

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

W.P No.1343-P/2020

**M/s A.K Tariq Foundry Vs. Government of Pakistan &
others.**

Date of hearing: 28.11.2022.

Date of announcement: 02.12.2022.

Mr. Isaac Ali Qazi, Advocate, for the petitioner.

**M/s. Sana Ullah, DAG and Amir Javed, Addl Attorney General,
for the Federation.**

**M/s. Ishtiaq Ahmad, Rehman Ullah and Zia-ur-Rehman Tajik,
Advocates, for the respondents.**

JUDGMENT

SYED ARSHAD ALLI, J: - This consolidated judgment shall dispose of the instant constitutional petition as well as connected constitutional petitions; the detail whereof is provided in "*Annexure A*" to this petition as in all these petitions, adjudication of common question of law are involved.

2. There are a good number of petitioners who are registered limited companies, partnerships, and sole proprietors who have established their manufacturing units in the Erstwhile Provincial Administered Tribal Area ("*PATA*")/Federal Administered Tribal Area ("*FATA*"). In order to effectively comprehend the grievances of the petitioners, let us reproduce the prayer clause of the petition which reads as under: -

"Considering the above submissions, it is, therefore, humbly prayed that on acceptance of this petition this Hon'ble Court may please to;

- i. *DECLARE that the respondents attempt to charge sales tax in any form including further tax, extra tax etc. on supply of electricity to the petitioner is discriminatory and confiscatory as such liable to be read down;*
- ii. *DECLARE that "exclusion of phrase" of Entry No.152 ibid being confiscatory upon the petitioner proprietorship right of exemption which cannot be taken away without compensation;*
- iii. *DECLARE that in view of letter and spirit of the 25th Constitutional Amendment read with SRO 1212(I)/2018 and 1213(I)/2018 both dated 05.10.2018, the supply of electricity to the petitioner could not be charged either to taxes leviable under the Sales Tax Act, 1990 and Income Tax Ordinance, 2001 at least up to 30th June, 2023;*
- iv. *DECLARE that in view of letter and spirit of the 25th Constitutional Amendment, the Entry No.152 of the Sixth Schedule to the Sales Tax Act, 1990 is ineffective upon the petitioner right of exemption from Sales Tax leviable under the Sales Tax Act, 1990 at least up to 30th June, 2023;*
- v. *An appropriate writ/order may kindly be issued declaring that supply of electricity in view of deeming Article 247(3) of the Constitution for consumption into erstwhile Tribal Area are not liable to taxes leviable under the Sales Tax Act, 1990;*
- vi. *In alternate the exclusion clause in the Entry No.152 of the Sixth Schedule to the Sales Tax Act, 1990 i.e. "but excluding steel and ghee or cooking oil industries" may please be declared as void ab initio, ultra vires and legally ineffective upon the supply of electricity to the petitioner;*
- vii. *In alternate the exclusion clause in the Entry No.152 of the Sixth Schedule to the Sales Tax Act, 1990 i.e. "before 31st May, 2018" may please be declared as void ab initio, ultra vires and legally ineffective upon the supply of electricity to the petitioner;*

➤ **Arguments on behalf of petitioners: -**

3. The learned counsels for the petitioners have maintained that in view of the geographical location of FATA and PATA since the enactment of the Government of India Act, 1935; they are governed through a separate legal dispensation where the normal laws of the country are not extended but subject through a special mechanism which was provided in Erstwhile Article 313 of the Government of India Act, 1935, Article 103, Article 104 of the Constitution of

Pakistan, 1956, Article 233 as provided in the Constitution of Pakistan, 1962 and Article 246/247 of the Constitution of Islamic Republic of Pakistan, 1973. The said constitutional and legal dispensation has also been affirmed by this Court as well as in the Apex Court in various cases. In support of their arguments, they have relied upon, "Commissioner of Income Tax, Peshawar Vs. Gul Cooking Oil and Vegetable Ghee (Pvt) Ltd (2008 PTD 169), Taj Packages Company (Pvt). Ltd Vs. Government of Pakistan through Federal Secretary Finance and Revenue Division (2016 PTD 203), Pakistan through Chairmand FBR Vs. Hazrat Hussain (2018 SCMR 939)." On promulgation of the 25th Constitutional Amendment Act, 2018 though Article 247 (Erstwhile provision of the Constitution of Islamic Republic of Pakistan) was repealed/omitted, however, despite that in view of SRO No.1213, Entry No.151 and Entry No.152 in the 6th Schedule of Sales Tax Act, 1990 through Finance Act, 2019; a deeming clause was inserted whereby the supplies and import made by the persons who are located in the Erstwhile Tribal Area PATA and FATA are exempt from payment of sales tax.

4. It was further argued by the learned counsels for the petitioners that through Entry No.151 all the supplies of the persons who are carrying taxable activities in Erstwhile FATA/PATA are exempt from the charging provision of the Sales Tax Act, 1990, however, through Entry No.152, 2 classes of manufacture have been excluded from the said exemption as far as the charging of sales tax on supply of electricity is concerned. Entry No.152 of the 6th Schedule to the Sales Tax Act, 1990 excludes the industries

established after 31.05.2018 within the Erstwhile Tribal Area FATA/PATA as well as the Ghee, Cooking Oil, and Steel industries from availing exemption on supply of electricity. This exclusion is prima-facie discriminatory as the same is not based on the reasonable classification. All the industries/persons who are generating their income from taxable activities in the Erstwhile FATA/PATA are immune from imposition of any kind of taxation. In support of their arguments, they have relied upon on a good number of case laws. Some of the case laws relevant to the controversy are, "Habib Akram Vs. Federation of Pakistan through Ministry of Parliament Affairs, Islamabad & others (PLD 2018 Lahore 641), Arshad Mehmood Vs. Commissioner/Delimitation Authority, Gujranwala (PLD 2014 Lahore 221), Province of Sindh through Chief Secretary and others Vs. MQM through Deputy Convener and others (PLD 2014 SC 531), Dr. Tariq Iqbal and 08 others Vs. Government of KP through Secretary Administration Peshawar and others (2019 SCMR 859), Saif-ur-Rehman Vs. Additional District Judge, Toba Tek Sindh and 02 others (2018 SCMR 1885), Messrs. M.Y. Electronics Industries (Pvt) Ltd through Manager and others Vs. Government of Pakistan through Secretary Finance, Islamabad and others (1998 SCMR 1404), Messrs. Chenone Stores Ltd through Executive Director (Finance Accounts) Vs. Federal Board of Revenue through Chairman and 02 others (2012 PTD 1815), Gul Ayaz Plastic Industry Vs. Tribal Areas Electric Supply Company, WAPDA House through Chief Executive & 06 others (2021 PTD 795), Messrs. Abid Foundry through authorized representative and another Vs. Pakistan through Federal

Secretary, Finance and Revenue Division, Islamabad and 05 others (2019 PTD 1652), Government of Pakistan and others Vs. Muhammad Ashraf and others (PLD 1993 SC 176)."

> Arguments on behalf of respondents: -

5. On the other hand, M/s. Amir Javed the learned Additional Attorney General assisted by Mrs Mukhtyar Ahmad and Rehmanullah learned counsels for the Revenue, while rebutting the arguments of learned counsel for the petitioners have argued that in these petition, the vires of fiscal statute is challenged which has been passed by a competent legislature, and in the field of taxation, the legislature enjoys a greater latitude and fiscal statutes cannot be struck down solely on the ground that the rate of tax levied was unreasonably high. They have further maintained that a legislation can be struck down only on two grounds; firstly, that the appropriate legislature did not have the competency to make law and secondly, where the enactment abridged any of the fundamental rights enumerated in the Constitution. In the present case, there is a justification for the aforesaid two classifications and its exclusion from the purview of exemption; as the constitution empowers the Parliament to classify various persons or classes of persons differently on the basis of intelligible differentia. Oil, Ghee and Steel are separate class of their own and the said exclusion from the purview of the exemption in respect of electricity supply is permissible under the law as it is established principle of law that the wisdom of legislature cannot be questioned before a court. The respondents have relied upon "Messrs Infotech (Pvt) Ltd Vs.

Federation of Pakistan & 04 others (2016 PTD 2839), *Muhammad Khalid Qureshi Vs. Province of Punjab through Secretary, Excise and Taxation Department, Lahore and another* (2017 CLC 523), *Muhammad Khalid Qureshi Vs. Province of Punjab through Secretary, Excise and Taxation Department, Lahore & another* (2017 PTD 805), *Messrs Colony Sugar Mills Ltd through Deputy Manager Vs. Province of Punjab & 05 others* (2017 PTD 406), *Zaman Cement Company (Pvt) Ltd Vs. Central Board of Revenue and others* (2002 SCMR 312).”

6. The learned counsels for the respondents have also raised a preliminary objection by arguing that these petitions are admittedly filed by the registered companies which is a juristic person but not a citizen of Pakistan on the ground of violation of fundamental rights enshrined in Chapter-II of the Constitution of Islamic Republic of Pakistan, 1973. The fundamental rights are only available to the citizens of Pakistan and not to juristic persons, therefore, this petition is not maintainable and in support of these arguments the learned counsel for the respondents has relied upon “*Federation of Pakistan through Secretary, Ministry of Finance & others Vs. Haji Muhammad Sadiq & others* (PLD 2007 SC 133).”

7. Arguments heard and record of the case was perused.

➤ *Background of the legal dispensation/indemnity of the persons located in the Erstwhile FATA/PATA from operation of fiscal laws: -*

8. Prior to the 25th amendment in the Constitution through Act No. XXXVII of 2018 dated 05.06.2018, there was a separate

dispensation/mechanism for extension of laws to the erstwhile FATA. The relevant provision of the Constitution i.e. Article 247(3) for ease reference is reproduced as under: -

"247 (3). No Act of [Majlis-e-Shoora (Parliament)] shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no Act of [Majlis-e-Shoora (Parliament)] or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situate, with the approval of the President, so directs; and in giving such a direction with respect to any law, the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction".

9. There remained a judicial consensus that the Income Tax, as well as Sales Tax Laws, were never extended to the FATA, prior to the promulgation of the 25th amendment thereby omitting Article 247 from the Constitution. However, there has been a long-standing dispute between the Federal Board of Revenue ("**FBR**") and the trade community/business community of the erstwhile tribal area regarding the imposition of income tax as well as sales tax on the import of raw material for the manufacturing units, which were located in the erstwhile FATA. This Court in its celebrated judgment authored by his Lordship Justice Yahya Afridi as he then was in the case of "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)", has elaborately dealt with the issue of taxing the raw material/goods which were imported for the purpose of its consumption in the erstwhile FATA. The said judgment was also

approved by the august Supreme Court of Pakistan in the case titled "Pakistan through Chairman, FBR and others Vs. Hazrat Hussain (2018 SCMR 939)", wherein it has been unequivocally held that the business concerns/manufacturing units located in the PATA are immune from the impost of both, the income tax as well as sales taxes; that similarly, the goods or machinery, which they are importing for their home consumption are equally immune from the impost of both taxes at the import stage, however, in order to ensure that the consumption of goods do not cross the limits of the non-tariff area, the petitioners have to provide security in form of post-dated cheques equal to the value of the imported goods.

10. The perusal of the aforesaid judgments would show that the main concern of the FBR was that there is no foolproof system ensuring that the goods that are imported for its consumption in the FATA and for that reason, this Court in the case of Messrs Taj Packages Company (Pvt) Ltd (supra) has issued the following directions.

"Accordingly, for the reasons stated hereinabove, this Court would hold and:—

(i) Declare that advance tax charged on import under section 148 of the Income Tax Ordinance, 2001, is not payable by petitioners importing goods for its utilization or consumption in Federally Administered Tribal Area or Provincially Administered Tribal Area;

(ii) Declare that Sales Tax charged under section 3(1)(b) of the Sales Tax Act, 1990, is not payable by the petitioners importing goods for its utilization or consumption in Federally Administered Tribal Area or Provincially Administered Tribal Area;

(iii) Direct the Federal Government to take appropriate steps to ensure that persons carrying on business in FATA or PATA are rendered immunity from the payment of taxes under Income

Tax Ordinance, 2001, and the Sales Tax Act, 1990, as the said statutes have not been extended to the said areas within the contemplation of Article 247(3) of the Constitution;

(iv) Direct the Federal Government to take necessary steps to formulate a uniform policy for seeking securities from the persons importing goods for its consumption and utilization in FATA or PATA, so that the immunity provided under the Constitution is not abused and in case the imported goods are utilized or sold out side the said area, then the revenue of the State is recoverable from the securities, so provided.

(v) Direct that till the decision is taken by the Federal Government regarding the security mechanism stated hereinabove, the Board shall obtain from the petitioners postdated cheques for the payment of taxes at import stage under the Act and the Ordinance, as security, for goods destined for utilization and consumption in FATA or PATA. The postdated cheques shall be returned to the petitioners upon production of consumption certificates duly issued by the concerned commissioners, as specified in Notification dated 28.2.2011. It will be the liability of the petitioners to approach the respondents for the issuance of consumption certificates."

11. The apprehensions of the FBR in this regard are not without reason. The menace of tax evasion in collaboration with the government official is known to all. The Apex Court in the case of "Messrs Elahi Cotton Mills LTD and others vs. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others (2016 PTD 1555)" has also elaborately considered various aspect of this issue. The relevant paras for reference are reproduced as under:-

"In the scenario of the corruption obtaining in Government and semi-Government Departments and so also to curb the dishonest tendency on the part of the tax-payers to evade the payment of lawful taxes by using unfair means, the Legislature is bound to adopt modern and progressive approach with the object to eliminate leakage of public revenues and to generate revenues which may be used for running of the State and welfare of the people".

12. After the 25th amendment in the Constitution, the trade community raised its voice for continuance of the said exemption

from the imposition of income tax and sales tax. The Federal Government through SRO.1212 (1)/2018 dated 05.10.2018 and SRO. 1213(1)/2018 dated 05.10.20218 had allowed the said exemption to the resident/domicile of the erstwhile FATA/PATA. Similarly, by inserting Entry No. 151 and 152 in the 6th Schedule of the Sales Tax Act, 1990, a mechanism was provided for availing exemption of the sale tax on import of goods that were meant for consumption in FATA. The said entries are reads as under: -

*"151. (a) Supplies; 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 may till 30th June, 2023, to which the provisions of the Act or the notifications issued thereunder, would have not applied had Article 247 of the Constitution not been omitted under the Constitution (Twenty-fifth 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 day 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".

13. Having provided the legal and factual background of the case; let us proceed to the merit of the case. The petitioners have

challenged the vires of Entry No.152 ibid on the touchstone of Article 25 and 18 of the Constitution.

14. Our Constitution is founded on the theory of trichotomy of powers between the three limbs/organs of the State namely; legislature, the executive and the judiciary. The function of legislature is to make the law, the executive is to execute and the judiciary is to interpret the law.

15. Article 8(2) of the Constitution of the Islamic Republic of Pakistan, 1973 ("*the Constitution*") prohibits the State from making any law that takes away or abridges the rights of citizens and therefore, any law to the extent of said violation of the fundamental rights is void.

16. Our Constitution expressly confers upon the courts, the powers of judicial review of the administrative action of the executive as well as the laws passed by Parliament/legislature to see as to whether the same is in conformity with the Constitution. Very aptly explained by the nine Judges Bench of the Apex Court of India in the case of "*S.C. Advocates-on-Record Association Vs. Union of India* (AIR 1994 SC 268), "*theory that the Constitution is the "will" of the people whereas the statutory laws are the creation of the legislators who are the elected representatives of the people. Where the will of the legislature- declared in the statutes-stands in opposition to that of the people- declared in the Constitution- the will of the people must prevail.*"

17. In the present case, the petitioners who have established their business concerns/manufacturing units at Erstwhile FATA/PATA have challenged the fiscal statute i.e. Entry No.152 in the 6th

Schedule of the Sales Tax Act, 1990 mainly on the ground of discrimination, therefore, in the present case we are faced with the vires of a taxing statute. N.S. Bindra in his Book, "Interpretation of Statutes" (7th Edition) at Page No.771 has commented that; *"In constructing a taxing measure for determining its Constitutional validity, the question of reasonableness cannot enter into a judicial mind. The only consideration, which is germane, is whether the legislation challenged is permitted by the Constitution. The reasonableness or otherwise of such a statute is a matter legislative policy and it is not fair that the courts to adjudicate upon."*

18. Similarly, the Supreme Court of India in the case of *"P.K.Kutty Haji and others Vs. Union of India and others* (1989 176 ITR 481) held that, *"the judicial approach throughout has been to allow the legislature flexibility at the joints, particularly when a taxing statute is under attack. A statute carries with it a presumption of constitutionality. Such a presumption extends also in relation to a law which has been enacted for imposing reasonable restriction in the fundamental rights. A further presumption may also be drawn that the statute authority would not exercise the power arbitrarily. People's Union for Civil Liberties Vs. Union of India* (AIR 2004 SC 1442). *The presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks to show that there has been a clear transgression of the Constitutional principles. T.M.A Pai Foundation Vs. State of Karnataka* (AIR 2003 SC 55)."

19. As stated above, the main attack of the petitioners on the vires of peace of legislation impugned herein is that they have been

discriminated against because in the impugned legislation, though exemption from the impost of sales tax on consumption of electricity has been granted to all industries/persons/traders but with two exceptions; firstly, those industries who have been established after 31.05.2018 and secondly, the industries which are involved in the manufacturing of Ghee, Cooking Oil and Steel. In this regard, it is the case of respondents that the said exception/exclusion is indeed classification and sub-classification of persons which is permissible under the law. In order to examine the said assertions of the respondents, we would like to examine whether the said classification falls within the scope of reasonable classification on the basis of intelligible differentia.

20. What would be a reasonable classification, this issue came before the Indian Supreme Court in the case "***Muhammad Hanif Qureshi and others Vs. The State of Bihar*** (AIR 1958 SC 731)" and the Indian Supreme Court while dealing with the meaning, scope and effect of Article 14 of the Indian Constitution (somehow similar to Article 25 to our Constitution), reiterated the earlier pronouncement on the issue holding therein that the test of permissible classification should fulfil the two conditions namely; i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and ii) such a differentia must have rational relations to the object sought to be achieved by the statute in question. The court further observed that classification might be founded on different basis, namely, geographical or according to object or occupations or the like, and

what should be necessary is that there must be a nexus between the basis of classification and the object of the act under consideration.

21. The law is by now settled that the vires of any legislation are to be struck down on two grounds. Firstly, where the appropriate legislature did not have competency to make law, and secondly, where its enactment abridges any of the fundamental rights annunciated in the Constitution or any other constitutional provision.

"Mcdowell and Co. (AIR 1966 SC 1627), State M.P Vs. Rakesh Kohli and another (2013 SCMR 34)."

22. Taxation Law is no exception to the doctrine of equal protection. "Ashwath Narayana Setty, P.M Vs. State of Karnataka (AIR 1989 SC 100)." Therefore, the taxing statute will be also struck down if it is in violation of the fundamental rights enshrined in Article 25 of the Constitution. However, in the matter of the taxation laws, the court permits a greater latitude to discretion of legislature in the matter of classification "Ganga Sugar Corporation Ltd Vs. The State of U.P (AIR 1980 SC 286), The Commissioner Inland Revenue, Peshawar Vs. Tariq Mehmood (2021 SCMR 440)" and in tax matters, the State is allowed to pick and choose, districts, objects, persons, methods and even the rates for taxation if it does so reasonably. "Khyerbari Tea Co. Ltd Vs. State of Hassam (AIR 1964 SC 925)."

23. Our own Supreme Court in the case of "Pakcom Ltd Vs. Federation of Pakistan (PLD 2011 SC 44)" in this regard has observed: -

"56. Now we intend to examine the provisions as enumerated in Article 25 of the Constitution which has been examined in depth on various occasions in different cases

and judicial consensus seems to be that this Article "enjoins that all citizens are equal before law and are entitled to equal protection of law, i.e., all persons subjected to a law should be treated alike under all circumstances and conditions both in privileges conferred and in the liabilities imposed. The equality should not be in terms of mathematical calculation and exactness. It must be amongst the equals. The equality has to be between persons who are placed in the same set of circumstances. The dominant ideal common to both the expressions is that of equal justice. The guarantee contained in this right is only this that no person or class of persons shall be denied the same protection of law which is enjoyed by other persons or other classes in like circumstances." (*Saeed ud Din v. Secretary to Govt. of N.W.F.P.* 1990 CLC 8, *Pak Petroleum Workers Union v. Ministry of Interior*) 1991 CLC 13, *Sheoshankar v. M.P. State Govt.* AIR 1951 Nag. 58, *Gul Khan v. Govt. of Balochistan* (PLD 1989 Quetta 8), *Muhammad Hussain v. Abdul Rashid* (PLD 1975 Lah. 1391), *F.B. Ali v. State* (PLD 1975 SC 506), *Mubarik Ali Khan v. Govt. of Punjab* (1990 CLC 136), *Zakaria v. Trustees of the Port of Karachi* (PLD 1968 Kar. 73).

60. We have dilated upon the question that what is discrimination which means "making a distinction or difference between things; a distinction; a difference; a distinguishing mark or characteristic; the power of observing differences accurately, or of making exact distinctions; discernment. But discrimination against a group or an individual implies making an adverse distinction with regard to some benefit, advantage or facility. Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context" (*Shirin Munir v. Govt. of Punjab* PLD 1990 SC 295). We are conscious of the fact that no enactment shall be enacted and policy formulated which is discriminatory, in violation of the Constitution and such enactment or policy would be void to the extent of such violation. In this regard we find support from the dictum laid down in case titled *Balochistan Bar Association v. Govt. of Balochistan* (PLD 1991 Quetta 7). It would not be enough to say that a piece of legislation or a policy formulated thereunder is discriminatory but it is to be substantiated by applying certain well entrenched principles on the subject of discriminatory legislation which are as follows:

(i) The expression 'equality before law' or the 'equal protection of law' does not mean that it secures to all persons the benefit of the same

laws and the same remedies. It only requires that all persons similarly situated or circumstanced shall be treated alike.

(ii) The guarantee of equal protection of law does not mean that all laws must be general in character and universal in application and the State has no power to distinguish and classify persons or things for the purpose of legislation.

(iii) The guarantee of equal protection of laws forbids class legislation but does not forbid reasonable classification for the purpose of legislation. The guarantee does not prohibit discrimination with respect to things that are different. The State has the power to classify persons or things and to make laws applicable only to the persons or things within the class.

(iv) The classification, if it is not to offend against the Constitutional guarantee must be based upon some intelligible differential bearing a reasonable and just relation to the object sought to be achieved by the legislation.

(v) Reasonableness of classification is a matter for the Courts to determine and when determining this question, the Courts may take into consideration matters of common knowledge, matters of common report, the history of the times and to sustain the classification, they must assume the existence of any state of facts which can reasonably be conceived to exist at the time of the legislation.

(vi) The classification will not be held to be invalid merely because the law might have been extended to other persons who in some respect might resemble the class for which the law is made because the legislature is the best judge of the needs of particular classes and the degree of harm so as to adjust its legislation according to the exigencies found to exist.

(vii) One who assails the classification must show that it does not rest on any reasonable basis.

(viii) Where the legislature lays down the law and indicates the persons or things to whom its provisions are intended to apply and leaves the application of law to an administrative authority while indicating the policy and purpose of law and laying down the standards or norms for the guidance of the designated authority in exercise of its powers, no question of violation of Article 25 arises. In case, however, the designated authority abuses its powers or transgresses the limits when exercising the power, the actual order of the

authority and not the State would be condemned as unconstitutional. (Emphasis provided)

(ix) Where the State itself does not make any classification of persons or things and leaves it in the discretion of the Government to select and classify persons or things, without laying down any principle or policy to guide the Government in the exercise of discretion, the statute will be struck down on the ground of making excessive delegation of power to the Government so as to enable it to discriminate between the persons or the things similarly situated. "*Ziaullah Khan v. Government of Punjab* PLD 1989 Lah. 554."

24. Similarly, Article 18 of our Constitution envisages that every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business subject to reasonable restrictions. The harmonious reading of both the provisions of the Constitution i.e. Article 18 and Article 25 would be that the legislature has the authority to classify persons or properties into categories and to subject them to different rates of taxes, however, the similarly placed persons are to be treated alike and if both persons who are a competitor in the market having the same opportunity and market; if dealt with in such a manner that one group similarly placed would be given a financial advantage over the other competitor relating to access to the market or imposing them subject to different taxes or whereby one person or group of persons who are exactly similarly placed is granted exemption from taxes and the other is subject to impost of taxes would amount to depriving him/it equal opportunity with the competitor in any form is a clear discrimination. In the case of "*Messrs Elahi Cotton Mills Limited and others Vs. Federation of Pakistan through Secretary, M/O Finance, Islamabad and 06 others* (PLD 1997 SC 582)" it was held that there is a power in the legislature and other taxing authorities to

classify the persons or properties into categories and to subject them to different rates of taxes, there is none to target incident of taxation in such a way that similarly placed persons are dealt with not only dissimilarly but discriminatory while it remains true that a taxation measure cannot be struck down lightly and even test of discrimination or rigorous, the rigors can be softened where the levy of authority is a delegated one coming to be exercised, not by the legislature, but the executive and at that, with a decree not only of non-concerns but even abandon, throwing up a case of disregard of fundamental rights and constitutional safeguards.

25. The harmonized effect of Article 18 and 25 of the Constitution was elaborately explained by the Apex Court in the case of "M/s Lucky Cement Ltd through its General Manager, Peshawar Vs. Khyber Pakhtunkhwa through Secretary Local Government and Rural Development, Peshawar & others (2022 SCMR 1961)" in the following manner: -

*"Article 25 of the Constitution mandates equality before the law and Article 18 of the Constitution secures the right to conduct any lawful trade or business. If both these Articles are read together and applied to the present case it means that the appellant cannot be made to face a more onerous tax regime than its competitors. It would be appropriate to reproduce applicable extracts from the five-member Bench decision of this Court in the case of I.A. Sharwani v Government of Pakistan."*⁶

- (i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;
- (ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;
- (v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient

basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;

vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;

(vii) that in order to make a classification reasonable, it should be based-

(a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;

(b) that the differentia must have rational nexus to the object sought to be achieved by such classification.'

The aforesaid principle was enunciated in a service matter but it is equally applicable in matters of taxation. In the case of Collector of Customs v Flying Kraft Paper Mills (Pvt.) Ltd. 7 it was held, by a three-Member Bench of this Court, that, 'while there is a power in the Legislature and other taxing authorities to classify persons or properties into categories and to subject them to different rates of taxes, there is none to target incidence of taxation in such a way that similarly placed persons are dealt with not only dissimilarly but discriminately.' Therefore, we have no hesitation in declaring that the treatment meted out to the appellant to the extent of imposing property tax on its buildings at a higher rate than which was imposed on the buildings of other cement manufacturers was discriminatory and to such extent it is illegal and ultra vires."

26. Let us now proceed with the issue involved in the present case relating to the vires of law challenged in these petitions. After the 25th amendment in the Constitution, through SRO No.1212(I)/2018, exemption from the wholes of the sales tax by whatever name called was given to the residents/business concern of the FATA/PATA. The said SRO was issued under Section 13 of the Sales Tax Act, 1990. Section 13 of the Sales Tax Act, 1990 further envisages that the Board (Federal Board of Revenue) shall place before the National

Assembly all notifications issued under this Section in a financial year.

27. The Parliament through Act No.V of 2019 (Finance Act) has inserted Entry No.151, 152, and 153 in the 6th Schedule of the Sales Tax Act, 1990 in terms of Section 13(1) of the Sales Tax Act, 1990. According to Entry No.151, all the supplies imports of plant machinery equipment for installation in Tribal Areas and the industrial input by the industries located in the Tribal Areas are exempt from the payment of sales tax. Similarly, under Entry No.152, exemption on the supply of electricity was also granted to all residential and commercial consumers in Tribal Areas but with two exceptions; i) that the said exemption on electricity supply would be available to those industrial concerns which were set and started their industrial production before 31.05.2018, ii) Steel, Ghee or Cooking Oil industries.

28. We have now to see whether these classifications are permissible in view of the law laid down by our Apex Court as well as the Apex Court of India. Before us, there are different groups of petitioners who are involved in the business of manufacturing Marble, Steel, Ghee, Cooking Oil, etc. First, we will take up the case of exclusion of industries other than Steel, Ghee, and Cooking Oil. All such industries except Steel, Ghee, and Cooking Oil which were set up and started production prior to 31.05.2018 as well as those who have set up their industrial units after 31.05.2018, their supplies are exempt from the impost of sales tax in terms of entry no 151 ibid. Whereas, as far as the supply of electricity, the industries have been classified into two categories, first, those established prior to

31.05.2018 and second, those industries which were established after 31.05.2018 meaning thereby that both the set of industries have one and same market, they are manufacturing one and same kind of goods and are competing for each other within the limited market of the geographical location of Erstwhile FATA/PATA. Therefore, allowing one set of industries, concession in the electricity supply i.e. exemption from sales tax, and withholding the said exemption from another group merely for the reason that it was set up after a particular date would obviously have serious effects on their earnings and may in some circumstances they would not be able to compete each other. This classification does not qualify the test of intelligible differentia and therefore, is contrary to Article 25 and 18 of the Constitution. The law laid down by the Apex Court in the case of M/s. Lucky Cement Ltd (Supra) applies to the present case.

29. Moving on to the case of Steel, Ghee, and Cooking Oil. Steel as a whole is a separate class and the entire steel industries located in the Erstwhile FATA/PATA though enjoying exemption from sales tax on other supplies made within the territorial limits of the Erstwhile FATA/PATA; however, on the supply of electricity the Parliament has refused to grant them exemption. Similar is the case of Ghee, and Cooking Oil. What is the wisdom behind this classification is not the function of this Court to question as the wisdom of legislature behind an enactment is immune from the judicial review of the Constitutional Court. What we have to see is as to whether this classification qualify the test of intelligible differentia. The law by now is settled that a law applying to one person or class of persons may be constitutionally valid if there is

sufficient basis or reason for it as there is always a presumption in favour of Constitutionality of law made by Parliament or State legislature. The legislature is competent to classify persons or properties into categories and to subject them to different rates of taxes, however, the exception is that no one is to target incident of taxation in such a way that similarly placed persons are dealt with not only dissimilarly but discriminatory. Since, through the impugned legislation, all Steel, Ghee and Cooking Oil industries were treated as a separate class and the exemption was not extended to its supplies of electricity, therefore, we could not find any element of discrimination in the matter.

30. In view of the above, we hold that Entry No.152 in the 6th Schedule of the Sales Tax Act, 1990 ultra vires the Constitution to the extent of making classification among the industrial, residential and commercial consumer which were established after 31.05.2018 and as a corollary thereof, the exemption in supply of electricity would be available to all residential, commercial and industrial consumers who have established their units in the Erstwhile FATA/PATA irrespective of the date of establishment till the life of Entry No.152 ibid except Steel, Ghee or Cooking Oil Industries.

31. We have also considered the objection of learned AAG regarding the maintainability of this petition on the ground that only a citizen of Pakistan can claim discrimination, whereas, in the present case limited companies have filed the petition claiming discrimination. It is the contention of learned AAG that though all the companies are juristic persons but are not citizens of Pakistan, therefore, they cannot claim discrimination and in order to claim

discrimination, the petitioners should have joined in the petition their shareholders or directors. In support of the arguments, the learned AAG has relied upon the judgment of Apex Court in the case of "Federation of Pakistan through Secretary, Ministry of Finance and others Vs. Haji Muhammad Sadiq and others (PLD 2007 SC 133)." However, this objection cannot be considered because before us, the limited companies alone are not the petitioners but natural persons who are sole proprietors of different industries have also approached this Court challenging the vires of impugned legislation, hence, the objection is overruled.

Announced

02.12.2022


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