Customs, Sales Tax and CED (Federal Excise Duty) Decisions.

LIST OF CASES DECIDED BY THE SUPREME COURT OF PAKSITAN
Year 2006.

1. Where the appeals have been decided in favour of the FBR/Department, Collectors may see the matters for recovery/implementation.
2. ***Where matters are remanded to the High Court, Tribunal or the Collector, such matters may be taken up by the Collectors for early disposal. In some of the judgments, Hon. Supreme Court has prescribed time for disposal of the remand matter. The same may please be pursued properly.***
3. Where cases have been disposed of through short orders, copy of concise statement of facts and high court's order have been attached for the reference and back ground of the issue(s) involved and circulated.
4. There could be Judgments related to a particular provision of law or notification, the same can be applied in the other cases where identical facts exist.

Disclaimer:

Draft notes are only for the guidance. The reading of the Judgment (s) in requested to have full comprehension of the issue.

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S. NO/ Page No.	CASE NO.	NO. OF APPEALS	TITLE OF THE CASE	ISSUE INVOLVED	DECISION
1. 1-84	CA2296/01 and 366 others	367	Fed. of Pakistan thr. Secy. M/o Finance and others vs. Haji Mahmood Sadiq and others	Whether CED on excisable services can be levied in relation to the loans outstanding at the end of each month at the rate of $1/12^{th}$ of 1% such outstanding loans?	The SCP has upheld the levy during the relevant period. The judgment has impact of over 9 billion rupees. Recovery of the balance amount has been estimated at Rs.0.5 billion. Excerpts from the judgment are as under: "In addition to it while construing a taxing measure for determining its constitutional validity at the touch stone of reasonableness cannot be entertained as per settled judicial norms. The only consideration is whether the legislation under challenge is permissible by the Constitution. The reasonableness or otherwise of such state is a matter

					of legislative policy and it is not for the courts for adjudication. (Interpretation of statute by N.S.Bindra Seventh Edition Pg 771 relied upon by this Court in the case of Anoud Power Generation Ltd. V/s Federation of Pakistan (PLD 2001 SC 340)……. The consensus of opinion as per these observations leaves no room to form contrary view, therefore, excise duty on excisable services is required to be indirect tax, recoverable from a person to whom excisable service has been provided or rendered, therefore, the CBR rightly considered the excise levy on excisable service to be indirect tax and vide circular dated Islamabad, the 26th Sept, 2006 issued clarification to the effect that all Banks, Financial Institutions, Insurance Companies, Cooperative Financial Societies, other Lending Banks or Institutions and other persons dealing in advancing of loans were/are required to realize the excise duty at the aforesaid rate from the amount of advances outstanding against each borrower…… Meaning thereby that during the month's period whatever services had been provided or rendered the excise duty will be levied upon the same on the last day of month keeping in view the amount of advances against the petitioner. It may be noted that unless such a measure is not adopted the provision of section 3-C(1)(b) read with item 14.14 of the Act 1944 would be rendered unworkable….. Fully comprehending that the excise levy is an indirect tax, the legitimate burden of which has to be borne by a person to whom services have been provided or rendered by the Banks and Financial Institutions etc. at the rate mentioned in column No.III of item 14.14, therefore, objection raised in this behalf has no substance…… This Court faced identical situation while dealing with the presumptive tax u/s 80-CC and minimum tax u/s 80-D of the Income Tax Ordinance, 1979 in the case of Ellahi Cotton Mills

					Ltd, wherein it was observed: *"The rate of half percent of minimum tax adopted u/s 80-D / (80CC) seems to be on the basis of minimum rate of tax suggested by Export Enhancement Committee."* Therefore, we are of the opinion that the rate of excise levy, as it stood finally incorporated, is just and proper thus free from any arbitrariness. As far as the respondents are concerned in fact they are not being burdened by the excise levy at the rates whatever mentioned in Column-III because it being an indirect tax has to be passed on by the respondent companies to their clients. In this behalf circular dated 26th Sept 1991 which has already been discussed hereinabove, is a clear demonstration of the factum of passing on the tax to the borrowers etc.…… The Federation of Pakistan is not signatory to the loan agreement, therefore, it is not bound with the condition of the same……. Thus for the foregoing reasons appeals filed against the judgments of High Court of Sindh at Karachi dated 22.12.2000 and 23.10.2001 are accepted whereas the appeals filed against the judgment of the Lahore High Court, Lahore dated 4.4.2002 and 27.5.2004, are rejected with costs throughout…….
2. 86-93	CRP NO. 200 to 329/05	30	Pakistan State Oil Co. Vs. Collector of Custom	Leave to appeal was granted by the SCP to determine, inter-alia, as to whether the show cause notice is time barred having been issued beyond the period of three years (being the maximum period at the relevant time) prescribed under section 32(2) of the Customs Act, 1969.	"The examination of section 32 (1) and (2) of the Customs Act, 1969, read with the related provisions would show that a factual inquiry is essential to ascertain the nature of transaction and to determine the commencing date for the purpose of calculation of the period for giving show cause notice under the above section. It may be pointed out that a question of law does not require investigation of facts and thus a question involving factual inquiry into facts is not a question of law. In view thereof, the question whether show cause notice was given

					within time prescribed under the law or beyond the said period, would be considered a question of fact and not question of law to be raised and decided by the High Court in the proceedings under section 196 of the Custom Act, 1969."
3. 94 - 102	CA Nos. 519 to 527 of 2005	8	Collector of Customs, Rawalpindi Vs. Khuda-e-Noor etc.	In these cases the legality of the carrying foreign currency as personal baggage was considered in the context of the Protection of Economic Reforms Act, 1992 and the Foreign Exchange (Temporary Restrictions) Act, 1998 particularly focusing on the meaning of the word 'transfer' used in section 2(1)(b) of the Act, 1992.	" The word 'transfer' obviously would mean a 'legal transfer' and even if a person claims to be benefited of the Act, 1992 which was amended subsequently by means of Act, 1998, he has to show that he is legally authorized to transfer the money out side the country for any purpose including his business. According to section 2(a) of the Foreign Exchange Regulation Act, 1947, 'authorized dealer' means a person for the time authorized under section 3 to deal in foreign exchange. Therefore, it is concluded that in respect of a criminal case, falling under any provision of law, prevailing in the country, if a person claims that he has been authorized to take the currency out of Pakistan, he has to adopt the proper procedure i.e. through bank etc and no one can be allowed to shift currency except to the tune of 10,000 US$, as it has been presented by the State Bank of Pakistan that if it has been purchased from the authorized dealer." "… no doubt that under the Act, 1992, certain facilities have been given for the purpose of development and promotion of economic activities in the country but simultaneously, it is also be checked that foreign currency is not moved un-authorizedly otherwise it would promote the offence of money laundering, as well, and as a result whereof public exchequer would be effected badly and its ultimate result has to be borne by the common man."
4.	CP Nos. 828 to	03	Nishat Mills Ltd. Lahore Vs. The	Whether the doctrine of Promissory Estoppel was available	"Admittedly, when the petitioners had filed their bills of entry, the exemption on goods had

103-106	830/2005		Federation of Pakistan etc.	in the presence of section 31A of the Custom Act, 1969 when the Bill of Entry was filed after the withdrawal of exemption notification?	already been withdrawn by SRO 479(I)/2003. Therefore, the same was liable to customs duty and the sales tax by virtue of provisions of section 31-A of the Customs Act, 1969, which was introduced by the Finance Act of 1988, notwithstanding the opening of letters of credit or conclusion of a contract or agreement for sale of such goods."
5. 107-108	CA Nos. 265 to 272 of 2001	8	Collector of Customs, Lahore Vs. Shamsul Anwar Khan etc.	The respondents had imported dump trucks at Karachi and were later on transshipped to Faisalabad Dry port and reached there on 02.03.2000. At the time of importation at Karachi, exemption from custom duty was available in terms of SRO 898(I)/99 dated 04.08.99. However, the same was withdrawn vide notification SRO 116(I)/2000 dated 07.03.2000 whereas the Bills of Entry were filed on 09.03.2000. The respondents claimed exemption from CD in terms of rescinded notification on the grounds that the dump trucks imported in the same ship and cleared at Karachi before 07.03.2000 availed the concession and denial of the same at Faisalabad would amount to discrimination. The proposition of the respondents was accepted by the LHC. But the SCP has rejected their plea in the light of provisions contained in section 30, 31 and 31A of the Custom Act, 1969.	"As per record, respondents filed bill of entry on 09.03.2000 i.e. after the withdrawal of the above concession/exemption. In view of provisions as ordained in sections 30, 31 and 31-A of the ACT and the case law referred (supra), the date for determining rate and amount of duty applicable to any imported goods shall be the rate and amount chargeable on the date of the submission of the bill of entry to concerned authority."
6. 109-121	CA Nos. 2590 to 2608 of 2001	19	Collector of Customs, Karachi Vs. State Cement Corporation	Leave to appeal was granted By The SCP to determine, inter alia, that whether the declaration made by the respondent corporation	"The court examined an identical proposition in the case of Federation of Pakistan through Secretary Finance, Islamabed and 4 others Vs. Ibrahim Textile Mills Ltd. and others (1992

				before Customs (regarding claim of exemption from duty) was a misdeclaration in terms of Section 32 of the Custom Act, 1969?	SCMR 1898) and held that error in making calculation would make a case falling within the mischief of Section 32(3) of the Custom Act, 1969, and therefore, on the basis of such observation, we are inclined to holds that since, in the instant cases as well, the case of the respondents was not covered under section 32(1) and 32(2) of the customs Act, 1969, as per contents of the show cause notice itself, rather it was the case where the question involved with regard to making payment of deficient customs duty under SRO referred to hereinabove, therefore, the respondents, at best, could have been called upon to make difference of payment of customs duty within the prescribed time and no penal action, as it was pointed out in the show cause notice, was called for.”

7. 122-143	CA Nos. 778-779 of 2000 & 937/2004	1	Assistant Collector of Customs etc. Vs. MKB Industries (Pvt) Ltd.	Leave to appeal was granted to consider whether rescission of SRO No. 569(I)/95 dated 26.06.1995 vide notification dated 13.06.996 would be operative from the date of the latter notification and the goods arrived thereafter would not be liable to the benefit of the rescinded notification notwithstanding the opening of the LCs before rescission and what would be the effect of the provisions of section 31A of the Custom Act and section 6 of the Sales Tax Act, 1990 on the afore said notifications.	Leave to appeal was granted to see whether rescission of SRO No. 569(I)/95 dated 26.06.1995 vide notification dated 13.06.1996 would be operative from the date of the latter notification and the goods arrived thereafter would not be liable to the benefit of rescinded notification notwithstanding the opening of the LCs before rescission and what would be the effect of section 31A of the Custom Act, 1969 and section 6 of the Sales Tax act, 1990 on the aforesaid notification. It was held that "on the basis of material available on record it can be safely concluded that the bill of entry was placed for the purpose of calculation on 20th June 1996 after seven days from the date of rescission of notification. There is no convincing evidence available on record to conclude that the transaction had already been concluded. Therefore, following the principles discussed in the case of Anoud Power Generation Ltd. and others V. federation of Pakistan and others (PLD 2001 SC340) we are of the opinion that under these circumstances the respondent(s) were not entitled for exemption of whole of the Sales Tax.
8. 149-151	CP No. 702-L of 2003	1	Collector of Sales Tax & CE Lahore Vs. Zimindara Paper and Board Mills	Whether the Show Cause Notice can be scrapped only for the reason that the relevant sub-rule was not mentioned therein, whereas the contents of the SCN clearly indicated that substantial compliance had been made as far specific allegation of mala fides is concerned?	"We have heard learned counsels for the both sides and have gone through the contents of the show cause notice carefully. In our considered opinion the substantial compliance has been made by making reference of the rules to identify the period of time during which tax has been allegedly evaded. Therefore, merely for the reason that sub-rules 2 & 3 of Rule 10 of the Central Excises Rules, 1944 have not been mentioned, it would not have been proper to declare the notice illegal. In view of the matter, the judgment of the High Court is not

					sustainable. It is to be noted that instead of taking into consideration technicalities, the Court looks into the matter with different angles namely as to whether substantial compliance has been made or if any of the sub rule has been omitted then what prejudice is likely to cause to the party to whom show cause notice is given".
9. 152-158	CA Nos 813/2002 to 821/2002 and 932-933/2002	11	Collector of Customs, CE & ST Vs. Mahboob Industries (Pvt). Ltd. etc.	The respondents are manufacturers of ghee. They purchase plastic film and is used to manufacture plastic pouches for filling of ghee. The case of the department was that the plastic bags/pouches were liable to CED, and at the same time being distinct product from the plastic film, was liable to sales tax as well.	Manufacture of plastic pouches from plastic film for packing of ghee is covered in the definition of manufacture given in the Central Excises Act, 1944, and constitutes 'supply' in terms of the Sales Tax Act, 1990. Being a distinct item, they are liable to CED as well as sales tax.
10. 159-162	CA Nos. 353 to 378 of 2004	26	Federation of Pakistan and others Vs. Gulistan Fibres Ltd.	Whether Board's clarification to the effect that consumable/ maintenance spares are not entitled to the exemption under SRO 554 (I)/1998 despite the fact that no such distinction was made while mentioning the word 'spares' therein?	Consumable/maintenance spares are fully covered in the notification SRO 554 (I)/1998 and the CBRs instructions/clarification dated 08.05.01 is not in accordance with the provisions of law.
11. 163-165	CA No. 3259 & 3260 of 2003 and 3345/2003	3	Collector of Custom, Rawalpindi Vs. Moon Enterprises Islamabad.	Whether Collector is competent to file appeals against the order passed by the CBR?	"Learned High Court, inter alia, concluded that against order of Central Board of Revenue, Islamabad dated 6.5.2000, appeals filed before the Customs, Excise and Sales Tax Appellate Tribunal, Lahore, were not competent. The conclusion drawn is not correct as this Court in a number of cases had held that the Collector is empowered to file an appeal. Ready reference may be made to the case of The state through Collector Customs and Excise, Quetta V. Azam Malik and others (PLD 2005 SC 686)…."

12. 166-171	CA 1429 of 2001	1	Central Board of Revenue and others V. The Institute of Chartered Accountants of Pakistan	The respondents had assailed the demand notices on the plea of 'discrimination' alleging that the department is making recovery of CED from them whereas the lawyers and doctors have been exempted and no recovery is being effected from them.	The SCP for the reason that the respondents were reasonable classification from the lawyers and doctors. Rejected the case of discrimination. CED is collectable for the period.
13. 172-175	CP. No. 1592 of 2004	1	Collector of Sales Tax Vs. Magna Textile Industries	The vires of the search undertaken by the department without following the mandatory provisions of CrPC were examined in these cases.	In view of the judgment of the Apex court in Collector of Sales Tax & Central Excise (Enforcement) V. M/s Mega Tech (Pvt) Ltd (2005 SCMR 1166), the appeal filed was rejected for the reason that the mandatory procedure for conducting search prescribed in the Criminal Procedure Order was not followed. The case can be distingarished on the basis of the facts
14. 176-188	CA No. 629/2002 and others	43	Collector of Sales Tax Vs. Phalia Sugar Mills Ltd.	Whether the 'distributors' being liable to be registered under the Sales Tax Act, 1990 but actually not registered with the department, were liable to pay Further Tax under section 3(1A) of the Sales Tax Act, 1990?	In these cases the issues of vires of further tax was in dispute. It has been held that liability of the respondents to pay further tax on the supplies made to unregistered persons involved factual inquiry regarding the liability of the latter regarding registration. Moreover, issue of refund also involved factual controversies. Therefore, the High Court could not have decided these issue in writ jurisdiction without scrutiny of record. **The case was remanded to the department.**
15. 189-193	CA No. 746 of 2002	1	Collector of Customs/Sales Tax Vs. M/s Northern Bottling (Pvt) Ltd.	Whether the refund of excess paid Sales Tax and CED could be refused to the respondents when the department could not produce any evidence to substantiate its view that the incidence of excess paid duty/tax had been passed on?	The SCP endorsed and upheld the finding of the High Court that "the department had no proof or evidence on record to indicate that the incidence of duty/tax was passed on to the consumer by the respondent and the appellants have not denied having received the excess duty/tax from the respondent, therefore, the impugned order of the tribunal does not suffer with any illegality or material irregularity warranting interference by this court."
16.	CP No. 664	1	Collector of	A quantity of 4.5 tons of tobacco	It was held that the material available on record

194-196	of 2004		Customs, CE & ST (Adj) Vs. Pakistan Tobacco Company	was claimed to have been wasted during the test run of machinery during the period fro which the closure notice had already been given to the department. Failure of the respondents to logically prove their view resulted in passing of an O-in-O against the respondents.	proves that it was not a case of inadvertence, error or mis-construction as the respondents failed to logically account for the usage of a significant quantity of tobacco.

17. 197-238	CP. No. 1674-l & 1675-L of 2004	2	Collector of Sales Tax vs. M/s Food Consultants (Pvt) Ltd. & M/s Diplex Beauty Parlor Clinic etc.	The vires of the search undertaken by the department without following the mandatory provisions of CrPC were examined in these cases.	In view of the judgment of the Apex court in Collector of Sales Tax & Central Excise (Enforcement) V. M/s Mega Tech (Pvt) Ltd (2005 SCMR 1166), the appeal filed was rejected for the reason that the mandatory procedure for conducting search prescribed in the Criminal Procedure Order was not followed.
18. 240-247	CA No. 863 of 2000	1	GOP thr. Addl Sec. Finanace Vs. Sandoz (Pakistan) Limited	Whether 'Leucopher' (*leeko)* is liable to CED being a 'dye', or is exempt there from being an 'optical brightener'?	The controversy whether the product 'Leucopher' manufactured by the respondent was an optical 'Brightener' or 'Dye' was decided in favour of the respondent holding that it was not a "Dye" and thus did not attract CED.
19. 248-251	CA No. 2721 of 2001	1	Dhan Fibres Ltd. Vs. The Central Board of Revenue, Islamabad.	The following question was answered: 1. Whether under Rule 5(4) of the Filing of Monthly Return Rules, 1996 vide notification No. SRO 551 (I)/96 dated 01.07.96 are ultra vires of section 6 of the Sales Tax Act, 1990? 2. Whether payment of tax made in deviation to the rules of 1996 could attract the liability particularly additional tax under section 34 of the Sales Tax Act, 1990?	"In our considered opinion, in the instant case there was no impediment or hurdle for appellant to ensure deposit of sales tax by submitting the tax return before 20th of the month instead of filing the same on the last cutout date, thereby depriving the public exchequer from the tax, which was due on the said date because actually the tax would be deemed to have been received when the bank instrument was cleared. Section 2(26) of the Act, 1990 clearly mandates that the tax shall be paid by the registered person at the time of filing of the return in respect of the period. making payment means that bank instrument should be cleared by the bank before 20th of the month, otherwise, it would be deemed that the tax was paid subsequently. The word 'paid' used in the section , as per its dictionary meaning represents that the money has been given. 8. Thus, we are of the opinion that so far as the rule 5(4) of the Rules, 1996 is concerned, it is not ultra vires to section 6 of the Act, 1990

					and under these circumstances, the department had rightly imposed additional tax upon the appellant in terms of section 34 of the Act, 1990."
20. 252-259	CA Nos. 1141 & 1142 0f 2003	2	Collector of ST& FE, Lahore Vs. Mitchells Fruit Farm (Pvt) Ltd.	Whether squashes/ juices manufactured by the respondents were a 'beverage' or' 'fruit juices' for the purpose of levy of CED?	Distinction between "Beverage" and "Fruit Juice' has been drawn in these cases.
21. 260-261	CA Nos. 822 to 825 of 2003	2	Collector of ST & CE Vs. Ashraf Sugar Mills and others.	Whether the term 'crushing season' would mean the number of days of actual crushing or otherwise the number of days a mills remains in operation? and,	Three issues were involved in these cases: (1). The issue regarding the definition of Crushing Season was decided in favour of the department.
22. 262-272	CP Nos. 1428 & 1281 of 2003	2	Collector of Customs, CE & ST Vs. M/s Indus Plastic Industries	Whether the rights created under a time bound notification could be withdrawn midway when the taxpayer has already acted on the basis of the representation made therein?	"… by now it is well settled that a time bound notification creates a right and unless the same is rescinded for very strong reasons, it would hold field till the time it was to remain in force".
23. 273-275	CPLA No. 1082-L of 2002	1	M/s Fazal Cloth Mills Ltd. Vs. Dy Collector of Customs Multan	Whether the clarification issued by the Board regarding the availability of exemption of sales tax on supply of bailing hoops was sustainable in the eyes of law when there was no such specific exemption available under the law?	" As far as the authority of the CBR of issuing the circular for the purpose of explaining certain provisions of law is concerned, the same cannot be denied but it must be in accordance with statutory provisions. Since there is no specific exemption of the tax under the schedule appended with the Sales Tax Act, therefore, the bailing hoops are not exempted".

24. 276-280	CA No. 728 of 2002	1	Federation of Pakistan Thr. Secretary Revenue Division Vs. Balochistan Mineral Oils	Whether lubricating oil supplied in bulk i.e. tankers was liable to CED when the terms 'packing' had been used in the relevant notification for the purposes of levy of CED?	The department did not file appeals against two decisions of the SHC and LHC on identical issues. Moreover, the notification levies CED on Lubricating Oil sold in packing and not in bulk.
25. 281-292	CA No. 304 of 2001	1	Collector of Customs, Peshawar Vs. Riaz Ahmad	Whether the High Court was bound to entertain the appeal when application submitted to the Appellate Tribunal under section 196 (3) for making a reference to the High Court was already time barred?	"… the condition precedent for invoking the jurisdiction of the High Court under section 196(3) is that an application is to be filed before the Tribunal within 30 days and if the Tribunal has stated that no question of law is involved and no case is made out for reference to the High Court then a party can invoke jurisdiction of High Court. In instant case, the application was beyond time, therefore, the Tribunal had no occasion to examine as to whether a question of law is involved or not, therefore, it would be presumed as if no such application was filed before the Tribunal." **Note**: This order is as per prevalent law at that time
26. 292-300	CA NO. 2036 OF 2004	1	Assistant Collector of Customs vs. M/s Tripple-M (Pvt) Ltd.	A Show Cause Notice was issued to the respondents on 10.07.89 for recovery of Custom Duty, whereas O-in-O was passed on 31.08.92. The respondents had assailed the SCN on the grounds that the O-in-O was passed with inordinate delay and, therefore, was liable to be struck down on this ground. The SCP has set aside the order passed by the LHC in favour of the respondents.	" No order can be scrapped or annulled or set aside, only on the ground that the same has been passed with un-reasonable delay. There is no such concept attached to the judicial and quasi-judicial proceedings, unless provided in the statute". This can be utilized where necessary. **Note**: It may be clarified that this case pertains to the period prior to the amendments made in section 179 of the Customs Act, 1969.

27. 359-370	M/s Rainbow Industries Vs. Collector of Customs etc. 469 of 2004	01	Refund of sales tax not claimed in the relevant tax period.	Rs. 6.35 m	Decided in favour.	NA	NA	The High Court had reiterated the well settled principle that if the fiscal statutes provides to do a certain thing in a certain manner, then it must be done in that manner and not otherwise. In such like cases, the question of loss to the exchequer or the subject are immaterial.
28. 443-466	Collector of Sales Tax Vs. M/s Phalia Sugar Mills (PUNJAB) (629/2002 1150/2002)	41	Payability of Further Tax by dealers/distributors liable to be registered but actually not registered with the department.	Rs. 40 m	NA	Remanded in favour as the department had lost in the High Court.	Refunds averted. Department can now make factual and legal inquiry into all material issues to identify/ determine the tax liabilities of the parties involved and then finalize accordingly.	The Collectors may look into claims to see whether supply was made to registered persons? Whether these were actually registered or/were taken as registered by fiction of law? Whether the incidence of tax was passed on to consumers/purchasers? Besides, if further tax was charged from the purchasers, how can suppliers claim refund of further tax?
29. 479-502	Collector of Sales Tax Vs. M/s Mehran Metal Container	01	Time limitation in issuance of SCN.	Rs. 26 m involved on under-valuation of supply of steel drums.	NA	Remanded in favour.	NA	The SHC had held that there was no malafide on the part of the respondents as in terms of the agreement between the respondents and their buyers, whole of CED leviable was to be paid by the buyers. However, it was argued before the SCP that this agreement was no more than a fig leaf to evade the duty. The H.C. to decide on duty matter.