

# IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-979 of 1995

**Present:**

**Mr. Justice Irfan Saadat Khan**

**Mr. Justice Zafar Ahmed Rajput**

Dates of hearing: 25.02.2016, 10.03.2016 and 17.03.2016.

Petitioner No.1: M/s. Ray Shipping Enterprise Limited through M/s. Muhammad Afzal Siddiqui and Rana Ikramullah, Advocates.

Petitioner No.2: M/s. Irfan Trading Company. Nemo.

Res. Nos.1, 2, 6 & 7: Assistant Collector of Customs (Port Bin Qasim), Collector of Customs (Port Bin Qasim), Assistant Collector of Customs (Customs House) and Deputy Collector of Customs (Customs House), respectively, through Mr. Kashif Nazeer, Advocate.

Res. No.3: Director General, Ports and Shipping Mercantile Marine Department, through Captain Rashid Anwer, Chief Nautical Survey Officer alongwith Fazal Abbas, Dealing Assistant for Registration of Ships.

Res. Nos.4 & 5: Central Board of Revenue and Federation of Pakistan, respectively, through Mr. Asim Mansoor Khan, Deputy Attorney General for Pakistan.

## **J U D G M E N T**

**IRFAN SAADAT KHAN, J.** The instant petition has been filed

with the following prayers:

- 1. That the demand made by Respondent No's 1 and 2 be declared null and void abinitio and the respondent Nos: 1 & 2 be directed to clear the said ship in accordance with the Exemption Notifications (as defined above) and the*

*Respondent No:3 be directed to issue a Deletion Certificate to the Petitioner accordingly.*

2. *In the alternative, the Respondents No.1 and 2 be directed to allow the Petitioner to cancel the Bill of Entry for import of ship for trading filed by the Petitioner and the said ship be considered to have been imported for breaking-up and the Respondent No:3 be directed to issue a Deletion Certificate accordingly.*
3. *If the effect of the Notifications No: 487(I) of 1994 and 562(I) of 1994 is to make the said ship chargeable with the duties and taxes as provided under these notifications then the same may kindly be declared ultra vires and null and void.*
4. *Without prejudice to the above and without admitting or cancelling any other liability, the petitioner is not in any case liable to payment of sales tax.*
5. *The petitioner seeks enforcement of its fundamental rights of equal treatment under and equal protection of law as per Article 25 of the Constitution of the Islamic Republic of Pakistan.*

*Any other relief that this Hon'ble Court may deem fit and necessary in the circumstances of the case may also graciously be granted.*

2. Briefly stated the facts of the case are that the petitioner No.1 **(the petitioner)** is a Public Limited Company and is engaged in the business of merchant shipping. That the respondent No.3, vide notification dated 25.04.1992, granted certain trade incentives and concessions for private investment in the shipping industry. That the Economic Coordination Committee (**ECC**) also, vide its decision dated February 24, 1993 granted exemption and trade incentives to encourage investment in shipping industry in private sector thereby granting exemption from import fees, duties and taxes on the import of ships upto the period of December 31, 1995. That the said decision of the ECC was enforced and implemented through various notifications issued from time to time by the concerned authorities. That in the abovementioned notification though on one hand it is

mentioned that ships imported in respect of the said scheme would be exempted from all taxes and duties but if any ship so imported is subsequently broken up, the same shall be chargeable with the duties at the rates applicable to ships imported for breaking up purposes. That the petitioner thereafter to avail the said incentive applied to the Director General of Ports and Shipping for a license to own and operate ships under the national flag, which was granted by the respondent No.3, vide license dated 10.11.1993. The petitioner also applied on 08.12.1993 to the Technical Committee of the Ports and shipping to approve the purchase of the ship, namely, MV Enterprise Sky which also was granted, vide letter dated December 13, 1993. The petitioner then applied to the respondent No.3 for a customs clearance in order to bring the ship in Pakistan, which permission was granted vide letter dated 19.12.1993, subject to the condition that the petitioner should first submit indemnity bond for the said purpose which was also furnished and thereafter the ship was registered under the Pakistani flag on 18.02.1994. Thereafter the said ship carrying a cargo of iron ore for Pakistan Steel Mills called at Bin Qasim Port on February 2, 1995. The ship was then given port clearance after fulfillment of legal formalities on 11.02.1995. In the meantime the respondent No.1 issued a notice dated 28.03.1995 under Section 82 of the Customs Act 1969 (**the Act**) mentioning therein that since the ship has not been cleared, the same may be cleared within 14 days. The petitioner then approached the customs authorities with the request that no customs duties are payable on the import of ship by the petitioner hence notice issued by the customs authorities is uncalled for. In the meanwhile the petitioner carried out an intensive survey of the ship and it revealed that the ship

requires major repairs and thereafter as per the petitioner they decided that rather than spending a huge amount on the repairs the shipit may be broken up and for that purpose the petitioner applied to the Collector of Customs under Section 79(3) of the Act for substitution of the bill of entry. In the meantime the petitioner entered into an agreement with the petitioner No.2 for sale of the ship and thereafter ship was beached at Gadani for breaking up purposes. The customs authorities however did not accept the stance taken by the petitioner and asked them to pay the import duty on the ship as per the notification No.SRO 482(I)/92 and the Bill of Entry furnished by the petitioner was returned without assessment and the petitioner was asked to pay an amount of Rs.26,656,168/- being chargeable on the import of the said ship. It is against the impugned demand that the present petition has been filed.

3. Previously, vide order dated 25.06.2002, the instant petition was disposed of by this Court by observing as under:

*20. For the foregoing reasons we would accept this petition to the extent that the petitioner No.1, who had imported the vessel, would be liable to pay 10% customs duty and sales tax. The petitioner No.2, who was subsequent purchaser of the vessel, would not be liable to pay any customs duty and other taxes. The bank guarantee furnished by the petitioner No.2 before this Court stands discharged. The scrap, if any, lying at Gadani would be released in favour of petitioner No.2.*

4. Thereafter the petitioner filed leave to appeal before the Hon'ble Supreme Court of Pakistan and the Hon'ble Supreme Court, vide order dated 28.10.2009, remanded the matter for fresh decision by observing as under:

*“After advancing their respective arguments at some length, learned counsel for the parties present in Court candidly*

*conceded that one of the crucial controversy involved in the petition before the High Court, as to whether the petitioner No.1 was not liable to pay customs duty and sales tax claimed by the respondent Nos.1 and 2 (Port Bin Qasim) or it was not recoverable from him, has been left undecided. Further, they did not dispute that passing of impugned judgment by the Division Bench of the High Court of Sindh after more than eight months to the hearing of the petition has resulted in overlooking many material aspects of the case.*

*2. In view of the above and by consent, the impugned judgment dated 04.10.2001 passed by the Division Bench of the High Court of Sindh, Karachi in Const. Petition NO.D-979 of 1995 is set aside and the case is remanded for fresh decision in accordance with law. Interim arrangement, if any, made earlier shall remain operative till the final disposal of the petition. It is expected that on remand the petition will be heard and disposed of within three months from the date of communication of this order.*

5. M/s. Muhammad Afzal Siddiqui and Rana Ikramullah Advocate have appeared on behalf of the petitioner and submitted that it is only the ships imported for breaking up purposes that the customs duties and taxes are leviable and the respondents were not justified in imposing customs duties and other taxes on the ship imported by the petitioner, as per the incentive granted by the Federation. While elaborating their viewpoint, they submitted that a complete package of time based exemption and trade incentive was announced by the Government of Pakistan (**GoP**) to encourage investment in shipping industry in private sector and in this regard several notifications were issued by the GoP. They submitted that in order to avail the said incentive the petitioner also imported a ship, however due to the circumstances beyond their control they had to send the ship for breaking up purposes since the same required major repairs which they could not afford. As per the learned counsel, it was never the intention of the petitioner to import the ship for breaking up purposes but the sole object for importing the ship was to carry on their business. They further submitted that all the legal

formalities with regard to import of the ship were duly fulfilled by the petitioner, which is evident from the various annexures annexed with the instant petition. They submit that no doubt it has clearly been mentioned in the notification that if a ship is imported and subsequently broken up the tax exemption granted would not be applicable to it but equal true is the fact that the petitioner never imported the ship for breaking up purposes as is evident from the correspondence made between the petitioner and the respondents wherein, according to the learned counsel, the stance of the petitioner that the said ship has been imported for business purposes impliedly has been endorsed and accepted by the respondents. The learned counsel further submit that it is the Port Qasim Authorities who kept the ship under arrest for three months due to which the ship had to undergo major repairs. They further state that due to those unavoidable circumstances the petitioner had to sell out the ship for breaking up purposes, since the circumstances went beyond their control. They further submit that the respondents erred in not accepting the revised Bill of Entry furnished by the petitioner. The learned counsel in the alternative submit that since the petitioner have sold out the ship to M/s. Irfan Trading Company, who are petitioner No.2 in the instant petition, hence, the demand of customs duty and other taxes raised by the respondents could not be demanded from the petitioner (No.1) and demand if any raised by the respondents should be recovered from the petitioner No.2. They further state that rights of the petitioner is protected by the principle of promissory estoppel also, as a benefit given earlier could not be withdrawn subsequently. In the end they submit that since the imposition of the customs duties and other charges on the petitioner

are illegal and uncalled for the same may be deleted. In support of their above contentions, the learned counsel have placed reliance on the following decisions:

1. *Messrs Gadoon Textile Mills and 814 others v. WAPDA and others (PLJ 1997 SC 739)*
2. *Collector of Central Excise and Land Customs and 3 others v. Azizuddin Industries Ltd., Chittagong (PLD 1970 Supreme Court 439)*
3. *Raja Industries (Pvt.) Ltd. through General Manager v. Central Board of Revenue, Government of Pakistan, Islamabad through Chairman and 4 others (1996 MLD 980)*
4. *Messrs M. Afzal & Sons and 2 others v. Federal Government of Pakistan, Islamabad through Secretary, Finance and another (PLD 1978 Lahore 468)*

6. Nobody has appeared on behalf of the petitioner No.2 despite service.

7. Mr. Kashif Nazeer Advocate has appeared for respondents No.1, 2, 6 and 7 and vehemently refuted the arguments of the learned counsel for the petitioner and stated that the petitioner has played fraud with the incentive given by the GoP as they have fraudulently imported the ship for breaking up purposes by terming the same as an import for business purposes. He stated that no doubt legal formalities for import of the ship were fulfilled by the petitioner but equal true is the fact that the said ship has not conducted even a single business voyage for the said purpose as they have not brought out any item for the so called business purposes for any port. As per the learned counsel the sole intention of the petitioner was to import a ship for breaking up purposes and to take undue advantage of the incentive given to the importers of the ships which is evident from the facts obtaining in the instant petition.

According to the learned counsel when the customs authorities unearthed the fraud played by the petitioner by not accepting the revised Bill of Entry only thereafter the petitioner started raising hue and cry in the instant matter and had tried to shift the burden of payment of duties/taxes etc. upon the petitioner No.2 with mala fide intention. As per the learned counsel the parameters provided under SRO 482 /92 and SRO 487/94 are quite clear and no lease in this behalf could be granted to the petitioner since they have imported the ship for breaking up purposes, hence, they are liable to pay the customs duties and taxes in accordance with law. The learned counsel further submitted that the said ship was imported just to defeat the incentive granted by the GoP and to deprive the exchequer to the extent of Rs.26,656,168/-, which is a huge amount. He further submitted that the petitioner without obtaining permission and by filing relevant documents to the respondents entered into a contract with petitioner No.2 who docked the ship at Gadani Beach for breaking up purposes, which also proves their mala fide intention. He further submitted that the petitioner have violated the provisions of Section 32 of the Act by mis-declaring the price as well as material facts to the respondents and thereafter approaching this Court by filing the instant petition with unclean hands. He submitted that mala fide on the part of the petitioner is evident from the fact that instead of availing departmental remedies they have filed the instant petition without first exhausting the remedies provided under the law. Hence, as per the learned counsel, this petition is premature and is liable to be dismissed. The learned counsel then read out the relevant portion of SRO 487/94 and various other notifications to prove that the petitioner is liable to pay the demand raised by the



customs authorities. The learned counsel, in the end, has prayed that since the petitioner is liable to pay the amount of the customs duty and the taxes raised by the department, the instant petition may be dismissed with heavy cost.

8. Mr. Asim Mansoor Khan, Deputy Attorney General has appeared for respondents No.4 & 5 and has adopted the arguments of Mr. Kashif Nazeer and has stated that this petition is liable to be dismissed.

9. Captain Rasheed Anwar, Chief Nautical Survey Officer of respondent No.3 along with Mr. Fazal Abbas, Dealing Assistant for Registration of Ships, have appeared on behalf of respondent No.3 and stated that they are only a proforma party and whatever orders are passed by this Court would be complied with by them in letter and spirit.

10. We have heard all the learned counsel at considerable length and have also perused the record and the decisions relied upon by the learned counsel for the petitioner (No.1).

11. Before proceeding any further we would like to reproduce hereinbelow the relevant notifications and various concessionary orders issued from time to time:

*GOVERNMENT OF PAKISTAN  
MINISTRY OF COMMUNICATIONS  
(PORTS & SHIPPING WING)  
\*\*\*\* \* \* \* \* \**

*Karachi, the 25<sup>th</sup> April, 1992.*

*NOTIFICATION*

*SUBJECT: concessions/incentives for private sector investment in shipping.*

*F. No.3(2)/91-Sh.II(Vol-II). In order to encourage private sector investment in shipping, the Government has taken the following decisions which shall be applicable with immediate effect :-*

- (a) *There would be no restriction on the age of ships which the licencees can import. This permission would, however, be subject to the condition that the ships possess sea worthiness certificates issued by recognised classification societies. Secondly, the licencees/importers will provide indemnity bonds to the effect that if such a ship is to be scrapped at any time they will report it to the Customs and pay all the import duties etc., before the ship is condemned for scrapping. (Underline ours)*

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*Incentives for the Shipping Industry.*

*Decision*

*The Economic Coordination Committee of the Cabinet (ECC) took note of the Summary dated 14-1-1993 submitted by the Communications Division and decided as under:*

- i) .. .. .
- ii) .. .. .
- iii) *Duties and Levies*  
*Import of ships would be exempted from all fees and duties for the period upto December, 1995.*

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**GOVERNMENT OF PAKISTAN  
MINISTRY OF FINANCE AND ECONOMIC AFFAIRS  
(REVENUE DIVISION)**

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*Islamabad, the 18<sup>th</sup> April, 1993.*

**NOTIFICATION**  
**(CUSTOMS)**

*S.R.O (I)/93.- In exercise of the powers conferred by sub-section (2) of section 5 of the Finance Act, 1985 (I of 1985), the Federal Government is pleased to direct that the following further amendment shall be made in this Ministry's Notification No. S.R.O. 481(I)/88, dated the 26<sup>th</sup> June, 1988, namely :-*

*In the aforesaid Notification, in the Table, after S. No. 54 in the first column and the entry relating thereto in the second*

column, the following new serial number and the entry relating thereto shall be added, namely :-

“55. Ships falling under heading Nos. 89.01, 89.02, 8903.9900, 8906.0010 and 8906.0900, if imported and subsequently broken up, it shall be leviable to Iqra surcharge in the same manner and at the same rate as is applicable at that time, to ships imported for breaking up. This exemption shall be valid up to 31<sup>st</sup> December, 1995.” (Underline ours)

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GOVERNMENT OF PAKISTAN  
MINISTRY OF FINANCE AND ECONOMIC AFFAIRS  
(Revenue Division)  
NOTIFICATIONS  
Islamabad, the 18<sup>th</sup> April, 1993  
CUSTOMS

S.R.O. 299 (I)/93.- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), and subsection (1) of section 13 of the Sales Tax Act, 1990, the Federal Government is pleased to direct that the following further amendment shall be made in this Ministry's Notification No. S.R.O. 482 (I)/92, dated the 14<sup>th</sup> May, 1992, namely :-

In the aforesaid Notification, in the Table, against sub-heading number, 89.01, 89.02, 8903.9900, 8906.0010 and 8906.0090 in column (2) for the entries relating thereto in columns (3) and (4) following shall be substituted namely :-

“Free If imported and subsequently broken up, it shall be leviable to customs duty and sales tax in the same manner and at the same rate as is applicable at that time to ships imported for breaking up. This exemption shall be valid up to 31<sup>st</sup> December, 1995”. (Underline ours)

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S.R.O. 482(I)/92:-

TABLE

Description of goods	Heading sub-Heading Nos.	Rate of duty	Conditions
1	2	3	4
Ships	89.01, 89.02	10% ad val	If imported <u>and subsequently broken up it shall be leviable to sales tax in the same manner and at the same rate as is applicable at that time to ships imported for breaking up</u> (Underline ours)

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S.R.O. 440(I)/93.-

“(28) for import of ships for the period upto the 31<sup>st</sup> December, 1995”.

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GOVERNMENT OF PAKISTAN  
MINISTRY OF COMMUNICATIONS  
(PORTS & SHIPPING WING)

No.3(2)040-Sh. II/91. Karachi, the 13<sup>th</sup> Dec.,  
1993.

From : Ishrat Ahmed,  
Section Officer.

To : The Chairman and Chief Executive,  
Ray Shipping Enterprises Ltd.,  
1st Floor, Hakimsons Building,  
19-West Wharf Road,  
Karachi.

Subject: ACQUISITION OF ONE SECOND HAND VESSEL M.V. ENTERPRISE BY M/S. RAY SHIPPING ENTERPRISES LTD.

Dear Sir,

I am directed to refer to your letter dated 8<sup>th</sup> December, 1993 regarding the subject noted above and to convey that the Technical Committee in the Ports & Shipping Wing had examined the particulars submitted for the above vessel and has technically cleared the vessel for acquisition and subsequently placing under Pakistani flag subject to the conditions appended below:-

(a) Installation of the mandatory carriage requirements of the NAVTEX, EPIRB, and Radio-Communications for compliance with the provision of SOLAS-74 and GMDSS.

(b) No guarantee or foreign exchange facilities will be provided by the Government of Pakistan or State Bank of Pakistan.

(c) Attention is also invited to the condition that if the vessel is to be scrapped at any time they will report it to the Customs and pay all the import duties etc. before the ship is condemned for scrapping.

2. This permission to acquire vessel is without prejudice and subject to full-filment of other necessary requirements for import into Pakistan as determined by other Government agencies.

Yours truly,

Sd/-  
( ISHRAT AHMED )  
SECTION OFFICER

(Underline ours)

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Government of Pakistan  
Ministry of Communications

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Subject: REGISTRATION OF VESSELS UNDER  
PAKISTAN FLAG.

- .. .. .  
2. .. .. .  
3. *The procedure for registration of ships was infact changed with a view to facilitate private sector shipping companies as bringing of ship in Pakistan Ports for meeting the formality was costing them heavily. The Exemption for importing ships will expire on 31.12.1995. In view of CBR's view point, all ships registered under Pakistan Flag shall have to call on Pakistani Port before 11.12.1995 for filling up the bill of entry failing which their claim for exemption of duties may not be entertained.*

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*M/s. Ray Shipping Enterprises Ltd.,  
First Floor, Hakim Sons Building,  
19-West Wharf Road,  
Karachi. Pakistan.*

NOTICE UNDER SECTION 82 OF THE CUSTOM ACT 1969.

Subject:- IMPORT OF SHIP AGAINST J.C.M. NO.48/95  
DATED 6.2.95 INDEX NO.2.

The above noted consignment has not been cleared nor the taxes have been paid even after the expiry of one month's time at Port Qasim.

*You are required to clear the above mentioned consignment within 14 days of the issuance of this notice failing which the same shall be sold through public auction.*

(Underline ours)

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S.R.O. 487(I)94

**TABLE**

Sr.No.	Description of goods	Heading/ Sub-heading Nos.	Conditions	Rate of duty
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(1)	(2)	(3)	(4)	(5)
100.	Ships	89.01,89.02 8903,9900 8906.0010 & 8906.0090	<i>If imported and subsequent broken up, it shall be liable to customs duty and Sales tax in the same manner and at the same rate as is applicable at that time, to ships imported for breaking up. This exemption shall be valid upto 31<sup>st</sup> December, 1995.</i> (Underline ours)	10% ad val

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**GOVERNMENT OF PAKISTAN  
CENTRAL BOARD OF REVENUE  
(CUSTOMS WING)**

\* \* \* \* \*

C.No.1(24)Tar.II/92. Islamabad the, 31<sup>st</sup> July, 1998.

**SPECIAL EXEMPTION ORDER NO.90 OF 1998**

**SUBJECT:- EXEMPTION OF CUSTOMS DUTY ON SHIPS REGISTERED BETWEEN 24.2.1993 AND 30.6.1996.**

2. Now, therefore, in exercise of the powers conferred by section 20 of the Customs Act, 1969 (IV of 1969), sub-section (1) of section 13 of the Sales Tax Act, 1990, and sub-section (2) of section 5 of the Finance Act, 1985 (I of 1985), the Central Board of Revenue is pleased to exempt, as a special case, eleven ships listed in column 3 of the table below imported by M/s. Milwa Shipping Co. (Pvt.) Ltd., M/s. Ray Shipping Enterprises Ltd., M/s. Pakistan National Shipping Corporation and M/s. Tristar Shipping Lines Ltd., from whole of customs duty, regulatory duty, leviable under the First Schedule to the Customs Act, 1969, sales tax, and iqra surcharge:-

S.No.	Name of Company	Name of Ship	Date of registration	GRT	NRT
(1)	(2)	(3)	(4)	(5)	(6)
1.	.....	.....	.....	...	...
2.	Ray Shipping Enterprises Ltd.	1. "Enterprises-R"	18-02-94	35486	22550
3.	.....	.....	.....	...	...

3. The above exemption is subject to the condition that if subsequently the ship is broken, it shall be liable to customs duty in the same manner and at the same rate as applicable at the time of its breaking, to ships imported for breaking up.

4. This order, however, shall not entitle anyone to claim or to get refund of duty already paid.

(MUHAMMAD ZAHID)

Secretary (CT-II)

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Mr. Muhammad Zahid  
Secretary (CT-II),  
Central Board of Revenue,  
Islamabad.

**SUBJECT: EXEMPTION OF CUSTOMS DUTY ON SHIPS REGISTERED BETWEEN 24.2.93 AND 30.6.96.**

Board's letter C.No.1(24)Tar.II/92 dated 31.7.98 on the subject cited above refers.

2. The Board's vide order No.90 of 1998 dated 31.7.98, (copy enclosed) allowed exemption of customs duty and other taxes on the import of ships purchased by Pakistani companies between 24.2.93 to 30.6.96, provided that duties already paid would not be refunded and if subsequently the ship is broke, it shall be liable to customs duty in the same manner and at the same rate as applicable at the time of its breaking, to ships imported for breaking up.

3. The case of M/s. Rays Shipping Enterprises (Pvt.) Ltd. listed at serial number 2 of the Special Exemption Order was scrutinized which revealed that the ship did not qualify for exemption as it was broken/scrapped on 19.5.95 and was no more operational.

4. Considering the above facts this Collectorate is of the view that the name of M/s. Ray Shipping Enterprises (Pvt.) Ltd., erroneously appears amongst the names of the ships which qualify for such exemption.

5. Board is accordingly, requested that the above named ship may be deleted from the list of the Special Exemption Order.

Sd/-  
for COLLECTOR

In our view the only controversy requiring deliberation of this Court is whether the petitioner No.1 was not liable to pay customs duty and sales tax claimed by the respondents No.1 & 2