

ORDER-IN-ORIGINAL NO. OF 2015-2016
M/s. DG Khan Cement Company (NTN-1213275), Lahore
Adj-II/Coll/SCN-162/DIT-Khi/Cont Report/Appg-II/645-B/DG Khan Cement/2015



GOVERNMENT OF PAKISTAN
COLLECTORATE OF CUSTOMS (ADJUDICATION-II)
CUSTOMS HOUSE, KARACHI



Adj-II/Coll/SCN-162/DIT-Khi/Cont Report/Appg-II/645-B/DG Khan Cement/2015 Dated: 28-01-2016

Before : **Ch. Muhammad Javaid**
Collector
Collectorate of Customs (Adjudication-II), Karachi

Respondents : **M/s. DG Khan Cement Company (NTN-1213275),**
53-A, Lawrence Road, Lahore

Date of Institution : **08-10-2015** (Show Cause Notice)

Dates of hearings : **20-10-2015, 10-11-2015, 17-11-2015 and 30-11-2015**

Date of Judgment : **-01-2016**

Present

For Respondents : Ch. Muhammad Rafiq Consultant of M/s. Masood Aziz Associates
Karachi **appeared on behalf of the respondent**

For Department : **Mr. Saud Hassan Khan**, Investigating Officer, appeared on behalf of
the General of Intelligence and Investigation-FBR (Customs
Enforcement), Regional Office, Karachi

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- 1) This copy is granted free of charge for the private use of the person to whom it is issued.
- 2) An appeal against this order lies with the Appellate Tribunal, Karachi, within 60 days from the date of communication of this order. The appeal shall be accompanied by a fee of Rs.1000/- (One thousand only) to be paid in the manner that may be prescribed by the Board.
- 3) The appellant should state in his Appeal if he desires to be heard in person or through a pleader.

* * * * *

Brief facts of the case are reported by the Directorate General of Intelligence and Investigation-FBR (Customs Enforcement), Regional Office, Karachi vide its Contravention Report No. 645-B/Appg-II/645-B/DCI/DG Khan/Cont/2015 dated 26-08-2015, as under:-

a.	Name and address of the Importer:	M/s. DG Khan Cement Company (NTN-1213275), 53-A, Lawrence Road, Lahore
b.	Particulars of the Good Declarations:	KAPE-HC-109099 dated 02.06.2014
c.	Declared Descriptions, PCT and Quantity of the goods as per Goods	New Caterpillar brand package Diesel Generator Model

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	Declaration and invoice:	C32-ATAAC Air cooled 1102 KVA/881EKW standby power 1000 KVA Prime Power at 3 Phase PCT 8502.1390 Quantity: One Set
d.	Actual Descriptions, PCT and Quantity of the goods:	New Caterpillar brand package Diesel Generator Model C32-ATAAC standby 880 eKW 1100 KVA 50Hz 1500 rpm 400 Volts PCT 8502.1310 Quantity: One Set
e.	Declared import / self-assessed value of goods as per GD / invoice on which taxes were paid	USD 155,000/- Rs. 15,422,861/-
f.	Duty and Taxes leviable on the basis of actual classification of the consignment:	Customs Duty @ 15% = Rs. 2,313,429/- Sales Tax @ 17% = Rs. 3,015,169/- Income Tax @ 5% = Rs. 1,037,573/- Total = Rs. 6,366,171/-
g.	Duty and Taxes paid:	Customs Duty @ 0% = NIL Sales Tax @ 0% = NIL Income Tax @ 5% = Rs. 771,143/- Total = Rs. 771,143/-
h.	Evaded amount of Duty and Taxes (recoverable):	Customs Duty @ 15% = Rs. 2,313,429/- Sales Tax @ 17% = Rs. 3,015,169/- Income Tax @ 5% = Rs. 266,430/- Total = Rs. 5,595,028/-
i.	Offence	Mis-declaration in description / capacity of Generator in GD and invoice aimed at evasion of Customs Duty and other Taxes
j.	Section of Law violated :	Sections 32(1), 32(2), 32(A) read with Sections 79 & 80 of the Customs Act, 1969, Sections 3, 4, 6, 33 and 34 of the Sales Tax Act, 1990, further read with Sections 148 of the Income Tax Ordinance, 2001, punishable under clauses 14 & 14A of Section 156 (1) of the Customs Act, 1969

2. And whereas, the Directorate General of Intelligence and Investigation-FBR (Customs Enforcement), Regional Office, Karachi received a credible information that M/s. DG Khan Cement Company (NTN-1213275), 53-A, Lawrence Road, Lahore have imported and cleared **Diesel Generator set** of 1100 kva valued at US \$ 310,000 through mis-declaration of output capacity of the generators as 1102 KVA. According to the source the generators of 1102 KVA are not manufactured by the Caterpillar and the importers deliberately produced manipulated catalogue of Model CAT C32 for clearance of aforesaid consignments. In pursuance of afore-said information the Goods Declaration bearing GD No. KAPE-HC-

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109099 dated 02.06.2014 has been identified cleared through MCC, Appraisement (East), Karachi.

3. And whereas, the Diesel Generators upto 1100 KVA are classified under PCT Heading 8502.1310 and attracting 15% Customs Duty and 17% Sales Tax whereas the Generating Sets of above 1100 KVA are classifiable under PCT Heading 8502.1390 chargeable to 0% Customs Duty and free of Sales Tax under the then SRO 727(I)/2011. On-line scrutiny of aforesaid GD show that goods were released on the basis of examination report and catalogue produced by the importer showing model of the generator as CAT C32 Caterpillar and standby power 1102 KVA (881.6 KW). The same were released under PCT Heading 8502.1390. Although the GD was completed under PCT Heading 8502.1310 but subsequently on submission of catalogue by the representative of importer, the assessment was reviewed and goods released under PCT Heading 8502.1390 on 0% Customs Duty and free of Sales Tax. It is pointed out that Generators of up to 1100 KVA are being manufactured locally hence chargeable to Sales Tax.

4. And whereas, in order to check the veracity of the catalogue produced by the importer, the relevant literature of Cat C32 and Cat 32 ACERT has been retrieved from the official website of Caterpillar. As per literature, no generators of 1102 KVA are manufactured but only generators of 1100 KVA i.e., 880 ekw are manufactured by the afore-said manufacturer which clearly confirmed that manipulated catalogue was produced by the importer. The evasion of duty and taxes in the instant case worked out to **Rs. 5,595,028/- (Customs Duty amounting to Rs. 2,313,429/-, Sales Tax amounting to Rs. 3,015,169/- and Income Tax amounting to Rs. Rs.266,430/-)** which is recoverable from the importer.

5. And whereas, thus M/s. DG Khan Cement Company (NTN-1213275), 53-A, Lawrence Road, Lahore managed to import and clear under reference consignment of Caterpillar Generator sets through mis-declaration of Description / Capacity of Generator in GD and invoice evading thereby customs duty and taxes to the tune of **Rs. 5,595,028/- (Customs Duty amounting to Rs. 2,313,429/-, Sales Tax amounting to Rs. 3,015,169/- and Income Tax amounting to Rs. Rs.266,430/-)** have committed offence of mis-declaration in terms of Sections 32(1), 32(2), 32(A) read with Sections 79 and 80 of the Customs Act, 1969, Sections 3, 4, 6, 33 and 34 of the Sales Tax Act, 1990, further read with Sections 148 of the Income Tax Ordinance, 2001, punishable under clause (14) of Section 156 (1) of the Customs Act, 1969.

6. Accordingly, M/s. DG Khan Cement Company (NTN-1213275), 53-A, Lawrence Road, Lahore was called upon to show cause under provisions of Sections 32(1), 32(2) & 32(A) read with Sections 79 and 80 of the Customs Act, 1969, Sections 3, 4, 6, 33 and 34 of the Sales Tax Act, 1990 & Sections 148 of the Income Tax Ordinance, 2001 as to why the evaded amount of duty and taxes to the tune of **Rs. 5,595,028/-**

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(Customs Duty amounting to Rs. 2,313,429/-, Sales Tax amounting to Rs. 3,015,169/- and Income Tax amounting to Rs. Rs.266,430/-) may not be recovered from them and penal action may not be taken against them under clauses 14 & 14A of Section 156(1) of the Customs Act, 1969.

7. Hearings in the case were fixed 20-10-2015, 10-11-2015, 17-11-2015 and 30-11-2015. Ch. Muhammad Rafiq Consultant of M/s. Masood Aziz Associates Karachi appeared on behalf of the respondent and submitted written reply to the show cause notice, which reply is reproduced as under:-

"Reply to the Show Cause Notice bearing No. Adj-II/Coll/SCN-162/DIT-Khi/Cont Report/Appg-II/645-B/DG Khan Cement/2015 dated 08.10.2015.

Reference: DG Khan Cement Company Lahore

We have been authorized by M/s. DG Khan Cement Company, 53-A, Lawrence Road, Lahore, (NTN 1213275), hereinafter referred to as 'respondents' (Letter of Authority enclosed at Annex-I), to represent them in the subject Show-Cause Notice (Annex-II) and make the following submissions on their behalf:

- 1. That the respondents imported one diesel generator set Model No. C-32-ATAAC Air to Air of 1102 KVA 1881 eKW Standby Power from Caterpillar SARL, UK, and filed GD CRN No. 1-HC-109099-02062014 for clearance thereof under PCT heading 8502.1390 @ 0% Customs duty. Copy of GD is enclosed at Annex-III.*
- 2. That the Customs after examination / inspection of the goods in question, allowed release under heading 8502.1390 @ 0% Customs duty.*
- 3. That the impugned Show Cause Notice has been issued on the complaint I report of Directorate General of Intelligence and Investigation wherein it has been alleged that:*
 - (i) The respondents have mis-declared the capacity of generating set as 1102 KVA as the generators of said capacity are not being manufactured by Caterpillar.*
 - (ii) The importer deliberately produced manipulated catalogue of Model CAT C 32 for clearance of aforesaid consignments.*
 - (iii) The relevant literature as retrieved from the website of the manufacturer viz. Caterpillar revealed that no generators of 1102 KVA are manufactured but only generators of 1100 KVA i.e. 880 eKW are manufactured by the aforesaid manufacturer.*
 - (iv) The respondents have committed offence U/s 32(1), 32(2), 32(A), read with Section 79 and 80 of the Customs Act, 1969; Section 3, 4, 6, 33 and 34 of the Sales Tax Act, 1990 and Section-148 of the Income Tax Ordinance, 2001, punishable under Clause-(14) of Section-156(1) of the Customs Act, 1969,*

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4. *Reply to the Allegations leveled in the Show Cause Notice:*

- (i) *The generating set imported by the respondents is essentially of 1102 KVA capacity. This fact can be proved from the three sources:*

- a). *The manufacturers' certificate dated 13.09.2015 (Annex-iv) confirms that impugned diesel generating set i.e., Model C32 1102 KVA /881 eKW is meant for standby application only. Relevant portion of the certificate is reproduced below:*

"Caterpillar generator set Model C32 having 1102 KVA / 881 eKW standby type (as per ISO conditions) at 3 phase, 400 Volts, 50 HZ, 1500 RPM, 0.8 power factor. This rating is suitable for standby application."

This certificate was issued in confirmation; of their dealer M/s. Allied Engineering Limited certificate dated June 06, 2014, (Annex-v) which is also reproduced below for ease of reference:

"We hereby confirm that Caterpillar Diesel Generator Set Model C32 is rated for 1102 KVA / 881 eKW standby power (as per ISO rating) at 3 phase, 400 volts, 50 hertz, 1500 RPM, 0.8 power factor."

Clearly, the certificates issued by the manufacturer and its dealer establish that the impugned generating set is of 1102 KVA. After the said certificates / confirmation, there remains no shadow of doubt about the capacity of the generators as such. Thus the same are essentially classifiable under heading 8502.1390.

- b). *The physical examination of the impugned generator by the Customs reveals that the plate (copy of photo of plate Annex-VI) showing model and other details of the product in question contains the following information:*

<i>Generating Set - ISO 08528</i>		
<i>Model</i>	<i>1100F</i>	
<i>Serial Number</i>	<i>CATOOC32JJAZ01655</i>	
<i>Year of Manufacture</i>	<i>2014</i>	
<i>Rated Power – Standby</i>	<i>1102.0</i>	<i>KVA</i>
	<i>881.6</i>	<i>KW</i>
<i>Power Factor</i>	<i>0.80</i>	<i>COSφ</i>
<i>Rated Voltage</i>	<i>400 / 231</i>	<i>V</i>
<i>Phase</i>	<i>3</i>	
<i>Rated Frequency</i>	<i>50</i>	<i>Hz</i>
<i>Rated Current</i>	<i>1591</i>	<i>A</i>
<i>Rated R.P.M.</i>	<i>1500</i>	
<i>Maximum Altitude</i>	<i>500.0</i>	<i>m</i>
<i>Maximum Ambient Temperature</i>	<i>40</i>	<i>°C</i>

The above information contained on the plate of the generating set clearly reveals that the same is of 1102 KVA/881 eKW capacity. Thus in the presence of this concrete information the allegations of the department that Caterpillar does not manufacture 1102 capacity generators becomes baseless. Moreover, in light of the information contained on the product plate wherein it is vividly embossed / printed that the Model CATOOC32JJAZ01655

has capacity of 1102KVA, the allegation of production of manipulated catalogue loses its weight as even if it is presumed for the sake of argument that the catalogue was manipulated (which is not the case here), the plate which was attached to the imported product confirms its capacity as 1102 KVA. The Show-Cause Notice requires to be vacated on this ground alone.

ii. *It is pertinent to mention here that the Directorate General of Intelligence & Investigation has erred in concluding that as the website of the manufacturer does not mention about generator of 1102 KVA thus the company does not manufacture a generator of this capacity. In this regard it submitted that DG 1&1 must visit the website of the manufacturer Caterpillar and click on the following link in order to arrive at correct conclusion:*

http://www.cat.com/en_ZA/products/new/power-systems/electric-powergeneration/diesel-generator-sets/18332039.html

This catalogue available on the aforementioned link confirms that the company is manufacturing generators of capacity ranging from 1030KVA to 1250 KVA. In fact, the Generating Set of 1102 KVA comes within the range of generators being manufactured by the company. The relevant portion from the catalogue is reproduced below for ease of reference.

(A copy of the catalogue is also enclosed at AnnexVII-):

"OVERVIEW

Producing reliable power from 830 kW to 1000 kW at 60Hz, our C32 ACERT™ diesel generator sets are made to meet your mission critical, continuous, standby and prime applications. We've designed each to ISO 8528-5 transient response requirements and to accept 100 percent rated load in one step. Generator sets range from low fuel consumption systems to EPA Stationary Emergency (Tier 2) certification. Seismic certification is also available for select models, ensuring you maintain power after unexpected disturbances. Our integrated control system, including Cat® UPS, ATS and switchgear, protects your power supply and keeps you connected through on-site and remote monitoring options. We offer easy-to-use EMCP control panel options, combining your management and diagnostic tools in one. The EMCP 4.4 controller provides multi-generator set paralleling capability, giving you the ability to add generator sets to match your growing power requirements. Browse a broad range of accessories and bolt-on system expansion attachments. Find flexible packaging to fit unique spatial requirements and environmental conditions. Even extend the safety of your operation with environmental conditions. Even extend the safety of your operation with UL 2200 and CSA certified package options. Our C32 generator sets are made for demands, so you can make yours.

Thus in view of the above, it is clear that the main allegation of the department has lost its weight which renders the impugned Show-Cause Notice without any substance and liable to be withdrawn.

(iii) *The manufacturer's catalogue describes the product as model CAT C32 ATAAC Diesel Engine of Capacity 881 kW 1102 KVA (Annex-VIII) having standby rating 1102 KVA. Since the output of the impugned generators exceeds 1100 KVA, the classification was correctly claimed under heading 8502.1390 @ 0% Customs duty.*

(iv) *In another case, M/s Allied Engineering and Services Limited imported caterpillar brand generator model No. C 32-1102 KVA and filed GD under heading 8502.1390 @ 1 0% duty vide*

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IGM No. 24/2012 dated 19.01.2012, Index No. 90. As per manufacturer's catalogue the standby capacity was 1102 KVA. The catalogue further describes that 'output available with varying load for the duration of interruption of the normal source power. Average power output is 70% of the standby power rating. The department issued demand cum show cause notice No. SI/Misc./WeBOC/47/PQ/2012 -dated 18.10.2012 that the goods were correctly classifiable under heading 8502.1310 @ 15% duty. The product in question was got tested by M/s Siemens Pakistan which confirmed that the standby capacity of the product was more than p.00 KVA i.e. 1112 KVA. On the basis of this test report, the Assessment Order No. SI/Misc./WeBOC/47/PQ/2012 dated 25.07.2013 (Annex-IX) was issued accepting classification under heading 8502.1390 @ 0% duty for generator bearing standby capacity 1102.

(v). That the respondents have not violated the Provisions of Section-32(1), (2), 3(A), 79 & 80 of the Customs Act, 1969 for the following reasons:

"Section-32. False statement, error, etc.- (1) If any person, in connection with any matter of Customs=

- (a) makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or
- (b) makes any statement in answer to any question put to him by an officer of customs which he is required by or under this Act to answer,
- (c) submits any false statement or document electronically through automated clearance system regarding any matter of Customs.

knowing or having reason to believe that such document or statement is false in any material particular, he shall be guilty of an offence under this section."

"Section-32(2) Where, by reason of any such document or statement as aforesaid or by reason of some collusion, any duty or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within five years of the relevant date, requiring him to show cause why he should not pay the amount specified in the notice.

The respondents have not made any statement or declaration which was found to be false in any material particular nor have they colluded with the Customs authorities whereby any duty or charge had not been levied or had been short levied at the time of importation of goods in question. Clearly the provisions of Section 32(1) & (2) are not attracted in view of the facts and circumstances of the matter at hand. Moreover, provisions of Section-33 of the Sales Tax Act, 1990 cannot be invoked as there is no mis-declaration on the part of the respondents as stated above.

Section-32A:

The respondents' declaration does not come within the purview of the fiscal fraud under Section 32A. The respondents have neither submitted any documents which were concocted, altered, mutilated, false, forged, tempered or counterfeit; nor have they declared the name and address of any exporter or importer which is physically non-existent; nor declared in the GD any untrue description, quantity, quality, origin and value of goods; nor have they altered, mutilated or

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suppressed any finding of the Customs functionary on any document or in the computerized record. Thus the provisions of Section-32A are not attracted at all.

Section 79 of the Customs Act, 1969

The correct declaration was made in the GDs. The classification of the goods was made in heading 5402.4410 as provided by the foreign supplier in the invoice, practice in vogue and on the basis of classification made by the Customs officials under 5402.4410. There was no element of mens rea to evade duty and taxes. As such no violation of Section 79 of the Customs Act was made.

Section 80 of the Customs Act, 1969

Section 80 of the Customs Act empowers the Customs to check the GD. No violation of this section has been made by the respondents. Section 3, 4, 6, 33 & 34 of the Sales Tax Act, 1990 Customs has been empowered to collect Sales Tax in the same manner and at the same time as the Customs duty. They have not been notified as officer of Sales Tax and as such raising demand for short levy of sales tax and adjudication thereof and demanding default surcharge is beyond jurisdiction of the Customs officials.

Section 148 of the Income Tax Ordinance, 2001

Advance Income Tax shall be collected in the same manner and at the same time as the customs duty in respect of the import. Customs is not empowered to determine and recover the short levied tax. Customs is only entitled to recover the tax once the order are passed for the recovery of tax by the Commissioner Income Tax under Section 161(1) of the Income Tax Ordinance.

"These penal clauses are not applicable as no violation has been made for Section 32(1), 32(2), 32A, 79, 80 of the Customs Act, 1969.

Prayer:

It is prayed in the interest of natural justice that:-

- 1. Show-Cause Notice may be vacated in the interest of justice.*
- 2. Orders may kindly be passed for classification of generators in question under heading 8502.1390 on the basis of standby capacity.*

Thanking you,

-SD/-

M/s. Masood Aziz & Associates

8. The reply submitted by the respondents was forwarded to the Directorate General of Intelligence and Investigation-FBR (Customs Enforcement), Regional Office, Karachi for furnishing parawise comments. The Directorate submitted parawise comments, the same are reproduced hereunder:-

Subject: SUBMISSION OF COUNTER COMMENTS ON THE REPLY TO THE SHOW CAUSE NOTICE

The parawise comments on behalf of the Directorate General of Intelligence & Investigation-FBR, Regional Office, Karachi, on the reply to the Show Cause Notice No. Adj-II/Coll/SCN-162/DIT-

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Khi/Cont Report/Appg-II/645-B/DG Khan Cement/2015 dated 08.10.2015, filed by M/s. DG Khan Cement Company Ltd, Lahore, through_ counsel are summarized as under:-

1. *That contents of para 1 of the reply to the Show Cause Notice are not denied to the extent of filing of GD CRN No. I-HC-109099-02062014 for the clearance of one unit generating set Model No. C-32-ATAAC Air. However, M/s. DG Khan Cement Company, Lahore, at the time of filing of aforesaid GD has mis-declared output capacity of the generator as 1102 KVA under PCT Heading 8502.1390, instead of actual output capacity of 1100 KVA, which is classified under PCT Heading 8502.1310 and attracting 15% Customs Duty and 17% Sales Tax, aimed at evading duty and taxes leviable thereon.*
2. *That contents of para 2 of the reply to the Show Cause Notice are not maintainable hence denied. It is evident on record that the said Goods Declaration was completed under PCT Heading 8502.1310 but subsequently on submission of manipulated catalogue by the representative of importer, the assessment was reviewed and goods released under incorrect PCT Heading 8502.1390 on 0% Customs Duty and free of Sales Tax.*
3. *That contents of para 3 of the reply to the Show Cause Notice need no comments.*
4. *That contents of para 4 (i) of the reply to the Show Cause Notice are denied. That M/s. DG Khan Cement Company Lahore, have imported generator set of 1100 KVA classified under PCT Heading 8502.1310, attracting Customs Duty @ 15% and Sales Tax @ 17%, which was mis-declared as CAT C32 Caterpillar and standby power 1102 KVA (881.6 KW) and cleared on the basis of manipulated catalogue produced by the importer. During investigation the relevant literature of CAT C32 and CAT 32 ACERT was retrieved from the official website of the Caterpillar which revealed that no generators of 1102 KV A are manufactured but only generators of 1100 KVA i.e. 880 eKW are manufactured which confirmed that at the time of clearance of the impugned generator manipulated catalogue was produced by the importer. For ease of the matter, it is submitted that:-*
 1. *Standby power rated generators are the most commonly rated generator sets. Their primary application is to supply emergency power for a limited duration during a power outage. With standby rated generators there is no overload capability built into the units. It is important to note that standby rated generators, under no circumstances, should run in conjunction with a public utility.*
 11. *Standby power rating should be applied to the unit where public utility power is available. The typical rating for a standby engine should be sized for a maximum of 80% average load factor and roughly 200 hours per year. This includes less than 25 hours per year of running time at the standby rating. **Standby power ratings should never be applied except in true emergency outage situations.** Predetermined outages with the utility company, under UL guidelines, are not considered emergency outages. Manual load shifts for testing purposes can be performed with most automatic transfer switches.*

DIFFERENCE BETWEEN KW AND KVA

The primary difference between kW (kilowatt) and KVA (kilovolt-ampere) is the power factor. KW is the unit of real power and KVA is a unit of apparent power (or real power plus re-active power). The power factor, unless it is defined and known, is

therefore an approximate value (typically 0.8), and the KVA value will always be higher than the value for KW.

To expand on it a bit more, the kW rating is essentially the resulting power output a generator can supply based on the horsepower of an engine. kW is figured by the horsepower rating of the engine times .746. For example if you have a 500 horsepower engine it has a kW rating of 373. The kilovolt-amperes (kVa) are the generator end capacity. Generator sets are usually shown with both ratings. To determine the kW and kVa ratio the formula below is used.

$$8\text{cp}^{\circ}\text{Ox}625(\text{kVa}) = 500 \text{ kW}$$

111. Thus using this simple formula it can be deduced that the real power of the Gensets sets is $.8 \times 1102 = 881 \text{ kW}$, from which it transpires that the Gensets under discussion has a power rating of 881 kW, again instead of 80%, if 70% power factor is used than the real power would be $.7 \times 1102 \text{ kVA} = 771 \text{ kW}$. Since, in the light of indication of the catalogue produced by the respondent, average output power of impugned standby generator is shown 70% of the standby power rating, therefore, generator is classifiable under PCT Heading 8502.1310 attracting Customs Duty @ 15% instead of 0% under PCT Heading 8502.1390. The said generator has a Standby rating of 881 kW 1102 kVA, 50 Hz 1500 rpm 400 Volts which converts into 881 kW at 80% (.8) power factor or 771 kW at 70% power factor for 200 hours per year.

- IV. The respondent has heavily relied upon catalogue, certificate dated 06.06.2014, issued by M/s. Allied Engineering and Services (Pvt) Ltd and Caterpillar SARL Branch Dubai. It is pointed out that in the said documents, it has been confirmed that "Caterpillar Generator set Model C32 having 1102 KVA/881 KWE standby type (as per ISO conditions) at three phase, 400 volts 50 Hz, 1500 RPM, 0.8 Power Factor. This rating is suitable for standby application only." Whereas, in terms of Pakistan Customs Tariff output capacity IS the yard stick for determination of exact classification of the generators not the standby capacity. Therefore, the said documents cannot be relied upon.

4. That contents of para 4 (i) (b) of the reply to the Show Cause Notice are not denied to the extent of examination report. However, it is pointed out that in the examination report the rated voltage of the impugned generator set, upon examination has been found as 400/231 Volts, whereas on the contrary in the catalogue produced by the respondent the rated voltage of 1102 KVA standby generator has been shown as 415 volts at 1500 rpm. The catalogue retrieved by the Directorate General from the official website of the Caterpillar shows the rated voltage of 1100 KVA Generator as 400 volts, at 1500 rpm. Such state of affairs is ample to establish that the respondent has produced manipulated catalogue on the basis of which generator was cleared fraudulently.

4. That contents of para 4 (ii), (iii) & (iv) of the reply to the Show Cause Notice are not maintainable. Detailed comments have already been offered in the preceding paras.

4. That contents of para 4 (v) of the reply to the Show Cause Notice are misconception and misinterpretation of law by the respondent. It is evident on record that the respondent has cleared the standby generator by mis-declaring its output capacity as 1102 under incorrect PCT Heading 8502.1390. The average power output of the impugned generator as per respondent's manipulated catalogue is 70% of the standby power rating, therefore, the running power rating comes to 771 KVA. As such, the impugned generators were to be classified under PCT Heading 8502.1310

attracting Customs Duty @ 15% instead of 0%. The respondent have therefore, committed an offence of mis-declaration within the mis-chief of Section 32(1) & (2) of the Customs Act, 1969. In this regard, reliance is placed on a judgment of the Hon'ble Supreme Court of Pakistan in case of *Baba Khan V/s Collector of Customs*, reported as PTCL 2000 CL. 688, whereby, it has been ruled out that:-

"We have carefully perused the provisions of Section 32 and also Section 79 of the Customs Act, 1969. Under subsection (1) of section 32, if any person in connection with any matter of Customs makes any declaration or statement which is untrue in any material particulars, he is guilty of an offence under that section. No reference is made in Section 32(1) to Section 79 or that such declaration or mis-statement is made in the Bill-of Entry. For an untrue declaration or statement to come within the mischief of Section 32(1), the same should be untrue in any material particulars and that the statement or declaration is made in "connection" with any matter of customs. The words "any matter of customs" are not restricted to bills of entry".

As far as the matter of adjudication and recovery of Sales Tax and Advance Income Tax is concerned, it is submitted that the customs authorities are fully empowered to adjudicate, adjudge and recover the evaded amount of custom duty and consequential allied taxes (sales tax and advance withholding tax) in terms of Section 32 and 32(A) of the Customs Act, 1969 read with Section 179 and Section 202 *ibid*. In the instant case principally a huge amount of customs duty/ taxes was evaded through mis-declaration of output capacity and classification and consequently other levies like advance income tax become payable. Hence all the evaded amount of duty and taxes are recoverable by the customs authority. It may be mentioned that in terms of Section 6 of Sales Tax, 1990 and Section 148 of Income Tax Ordinance 2001 the levies of import stage on imported goods are to be enforced assessed and collected by the clearance Collectorate of Customs in the same manner as it were duties of customs and all the provision of Customs Act, 1969. It is pointed out that there are no other specific provisions for recovery of short levied / evaded amount of taxes through mis-declaration on *in* respect of imported goods *in* the allied laws. Hence the cases of customs offences are adjudicated by customs authorities in terms of aforementioned provision of the Custom Act, 1969. Reliance is placed on Judgment dated 19.09.2012 of the Supreme Court of Pakistan in Civil No. 332 to 382 of 2012. In the said case PCT of imported goods was mis-declared to claim exemption of duty and taxes which resulted into evasion of Customs duty, Sales tax and Income tax. The issuance of SCN and Order-in- Original passed by the custom authorities and action taken in terms of Section 32 was upheld by the apex court.

Likewise, the Advance Income Tax on Imported goods is in terms of Section 148 of Income Tax Ordinance, 2001 is collected by the clearance Collectorate of Customs as collecting agent. In case of evasion of short levy of tax of import stage through mis-declarations or misuse of exemption etc ... the amount of evaded duties and consequential taxes in any case are to be adjudged by customs authority through adjudication where after customs authority are fully empowered to recover the same under Section 202 of the Customs Act, 1969. It may be mentioned that the Collectorate of Customs being collecting agent is entitled to recover the shot levy in evaded amount from the defaulter as provided under Section 161 (2) of the Income Tax Ordinance, 2001. Further reliance is placed on judgment dated 18.11.2003 of the Honourable High Court of Sindh in case of *MLs Al-Haj Corporation SCRA No.97/2002* wherein it was held that Customs authorities were competent to recover short leveled amount of income tax however, imposition of penalty was not warranted.

PRAYER

In view of above facts and evidences it is respectfully prayed that the respondent has not come forward with clean hands as such is not entitled for any exemption, relaxation and eq0table relief. Therefore, the case may graciously be adjudicated upon on merits

-sd/-

*(Saud Hassan Khan)
Investigating Officer"*

9. The case was fixed for final hearing on _____, Ch. Muhammad Rafiq Consultant of M/s. Masood Aziz Associates Karachi appeared on behalf of the respondent no. (i), submitted additional arguments. The same are reproduced hereunder for ready reference:

Additional Submissions in respect of Show-Cause Notice bearing No. Adj-II/Coll/SCN-162/DIT-Khi/Cont Report/Appg-II/645-B-DG Khan Cement/2015 dated 08.10.2015.

Reference: DG Khan Cement Company, Lahore

Facts: DG Khan Cement Co. Lahore imported a Gen Set Model CAT C-32 ATAAC stand by 1102 KVA and Rated Voltage 400/231 volts, filed Goods Declaration and claimed clearance under PCT heading 8502.1390.

The goods were examined. The examination Report contained the particulars of the Gen Set, copied down from the Printed Steel Plate Affixed on Goods, which reads as under:

*"Description of goods: caterpillar GenSet, Model CAT-C-32 ATAAC, Rated Power: Standby 1102 KVA
Rated Voltages: 400/231 Volts"*

3. *That the Declaration of goods was found correct in the Examination Report. Goods were assessed under PCT heading 8502.1390 and released to the lawful owners.*

That the 1st alternative and inconstant set of facts:-

Allegation No.1

The importer imported GenSet of 1100 KVA through Mis-Declaration of output capacity as 1102 KVA, and claimed GenSet of 1102 KVA which are not manufactured by the caterpillar. They deliberately produced manipulated catalogue of Model CAT C-32 for clearance of the goods.

Reply: That the allegation of mis-declaration of output capacity 1102 KVA of the GenSet was declared inthe GD u/s 79(1) of the Customs Act, 1969. Secondly the Examination Report confirmed the Description of goods as correct i.e. GenSet Model C-32 - 1102KVA - 400/231 Volts etc.

Thirdly Collectorate allowed clearance of goods u/s 83 of the Act.

Fourthly, *u/s 83 of the Customs Act, 1969, once the imported goods were subjected to examination, Examination Report confirmed the description of goods as correct. There is a Mandatory bar u/s 29 to amend it after clearance of the goods.*

II *The description of GenSet, C-32 having output capacity 1102 has attained finality.*

Fifthly: *That M/s. Allied Engg. & Services (Pvt.) Limited has issued a certificate:*

"Two whom it may concern:

We hereby confirm that Caterpillar Diesel Generator Set Model C32 is rated for 1102 KVA/881 KW Standby Power (As per ISO Rating) at 3 phase, 400 volts, 50 hertz, 1500 PRM, 0.8 power factor."

Sixthly: *That the above Certificate is further supplemented by M/s Caterpillar SARL Branch, UAE, which confirmed the Rated Capacity of GenSet 1102 KVA. To sum-up the allegation of mis-declaration of standby output capacity 1100 KVA stands negated, being incorrect false and inconsistent and alternative set of facts, which is liable to be set aside.*

2. Test Report

That we have already submitted a copy of the physical test report, carried out by M/s. Siemens of the GenSet-CAT-C-32 Model ATAAC in the presence of an appropriate officer of Customs, who alongwith M/s Siemens signed the Test Report, confirmed 'That the output rated capacity of the GenSet was 1112 KVA for 30 minutes.

As a consequence of the above Test Report, the Port Qasim Collectorate accepted the output rated capacity of the GenSet above 1100 KVA and allowed assessment under PCT heading 8502.1390.

Thus, in view of the above certificates, the allegation of mis-declaration of rated power capacity 1100 KVA is incorrect, false and fabricated which may finally be set aside.

It is pertinent to mention here that Honourable Customs Appellate Tribunal in its judgment dated 20.11.2015 in three appeal cases K-194 to 196 12014 in the case of M/s. Allied Engineering & Services Limited has categorically established the rated power capacity of GenSet Model Cat C-32 as 1102 KVA. The relevant portion from the judgment is reproduced below:

"It is a well settled principle of statutory interpretation that redundancy cannot be attributed to the legislature, therefore, we restrict ourselves to the literal interpretation of the headings produced supra, which clearly refer to the 'output' of the generating set, which in the instant case is 1102 KVA as is evident from the product catalogue as well as the evidence of test conducted by Siemens Pakistan in another identical case placed on record by the appellant."

Thus there remains no doubt about the fact that M/s Caterpillar has been manufacturing GenSet of output capacity of 1102 KVA, hence the allegations leveled in the Show-Cause Notice stand void and contrary to the facts in light of the above judgment of the honourable Appellate Tribunal read with the certificates issued by the respondent.

Allegation No.2:

The second alternative and inconsistent set of facts:

That the Caterpillar catalogue produced was manipulated and the said catalogue of Diesel GenSet - Standby 881 eKW 1102 KVA, 50HZ-1500RPM-415 volts is not manufactured by the Caterpillar and the only catalogue of GenSet 880 eKW 1100 KVA and 400 volts was manufactured by them which has a rated power capacity 1100 KVA and rated power voltage 400 volts.

Reply:

- i. *The physical examination by the Customs reveals that the plate showing model and other details of the product in question contains the following information:*

Model	1100F	
Serial Number	CATOOC32JJAZ01655	
Year of Manufacture	2014	
Rated Power – Standby	1102.0	KVA
	881.6	KW
Power Factor	0.80	COSO
Rated Voltage	400 / 231	V
Phase	3	
Rated Frequency	50	Hz
Rated Current	1591	A
Rated R.P.M.	1500	
Maximum Altitude	500.0	m
Maximum Ambient		
Temperature	40	°C

The above information contained on the printed plate of the generating set clearly reveals that the same is of 1102 KVA/881 eKW capacity and of rated voltage 400/231 volts.

Thus in the presence of this concrete information the allegations of the department that Caterpillar does not manufacture 1102 capacity generators becomes baseless.

Moreover, in light of the information contained on the product plate wherein it is vividly embossed / printed that the Model CATOOC32JJAZ01655 has capacity of 1102KVA, the allegation of production of manipulated catalogue loses its weight as even if it is presumed for the sake of argument that the catalogue was manipulated (which is not the case here), the plate which was attached to the imported product confirms its capacity as 1102 KVA. The Show-Cause Notice requires to be vacated on this ground alone.

It is pertinent to mention here that the Directorate General of Intelligence & Investigation has erred in concluding that as the website of the manufacturer does not mention about generator of 1102 KVA thus the company does not manufacture a generator of this capacity. In this regard it submitted that DG 1&1 must visit the website of the manufacturer Caterpillar and click on the following link in order to arrive at correct conclusion:

http://www.cat.com/en_ZA/products/new/power-systems/electric-powergeneration/diesel-generator-sets/18332039.html

This catalogue available on the aforementioned link confirms that the company is manufacturing generators of capacity ranging from 1030KVA to 1250 KVA. In fact, the Generating Set of 1102 KVA comes within the range of generators being manufactured by the company. The relevant portion from the catalogue is reproduced below for ease of reference.

"OVERVIEW

Producing reliable power from 830 ekW to 1000 ekW at 60Hz, our C32 ACERT™ diesel generator sets are made to meet your mission critical, continuous, standby and prime applications. We've designed each to ISO 8528-5 transient response requirements and to accept 100 percent rated load in one step. Generator sets range from low fuel consumption systems to EPA Stationary Emergency (Tier 2) certification. Seismic certification is also available for select models, ensuring you maintain power after unexpected disturbances. Our integrated control system, including Cat™ UPS, ATS and switchgear, protects your power supply and keeps you connected through onsite and remote monitoring options. We offer easy-to-use EMCP control panel options, combining your management and diagnostic tools in one. The EMCP 4.4 controller provides multi-generator set paralleling capability, giving you the ability to add generator sets to match your growing power requirements. Browse a broad range of accessories and bolt-on system expansion attachments. Find flexible packaging to fit unique spatial requirements and environmental conditions. Even extend the safety of your operation with UL 2200 and CSA certified package options. Our C32 generator sets are made for demands, so you can make yours."

Thus in view of the above, it is clear that the main allegation of the department has lost its weight which renders the impugned Show-Cause Notice without any substance and liable to be withdrawn.

iii. *The manufacturer's catalogue describes the product as model CAT C32 ATAAC Diesel Engine of Capacity 881 eKW 1102 KVA having standby rating 1102 KVA. Since the output of the impugned generators exceeds 1100 KVA, the classification was correctly claimed under heading 8502.1390 @ 0% Customs duty.*

Allegation No.3:

That the DG I&I has claimed short recovery of Rs 5,595,028/- but the fact remains that the respondents have already paid Rs 771,543/-. Thus the balance is Rs4,823A85/-.

Allegation No.4:

Violation of Section-32(1)(2), 32A, 79, 80 of the Customs Act, 1969. That the respondents has made correct declaration of goods, GenSet Model CAT C-32, rated power capacity 1102 KVA and PCT heading 8502.1390. The goods were examined and found as per declaration and cleared u/s 83 of the Customs Act, 1969. Therefore, the provisions of Section-32(1),(2), 32A, 79 and 80 are inapplicable in this case.

Prayer:

It is respectfully prayed that this forum raw like to declare that:

*GenSet Model CAT-C-32 ATAAC has standby capacity of 1102 KVA; and
The same is correctly assessable under PCT heading 8502.1390.*

Thanking you,

-SD/-

ORDER-IN-ORIGINAL NO. OF 2015-2016
M/s. DG Khan Cement Company (NTN-1213275), Lahore
Adj-II/Coll/SCN-162/DIT-Khi/Cont Report/Appg-II/645-B/DG Khan Cement/2015

M/s. Masood Aziz & Associates

10. I have examined the case record and considered written / verbal arguments of the advocate for the respondent and representative of the department. The case of the department is that the respondent has imported a Diesel Generator Set of 1100 KVA and mis-declared it to be of 1102 KVA to avail the benefit of Customs Duty and Sales Tax under the SRO 727(I)/2011. The Goods Declaration bearing GD No. KAPE-HC-109099 dated 02.06.2014 was released on the basis of catalogue produced by the importer showing model of the generator CAT C32 Caterpillar having standby power 1102 KVA. It has also been alleged that the manufacturing company caterpillar does not make generators of capacity more than 1100 KVA.

11. The respondent on the other hand has stated that the generator was released by the customs after examination and the manufacturing company i.e., Caterpillar manufactures generators of more than 1100 KVA capacity which fact can be confirmed from their official website. Moreover, the plate fixed on the generator also reveals the Rated Power of the generator to be 1102 KVA. Without going into the detail the whether ^{or not} Caterpillar manufactures generators of capacity of 1100 KVA or more ~~or not~~ the contention issue is that whether the imported generator is of 1100 KVA or not. If its actual power is 1102 KVA then the claim of the respondent will be Constructive valid and otherwise the case of the department will stand established.

12. The Pakistan Customs Tariff Code 8502.1390 allows concession of duties and taxes on a generating set of an output exceeding 1100 KVA. Now the question is what output is to be considered for the calculation of KVA. In the instant case the Rated Power mentioned is standby power which is meant to supply emergency power for a limited duration without overload capacity power or the prime power at which the generator will operate for maximum length. This prime power is normally taken at 80% average load factor of the standby power. In this case of imported generator the average output power of the standby generator is shown (70% of the Standby Power) in the light of the criterion laid down in the given catalogue. ^{of the imported generator} Therefore, the said generator was to be classified under PCT Heading 8502.1310 instead of 8502.1390 ^{being of 771 KVA output power and of 1102 KVA standby power.}

13- The other point raised by respondent has also been examined. The allied laws empower customs under Section 6 of Sales Tax Act, 1990 and Section 148 of Income Tax Ordinance, 2001 to assess and collect these Taxes as collection of custom duties. The judgment of superior Court provided by seizing agency support this contention.

13. Accordingly based on the foregoing deliberations, the stance of the respondent is not tenable and not maintainable in the light of evidence and material available on record. In view of the above, it is concluded

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that the charges as mentioned in the Show Cause Notice stand established against the respondents. I hereby order as under:

- a) The evaded amount of duty and taxes to the tune of **Rs. 5,595,028/- (Customs Duty amounting to Rs. 2,313,429/-, Sales Tax amounting to Rs. 3,015,169/- and Income Tax amounting to Rs. Rs.266,430/-)** is adjudged against the respondents for violation of the provisions of Sections 32(1) & 32(2) read with Sections 79 and 80 of the Customs Act, 1969, Sections 3, 4, 6, 33 and 34 of Sales Tax Act, 1990, further read with Sections 148 of the Income Tax Ordinance, 2001. M/s D.G. Khan Cement, Lahore are directed to deposit the aforesaid amount in the Government Treasury failing which action may be initiated against the respondents under Section 202 of the Customs Act, 1969 read with Chapter XI (Recovery Rules) of the Customs Rules, 2001 notified vide SRO NO.450(I)2001 dated 18.06.2001.
- b) A penalty of Rs.500,000/- (Rupees five hundred thousand) is also imposed upon M/s D.G. Khan Cement, Lahore in terms of clause (14) of Section 156(1) of the Customs Act, 1969.
- 14 This order consists of () pages and each page bears my initial as well as official seal with full signature on the last page.

(Ch. Muhammad Javaid)

To,

M/s. DG Khan Cement Company (NTN-1213275),
53-A, Lawrence Road,
Lahore

Copy for information to:

1. The Director, Directorate General of Intelligence and Investigation-FBR (Customs Enforcement), Regional Office, 81-C, Block- 6, P.E.C.H.S., Karachi
2. The Collector of Customs, Model Customs Collectorate of Appraisalment (East), Mezzanine Floor, Customs House, Karachi
3. M/s. Masood Aziz and Associates, First Floor, State Life Building No. 3, Dr. Ziauddin Ahmed Road, Near Sheraton Hotel Karachi.
4. Notice Board
5. Guard Copy.

(Ch. Muhammad Javaid)

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The official website of Caterpillar shows rated voltage of 1100 KVA generator as 400 volts at 1500 RPM the standby generator was cleared as output capacity on 1102 under incorrect PCT 8502.1398. The impugned generator were to classify under PCT 8502.1318 attracting customs duty 15% instead of the 0%. Caterpillar catalogue shows that no generator of 1102 KVA are manufactured. The standby generator works at under rated power which averages around 771 KVA. The other point raised by respondent has also been examined. The allied laws empower customs under Section 6 of Sales Tax Act, 1990 and Section 148 of Income Tax Ordinance, 2001 to assess and collect these Taxes as collection of custom duties. The judgment of superior Court provided by seizing agency support this contention.

06. Accordingly based on the foregoing deliberations, the stance of the respondent is not tenable and not maintainable in the light of evidence and material available on record. In view of the above, it is concluded that the charges as mentioned in the Show Cause Notice stand established against the respondents. I hereby order as under:

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