

PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

WP No. 3433-P/2024 with IR

M/s Imtiaz Textile Bara,
District Khyber and others

.....Petitioners.

V/s

The Federation of Pakistan
Through Federal Secretary,
Finance and Revenue Division,
Islamabad and others.

.....Respondents.

For the Petitioners:

Mr. Shumail Ahmad Butt,
Advocate.

For Respondents:

M/s Rahat Ali Khan Nahaqi,
Assistant Attorney General,
Rehmanullah Advocate along
with Sharifullah Assistant
Director (Legal).

Date of hearing:

11.07.2024

JUDGMENT

SYED ARSHAD ALI, J.- This consolidated judgment shall dispose of instant petition as well as connected petitions¹ having commonality of facts and interpretation of law is involved therein.

¹ WP No. 3433-P/2024 "M/s Imtiaz Textile Bara and others vs. The Federation of Pakistan and others".
WP No. 3393-P/2024 "M/s Iqbal Brothers Steel Furnace vs. Federal Board of Revenue and others".
WP No. 3394-P/2024 "M/s Apha Textile and Blanket Industry vs. Federal Board of Revenue and others".
WP No. 3431-P/2024 "M/s Shah Steel Works vs. Federal Board of Revenue and others".
WP No. 3445-P/2024 "M/s Abid Steel vs. Federal Board of Revenue and others".
WP No. 3464-P/2024 "M/s Hi-Tech Electronics (Pvt) Ltd vs. The Government of Pakistan and others".
WP No. 3469-P/2024 "M/s Maidan Ghee & Oil Mills (Pvt) Ltd and others vs. Federation of Pakistan and others".
WP No. 3470-P/2024 "M/s Etifaq Enterprises and others vs. Federation of Pakistan and others".
WP No. 3475-P/2024 "M/s SH Foods (Pvt) Ltd and others vs. The Federation of Pakistan and others".

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2. The petitioners in all the connected cases are either individual or private limited companies, who have established their manufacturing units at the erstwhile Federally Administered Tribal Area/Provincially Administered Tribal Area (“FATA/PATA”). It has been settled proposition that prior to 25th amendment in the Constitution of Islamic Republic of Pakistan, 1973 (“**Constitution**”) vide Act No. XXXVII of 2018 dated 05.06.2018 all the petitioners including other persons, whose business activities were limited to the erstwhile tribal area, were enjoying immunity from payment of sales tax as well as income tax.²

3. After 25th amendment in the Constitution, the said exemption were made available to the petitioners and similarly placed other persons in terms of two SROs i.e. SRO 1212(1)/2028 dated 05th October, 2018 which was issued under the enabling provision of the Sales Tax Act, 1990 (“**Act, 1990**”) and SRO 1213(1)/2018 of the same date issued under the enabling provision of Income Tax Ordinance, 2001 (“**Ordinance, 2001**”).

4. The exemption from sales tax through SRO 1212 (1)/2018 dated 5th October, 2018 was later translated by making insertion in 6th Schedule of Act, 1990 in the following manner:-

151. (a) Suppliers; and

*(b) imports of plant, machinery, equipment for installation in tribal areas and of industrial inputs by the industries located in the tribal areas, as defined in the Constitution of Islamic Republic of Pakistan, -
as made till 30th June, 2023, to which the provisions of the Act or the notifications issued thereunder, would have no applied had Article 247 of the Constitution not been omitted under*

² Messrs Taj Packages Company (Pvt) Ltd through Manager vs. The Government of Pakistan through Federal Secretary Finance and Revenue Division and 6 other (2016 PTD 203); Pakistan through Chairman, FBR and others Vs. Hazrat Hussain (2018 SCMR 939).

the Constitution (Twenty-fifty Amendment) Act, 2018 (XXXVII of 2018):

Provided that, in case of imports, the same shall be allowed clearance by the Customs authorities on presentation of a post-dated cheque for the amount of sales tax payable under the Sales Tax Act, 1990, and the same shall be returned to the importer after presentation of a consumption or installation certificate, as the case may be, in respect of goods imported as issued by the Commissioner Inland Revenue having jurisdiction:

Provided further that if plant, machinery and equipment, on which exemption is availed under this serial number, is transferred or supplied outside the tribal areas, the tax exempted shall be paid at applicable rate on residual value.

152. Supplies of electricity, as made from the date of assent to the Constitution (Twenty-fifth Amendment) Act, 2018, till 30th June, 2023, to all residential and commercial consumers in tribal areas, and to such industries in the tribal areas which were set and started their industrial production before 31st May, 2018, but excluding steel and ghee or cooking oil industries.

5. The exemption allowed through entry No. 151 *ibid* was available to the petitioners till 30th June, 2023 as their industrial input and supplies etc were exempt from levy of sales tax till 30th June, 2023, however, as provided under the proviso to entry No. 151 a security instrument in form of post-dated cheque was to be presented to the respondents as a security that the petitioners would ensure that the goods are consumed in the erstwhile tribal area and in case the said goods were transferred or supplied outside the tribal area in any form, the same would be subject to the impost of sales tax.

6. The said exemption was to expire on 30th June, 2023, however, through Finance Act, 2024 it was further extended to 30th June, 2024 on the same terms as provided under entry No. 151 *ibid*. Through Finance Act, 2024 the following amendments were made in Entry No. 151:

In the first proviso,-

- (i) for the words "post-dated cheque", the words "pay order" shall be substituted; and*

(ii) after the word "presentation", occurring for the second time, the expression, "within six months", shall be inserted.

7. The effect after the amendment in entry No. 151 *ibid*, the same would, thus, reads as following:-

"Provided that, in case of imports, the same shall be allowed clearance by the Customs authorities on presentation of a pay order for the amount of sales tax payable under the Sales Tax Act, 1990, and the same shall be returned to the Importer after presentation within six months of a consumption or installation certificate, as the case may be, in respect of goods imported as issued by the Commissioner Inland Revenue having jurisdiction".

8. The dispute between the parties for adjudication of this Court is *whether the goods which were already imported by the petitioners, the consignment whereof was manifested/the said goods reached territorial water of Pakistan would be subject to the new mechanism as introduced through Finance Act, 2024 i.e. the petitioners would be required to provide pay order instead of post-dated cheque for release of the said goods or the said goods would be released on payment of post-dated cheque?*

9. The learned counsels for the petitioners have argued that in number of cases not only the goods have reached the territorial water of Pakistan but are presently parked at Dry Port, Azakhel, Nowshera and due to the bottleneck created by the respondents, the petitioners could not release the said goods and one of the said reason is that the annual quota which were allocated to the petitioners was not punched in the WeBOC system, therefore, there has been delay in releasing of the said goods, however, the main contention of the learned counsels for the petitioners is that since the legislation has no retrospective effect, therefore, in view of the law laid down by

the Apex Court in *Al-Samrez Enterprise's case*³, this amendment is not applicable retrospectively. Further reliance was placed by the learned counsels for the petitioners on the unreported judgment of the worthy Sindh High Court in the case of *Gas & Oil Ltd, Pakistan vs. Collector, Model Customs Collectorate of Preventive & others* (C.P No. D-1650 of 2020 decided on 29.10.2020) and the judgment of this Court passed in the case of *M/s Gadoon Textile Mills and 02 others vs. Federation of Pakistan and 02 others* (WP No. 6127-P/2019 decided on 07.09.2023).

10. The worthy Deputy Attorney General as well as the learned counsel representing the Revenue have argued that the Finance Act, 2024 has to be interpreted in the manner as provided under section 30⁴ of the Customs Act, 1969, which

³ *Al-Samrez Enterprise vs. The Federation of Pakistan* (1986 SCMR 1917)

⁴ **30. Date of determination of rate of import duty.**—The rate of duty applicable to any imported goods shall be the rate of duty in force;

(a) in the case of goods cleared for home consumption under section 79, on the date on which a goods declaration is manifested under that section; and

(b) in the case of goods cleared from a warehouse under section 104, on the date on which a goods declaration for clearance of such goods is manifested under that section:

Provided that, where a goods declaration has been manifested in advance of the arrival of the conveyance by which the goods have been imported, the relevant date for the purposes of this section shall be the date on which the goods declaration is manifested under section 79 or section 104, as the case may be, except for those goods declaration in respect of which the rate of duty change after the submission of the goods declaration and before the berthing or cross-over event of the vessel or the vehicle respectively, as the case may be, the relevant date in which case, for the purposes of this section, shall be the date on which the vessel has berthed or the vehicle has crossed-over the border, as the case may be.

Provided further that, in respect of goods for the clearance of which a goods declaration for clearance has been manifested under section 104, and the duty is not paid within seven days of the goods declaration being manifested, the rate of duty applicable shall be the rate of duty on the date on which the duty is actually paid:

Provided further that in case of the goods illegally removed from the warehouse, the rate of duty shall be the rate prevalent either on the date of in-bonding or detection of case or date of payment of the duty and taxes, whichever is higher:

clearly envisages that the rate of duty applicable to any imported goods shall be the rate of duty in force on which the goods declaration is manifested. Therefore, in all these cases since no goods declaration has been filed by the petitioners so far, therefore, the new dispensation as provided under the Finance Act, 2024 would stand applicable from the date when the goods declaration is manifested. Thus, all the petitioners are required to clear the goods against the pay order equal to the amount of tax otherwise they would not be entitled to the exemption as provided under entry No. 151 *ibid*.

11. Arguments heard and record perused.

12. Here in these cases we are dealing with interpretation of a taxing statute. In any taxing statute, there are three stages; firstly, the imposition or creation of the very tax or levy known as the 'charge'. The provision which deal with the latter are called the charging section. Secondly, the quantification of the tax or levy which is called 'assessment' and thirdly, the recovery of the levy or tax is called collection. The latter two are the machinery provisions, which are contained in the machinery sections of statute.⁵ Through the Act of 1990 the tax is charged and levied under sections 3 & 5 whereas section 11 provides for assessment of the sales tax and the recovery /collection of tax is provided under chapter-IX and other enabling provisions of the Act, 1990. Section 13

Provided further that in case of exercising option for redemption of fine in lieu of confiscation of the goods seized during anti-smuggling operations, the rate of duty shall be the rate prevalent either on the date of seizure or date of payment of duty and taxes, whichever is higher:

Provided further that the Board, with approval of the Federal Minister-in-charge may, by notification in the official Gazette, for any goods or class of goods, specify any other date for the determination of rate of duty.

Explanation:- For the purpose of this section "manifested" means that when a machine number is allocated to goods declaration and is registered in Customs record.

⁵ M.Y. Electronic Industries (Pvt) Ltd. Vs. Government of Pakistan (1998 SCMR 1404)

of the Act, 1990 deals with exemption of the person or class of person from exemption of the sales tax. The goods which are exempt from levy of sales tax and its condition, if any, inter alia, are provided in 6th Schedule to the Act, 1990. The Finance Act, 2024 neither does effect the charging section nor the machinery section of the Act, 1990, however, has only substantially changed the condition of the exemption prior to the Finance Act, 2024. One of the condition in order to avail the said exemption that against the imported goods the petitioners were required to provide the post-dated cheque as a security instrument which was substituted by the pay order. This substitution is indeed a temporary financial burden upon the petitioners, therefore, has materially prejudiced them. Thus, we have to see whether the financial burden in form of requirement of presentation of pay order instead of post-dated cheque introduced through Finance Act, 2024 has any retrospective effect.

13. At common law, there is a presumption that a statute does not have retrospective effect. The statement in Maxwell on the Interpretation of Statues, 12th Edition (1969), page 215 is frequently quoted:

“Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statues a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statues were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.”

14. Lord Woolf, LCJ while speaking for the Court in the case of *Wainwright*⁶ at para-27 has stated, “the general presumption that legislation should not be treated as changing

the substantive law in relation to events taking place prior to legislation coming into force." The principle was very elaborately explained in the case of *Gustavson Drilling (1964) Ltd*⁷ by the Supreme Court of Canada wherein at page 279 to 280 Dickson Judge observed that "the general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances, the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view is to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as the appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment statute".

15. In our jurisdiction, the Apex Court of Pakistan in the case of *Aziz-ud-Din Industries Ltd*⁸ has affirmed the said principles in our jurisprudence wherein; it was held that:

⁶ *Wainwright v. Home Office*[2002] QB 1334, 1345F

⁷ *Gustavson Drilling (1964) Ltd v. Minister of National Revenue* [1977] 1 SCR 271

⁸ *Collector of Central Excise and Land Customs and 3 others vs. Azizuddin Industries Ltd, Chittagong* (PLD 1970 Supreme Court 439)

"It is well-settled that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such construction."

16. In the case of *Al-Samrez Enterprise (supra)*, the Apex Court while dealing with the matter where exemption was granted by the Government through notification issued under section 19 of Customs Act, 1969 and when the said exemptions were withdrawn after the opening of letter of credit by a party in favour of foreign supplier, the Apex Court has held that:

"the opening of letter of credit by a party in favour of foreign supplier had created vested right in favour of the party which could not be taken away or destroyed by the withdrawal of exemption on the date subsequent to the opening of letter of credit."

In the case of *Zila Council Jehlum*⁹, it was held by the Apex Court, although the Legislature can legislate prospectively and retrospectively, such power is subject to certain constitutional and judicially recognised restrictions. According to the canons of construction, every statute including amendatory statutes is prima facie prospective, based on the principle of *nova constitutio futuris formam imponere debet, non praeteritis* (which means 'a new law ought to regulate what is to follow, not the past' as per Osborn: Concise Law Dictionary); unless it is given retrospective effect either expressly or by necessary implication. In other words, a statute is not to be applied retrospectively in the absence of express enactment or necessary intendment, especially where the statute is to affect vested rights, past and closed transactions or facts or events that have already occurred. This principle (s) is attracted to fiscal statutes which have to be construed strictly, for they tend to impose liability and are therefore burdensome (as

opposed to beneficial legislation). Furthermore, it is not only the wording/text of the statute which is to be considered in isolation; we are not to examine simpliciter whether such law has a retrospective effect or not, rather it has to be examined holistically by considering several factors such as, the dominant intention of the legislature which is to be gathered from the language used, the object indicated or the mischief meant to be cured, the nature of rights affected, and the circumstances under which the statute is passed. The law laid down in *Zila Council's case* ibid was reaffirmed by the Apex Court in the case of *Qaisar Abbas and others*¹⁰, further elucidating the matter that retrospectivity can only be attributed to a statute where it is made explicit or can be inferred by necessary implications; it cannot be presumed.

17. The close perusal of the Finance Act, 2024 does not give any impression that it applies to any transaction which has taken place prior to 1st July, 2024 nevertheless judgment of the Apex Court in the *Al-Samrez Enterprise's case (supra)*, in our humble view, is attracted to the present cases wherein it was held that *"we are therefore, clearly of the opinion that if a binding contract was concluded between the appellants and the foreign exporter or steps were taken by the appellants created a vested right to the then existing notification granting exemption, the same could not be taken away and destroyed in modification of the earlier one, on the ground that under section 21 of the General Clauses Act, the government could exercise the power of modification"*.

18. Moving on to the assertion of the learned counsel for the respondent/Revenue regarding the application of section

⁹ *Zila Council Jehlum through District Coordination Officer Vs Messrs Pakistan tobacco Company Ltd and others (PLD 2016 SC 398)*,

¹⁰ *Member (Taxes) Board of Revenue Punjab, Lahore and others Vs Qaisar Abbas and others (2019 SCMR 446)*

30 of the Customs Act, 1969 to the present cases which, inter alia, envisages for determination of the rate of duty on the day when the goods declaration is manifested. This assertion of the revenue, in our humble view, is out of context because the present cases do not deal with any change in the rate of duty. The rate of duty is always provided in the charging section and the impugned amendment has neither affected any charging or even machinery provision of the Act, 1990, therefore, section 30 of the Customs Act, 1969 even otherwise has no application to the present cases.

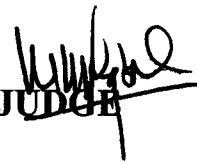
19. We are mindful of our jurisdictional contour that the factual position as to whether the goods of any of the petitioners has been manifested or otherwise or the goods have reached the territorial water of Pakistan before 1st July, 2024 cannot be determined by this Court and thus, the matter is left to the respective Collectorate of the respondents to determine it. We in the present cases are only dealing with the question of law, stated above.

20. In view of the above, we hold and declare that the amendment made in entry No. 151, stated above, through Finance Act, 2024 would not be applicable to those imports of the petitioners whereby they have imported their input/goods, machinery, raw material and the same had reached the territorial water of Pakistan/the goods were manifested prior to 1st July, 2024.

21. All the writ petitions are allowed accordingly.


JUDGE

Date of hearing & announcement
Of judgment.....11.07.2024


JUDGE

Date of preparation & signing
Of judgment.....12.07.2024

Nawab Shah CS (DB) Justice Syed Arshad Ali & Justice Dr. Khurshid Iqbal