mr. Khalid Mehmood Siddiqui, Advocates for Defendants have adopted the arguments of other learned Counsel for Defendants.

8. I have heard all the learned Counsel and perused the record. As per admitted record all Plaintiffs are Pharmaceutical Companies

duly registered with the relevant Government authorities including (DRAP) and are importing various raw materials, including packing materials for the manufacture of Pharmaceutical Products/Drugs and for the present purposes, the controversy before the Court is in respect of their claim of exemption from sales tax on the import of various packing materials as according to them Entry No.105 of the 6th Schedule to the Act, allows such exemption. On the other hand, the case of the department is that the exemption against the Entry No.105, as above, is only specific in respect of raw materials and not packing materials. With the consent of all, these Suits have been heard finally along with listed applications as it only involves a legal controversy, therefore, the following legal Issues by exercising powers under Order 14 Rule 2 CPC are settled for adjudication:-

- i. Whether the Suits are maintainable?
- ii. Whether the Plaintiffs are entitled for exemption from sales tax on the imports of packing materials in terms of Entry No.105 of the 6th Schedule to the Sales Tax Act, 1990?
- iii. What should the decree be?

9. Insofar as Issue No.1 that as to whether the Suits are maintainable is concerned, it appears that after passing of the judgment by the Hon'ble Supreme Court in the case reported as ***Searle IV Solution (Pvt.) Ltd and others V. Federation of Pakistan and others (2018 SCMR 1444)***, the Plaintiffs were required to deposit 50% of the disputed amount (who had not done so at the time of passing of ad-interim orders) and pursuant to various orders passed on different dates in all these Suits, such compliance was made, and therefore, in view of such compliance,

all these Suits are maintainable notwithstanding the ouster clause as provided in Section 51 of the Act. However, the fate of the amount of 50% already deposited, would depend on the final outcome of these Suits that as to whether the said amount is to be refunded to the Plaintiffs or they are required to pay the balance amount, if the Suits are dismissed. This issue is answered accordingly.

10. Insofar as Issue No.2 is concerned, it would be advantageous to refer to Entry No.105 of the 6th Schedule which reads as under:-

“105	Raw materials for the basic manufacture of pharmaceutical active ingredients and for manufacture of pharmaceutical products, provided that in case of import, only such raw materials shall be entitled to exemption which are liable to customs duty not exceeding (eleven) per cent ad valorem, either under the First Schedule (or Fifth Schedule) to the Customs Act, 1969 (IV of 1969) or under a notification issued under section thereof.”	Respective headings
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Perusal of the aforesaid Entry reflects that an exemption has been provided to the raw materials for the basic manufacture of the pharmaceutical active ingredients and for manufacture of pharmaceutical products. This exemption is subject to a qualification that in case of import (other than local manufacture), only such raw materials shall be entitled to exemption, which are liable to Customs Duty not exceeding 11% ad-valorem, either under the First Schedule or the 5th Schedule to the Customs Act, 1969 or under a Notification issued under Section 19 thereof. Therefore, for claiming exemption under Entry 105 *ibid*, the imported raw material must be attracted to Customs Duty at the rate of 11% maximum, whether, it is under the Customs Tariff itself; or is

reduced through any other exemption under the Customs Act. For the present purposes, it is not in dispute that otherwise the Plaintiffs do fulfill this requirement/condition so stipulated in Entry No.105 of the 6th Schedule as above i.e. the imported material(s) in question are attracted to 11% Customs Duty, and if otherwise, they would not be entitled for any exemption of sales tax under this Entry. Simply put, this is in respect of raw materials on which there must not be any dispute. The question that whether packing material is covered under raw material is being discussed and decided herein below; but for clarity, it must be noted and in any case this condition has to be met by the Plaintiffs first.

11. The next and the most important issue for adjudication is to the effect that whether the packing material imported by the Plaintiffs falls under this Entry, which only caters for raw materials. The question that whether such raw material is for the basic manufacture of *pharmaceutical active ingredients* or for *manufacture of pharmaceutical products* no more remains in dispute after the judgment of a learned Single Judge of this Court in the case of ***Shazeb Pharmaceutical Industries Ltd.*** (*supra*), wherein, it has been held that the word **“and”** between pharmaceutical active ingredient and pharmaceutical product is to be read **“disjunctively”**, as **“OR”** and the exemption is available to both the categories of manufacture. Therefore, I need not dilate upon this aspect of the matter as though, initially some of the learned Counsel for the Defendants had raised this objection as well.

12. As to the remaining issue, the precise arguments of the learned Counsel for the Plaintiffs are to the effect that packing

material, which is specifically imported for packing of pharmaceutical products falls within the term "raw material" as used in Entry No.105 of the 6th Schedule. On the other hand, the Defendants' argument is that these packing materials do not qualify and it is only basic raw materials, which are entitled for exemption. One of the learned Counsel appearing on behalf of the Plaintiff in Suit No. 2067/2016 has placed reliance on the definition of "manufacture", as provided in Section 2(16) of the Act, and has submitted that the process and operation of assembling, mixing, cutting, dilating, bottling, packaging, repacking or preparation of goods in any other manner falls within the term "manufacture" as defined in the Act itself, and therefore, the packaging process of pharmaceutical products is entitled for the above exemption. To this argument, it may be observed that the same has no relevance for the present purposes, whereas, even otherwise, this contention does not appear to be correct and in fact it is the inverse, as apparently, the definition of "manufacture" has been given in the Act to include the activity of packaging as a *taxable activity* and for such purposes, a broad definition of any sort of packaging has been defined as "manufacture", which resultantly makes such activity as taxable under the Act. In fact, it caters to the activity (*packaging*) independently, being carried out by packaging companies, which by itself, do not manufacture any products; but render their services as packaging companies to third parties. In view of such position, this argument is hereby repelled.

13. The other argument, which has been raised by the same learned Counsel is to the effect that all these packaging materials

have already been classified as "raw materials" by the Customs Department ("IOCO"), whereby, they have issued various Certificates of import authorization. According to him once the said materials, which are used admittedly for packaging of the pharmaceutical products are classified as a "raw material" for such industry, then at the same time it must also be recognized as "raw material" for the purposes of sales tax exemption under Entry No.105 of the 6th Schedule to the Act. To have a better understanding of this issue, one has to look into the 5th Schedule to the Customs Act, 1969, wherein, various exemptions and/or reduction of customs duties have been provided on the goods classified under the First Schedule to the Customs Act, 1969, and for that IOCO has issued requisite import authorizations. Under part-II of the 5th Schedule, the exemption or reduction of Customs duty on the import of Active Pharmaceutical Ingredients, Excipients / Chemicals, Drugs, Packing Material / Raw Materials for packing and diagnostic kits and equipment's, components and other goods has been provided. It would be advantageous to refer to the exemption available under the 5th Schedule for this purposes, which reads under:-

"The Imports under this part shall be subject to following conditions, namely:-

- (i) The active pharmaceutical ingredients, Excipients / chemicals, **packing material and raw material for packing** shall be imported only for in-house use in the manufacture of specified pharmaceutical substances, as approved by the Drug Regulatory Agency of Pakistan.
- (ii) The requirement for active pharmaceutical ingredients and Excipients / chemicals, drugs as specified in Table A, B & C, shall be determined by the Drug Regulatory Agency of Pakistan.
- (iii) The requirement for **packing materials / raw materials for packing** as specified in Table-D, shall be determined by Input Output Coefficient Organization;

- (iv) The designated / authorized representative person of Drug Regulatory Agency of Pakistan shall furnished all relevant information, as set out in this part, online to the Customs computerized system, accessed through the unique user identifier obtained under section 155d of the Customs Act, 1969, along with the password thereof;
- (v) For "Respective Headings" entries in column (3)of the Table against which two rates of customs duty 3% and 5% have been mentioned in Column (4) the rate of 3% shall be applicable only for such goods which are chargeable to 3% duty under the First Schedule to Customs Act 1969."

Perusal of the aforesaid exemption under the 5th Schedule to the Customs Act, 1969 reflects that the Imports under this part shall be subject to various conditions to the effect that the active pharmaceutical ingredients, Excipients / chemicals, packing material and raw material for packing shall be imported only for in-house use in the manufacture of specified pharmaceutical substances, as approved by the DRAP. It further provides that the requirement for active pharmaceutical ingredients and Excipients / chemicals, drugs as specified in Table A, B & C, shall also be determined by the DRAP, whereas, clause-(iii) (which is relevant for the present argument of the Plaintiff's Counsel) provides that the requirement for packing materials / raw materials for packing as specified in Table-D, shall be determined by IOCO. Perusal of this exemption and methodology for claiming it clearly reflects that in the 5th Schedule to the Customs Act, there is a specific exemption not only for *raw materials* of the pharmaceutical products, but so also for *packing material / raw materials for packing* and which have been defined and specified in Table-D to this Schedule, which presently describes at least 35 different packing materials as well as raw materials for packaging purposes, against which various reduced rates of customs duties have been notified. And for this purposes

the certification of IOCO is required and perhaps it is being issued to the Plaintiffs. However, when this exemption of customs duty on the packing material or the raw material for packing is read in-juxta position with Entry No.105 of the 6th Schedule, it reflects that there is no resemblance / similarity in the wordings of both these Schedules/ Entry. The 6th Schedule against Entry No.105 only specifies raw materials and does not cater to any other product, including the packing material. Insofar as the 5th Schedule to the Customs Act is concerned, it has a broad description and covers numerous items, including packing material as well as raw material for packing. Therefore, I am of the view that it would not be appropriate to compare both these Schedules / Entries inasmuch as there is no similarity in both of them insofar as the wordings are concerned. One is more elaborate and includes numerous goods / products for exemption, whereas, the other is only restrictive to “raw materials”. The rule of what is not included is excluded would apply as presently it is a case where an exemption is being claimed by the Plaintiffs. The Rules of interpretation in such a situation do not permit to make any co-relation between both these Schedules because of the difference in wording and description. Both are to be interpreted on the basis of the description and wordings provided therein independently. It may be true that the packing material, which has been imported by the Plaintiffs is being exclusively used in the manufacture of pharmaceutical products; but for the present purposes, this Court has to confine itself only to the exemption provided against Entry No.105 of the 6th Schedule to the Act. The contention of the learned Counsel appearing on behalf of the Defendants is also convincing to the effect, that in

case of an exemption, it is for the taxpayer to show that he comes within the scope thereof and if two reasonable interpretations are possible, the one against him will be adopted. This is trite law and there are a series of judgments to this effect.

14. The argument which has been pressed upon vehemently on behalf of the Plaintiffs is that this Court must read the word “*raw material*” mentioned in Entry No.105 *ibid* so as to include the packing material which has been imported by the Plaintiffs. It is a settled principle of interpretation that while interpreting a specific provision of a statute, the intent of the legislature and the language employed is determinative of the legislative intent and the Courts have to interpret the same while keeping such intention in mind. It has been noted hereinabove that 5th Schedule to the Customs Act clearly provides for exemption/reduction in respect of packing material as well as raw materials for packing of pharmaceutical products, whereas, Entry No.105 of the 6th Schedule is silent to this effect. Therefore, this Court is not permitted to add anything in the said provision. The principle of “*Casus Omissus*” is squarely applicable here, that a matter which should have been, but has not been provided for in a statute cannot be supplied by Courts, as to do so will be legislation and not construction, [**Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co. Ltd., AIR 1933 PC 63**]. A *Casus Omissus* can, in no case, be supplied by the Court of law as that would amount to altering the provision, [**Nadeem Ahmed Advocate v. Federation of Pakistan 2013 SCMR 1062**]. Moreover, in interpreting a penal or taxing statute the Courts must look to the words of the statute and interpret them in the light of what is clearly expressed. It cannot imply anything which is not expressed;

it cannot import provisions in the statute so as to support assumed deficiency, [**Collector of Customs (Appraisement) v. Abdul Majeed Khan & Others** 1977 SCMR 371]. A statute is an edict of the Legislature and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker. Once, the word "packing material" has been specifically left out against Entry 105 *ibid*, whereas, the same has been consciously inserted or provided in the 5th Schedule to the Customs Act, then, it makes it clear that the intention is not to grant any exemption of Sales Tax on the packing material; and at the same time it is granted for the purposes of Customs Duty. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. It is settled law that the function of the Courts is only to expound and not to legislate.

15. There is somewhat a contrary view as well in respect of *Casus Omissus*, but has not been approved and or endorsed by our Courts. One view, which reflects the traditional approach, is that the Court cannot legislate for *Casus Omissus* and that if there is a gap or an omission in the statute the lacuna cannot be supplied by the Court by judicial construction and that it is for the law making authority to remove the defect. The other view has been thus put forward forcefully by Denning, L.J., in ***Seaford Court Estates Ltd. v. Asher*** [1949] 2 All E.R. 155:

When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written words so as to give 'force and life' to the intention of the legislature. A judge should ask himself the question how, if the makers of the Act had themselves

come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases." (p. 164)

16. He again reiterated this view in ***Magor & St. Mellons Rural District Council v. Newport Corporation*** [1951] 2 All E.R. 1226, and went on to observe that:

We sit here to find out the intention of Parliament and of ministers and carry It out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis." (at. 1236)

17. However, the said views of Lord Denning have not been approved by the House of Lords in ***Magor & St. Mellons Rural District Council***, [1951] 2 All E.R. 839. Per Lord Simmons "*it appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation*". Similarly Lord Morton observed "*these heroics are out of place*", whereas, Lord Tucker went on to observe that "*Your Lordships would be acting in a legislative rather than a judicial capacity if the view put forward by DENNING, L.J., were to prevail.*" For the present purposes it is not required to dilate upon as to what Lord Denning intended when he made such observations, as our Hon'ble Supreme Court has already opined that Courts are not required to provide what is missing.

18. In view of hereinabove facts and circumstances of this case Issue No.2 is answered in negative by holding that Plaintiffs are not entitled for claiming exemption of sales tax in terms of Entry No.105 of the 6th Schedule to the Act, on the import of packing materials.

19. As a consequence thereof, Issue No.3 is answered by holding that Plaintiffs Suits are hereby dismissed with all pending

applications, whereas, the amount deposited, if any, with the Nazir of this Court shall be paid to the respective Collectorates who should approach the office of the Nazir for such purposes. Similarly, if there are any Bank Guarantees or any other form of security, the Nazir shall encash the same and pay it in similar manner to the respective Collectorates.

20. All listed Suits are dismissed with pending applications.

Dated: 02.08.2019

J U D G E