

4/23

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Panel IV

Mr. Justice Syed Munnor Ali Shah
Mr. Justice Sayed Mazhar Ali Akbar Naqvi
Mr. Justice Jargal Khan Mandokhail
Mr. Justice Muhammad Ali Mazhar

Civil Petitions No. 159 to 178, 262 to 274, 288, 341 to 350,
364 to 367, 564, 649, 1271 to 1282, 1090, 1197, 363, 3692,
3693 & CMA No. 663/2023

C.P.159/2023

*(Against the judgment dated 02.12.2022,
passed by the Peshawar High Court,
Peshawar in WP No.1343-P/2020)*

M/s AK Tariq Foundry Bar Khyber thr.
its Authorised Representative v.
Government of Pakistan thr. Federal
Secretary Finance and Revenue
Division, Islamabad & others

C.P.160/2023

and (2)

*(Against the judgment dated 02.12.2022,
passed by the Peshawar High Court,
Peshawar in WP No.3682-P/2020)*

M/s Taj Re-Rolling & Steel Mills Pvt
Ltd District Malakand v. Government
of Pakistan through Federal Secretary
Finance and Revenue Division,
Islamabad and others

C.P.161/2023

and (3)

*(Against the judgment dated 02.12.2022,
passed by the Peshawar High Court,
Peshawar in WP No.1443-P/2020)*

M/s Lillah Steel Mill, District Khyber
thr. its Proprietor v. Government of
Pakistan through Federal Secretary
Finance and Revenue Division,
Islamabad and others

C.P.162/2023

and (4)

*(Against the judgment dated 02.12.2022,
passed by the Peshawar High Court,
Peshawar in WP No.1433-P/2020)*

M/s Mohmand Moulding Works thr.
its Proprietor, District Khyber v.
Government of Pakistan through
Federal Secretary Finance and
Revenue Division, Islamabad and
others

C.P.163/2023

and (5)

*(Against the judgment dated 02.12.2022,
passed by the Peshawar High Court,
Peshawar in WP No.1434-P/2020)*

M/s New Mohmand Steel Mills thr. its
Managing Partner, District Mohmand
v. Government of Pakistan through
Federal Secretary Finance and
Revenue Division, Islamabad and
others

ATTESTED

[Signature]
Senior Secretary
Supreme Court of Pakistan
Islamabad

C.P.164/2023
(Against the judgment dated 02.12.2022, passed by the Peshawar High Court, Peshawar in WP No.1344-P/2020)

M/s Dna Steel Furnace thr. its Authorized Representative, District Khyber v Government of Pakistan through Federal Secretary Finance and Revenue Division, Islamabad and others

C.P.165/2023
(Against the judgment dated 02.12.2022, passed by the Peshawar High Court, Peshawar in WP No.1344-P/2020)

M/s MK Steel Mills thr. its Attorney, District Khyber v Government of Pakistan through Federal Secretary Finance and Revenue Division, Islamabad and others

C.P.166/2023
(Against the judgment dated 02.12.2022, passed by the Peshawar High Court, Peshawar in WP No.1344-P/2020)

M/s Gillan Steel Re-Rolling Mill Pvt Ltd thr. its Authorized Representative, District Khyber v. Government of Pakistan through Federal Secretary Finance and Revenue Division, Islamabad and others

C.P.167/2023
(Against the judgment dated 02.12.2022, passed by the Peshawar High Court, Peshawar in WP No.1344-P/2020)

M/s Universal Steel Mills, thr. its Sole Proprietor, District Mohmand v. Government of Pakistan through Federal Secretary Finance and Revenue Division, Islamabad and others

C.P.168/2023
(Against the judgment dated 02.12.2022, passed by the Peshawar High Court, Peshawar in WP No.4169-P/2020)

M/s Talha Steel Furnace thr. its Partner, District Khyber v. Government of Pakistan through Federal Secretary Finance and Revenue Division, Islamabad and others

C.P.169/2023
(Against the judgment dated 02.12.2022, passed by the Peshawar High Court, Peshawar in WP No.5143-P/2020)

M/s Makkah Steel Furnace thr. its Proprietor, District Mohmand v. Government of Pakistan through Federal Secretary Finance and Revenue Division, Islamabad and others

C.P.170/2023
(Against the judgment dated 02.12.2022, passed by the Peshawar High Court, Peshawar in WP No.4132-P/2020)

M/s AG Steel Furnace thr. its Authorized Representative, District Khyber v. Government of Pakistan through Federal Secretary Finance and Revenue Division, Islamabad and others

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Senior Associate
Supreme Court of Pakistan
Islamabad

CP-112-2023

C.P.3692/2023
and (67) *(Against the judgment dated 27.6.2023, passed by the Peshawar High Court, Peshawar in WP No.37-P/2023)*

Commissioner Inland Revenue
(Peshawar Zone) Regional Tax Office,
Peshawar v. M/s Sher Ghani, Khyber
and another

C.P.3693/2023
and (68) *(Against the judgment dated 27.6.2023, passed by the Peshawar High Court, Peshawar in WP No.36-P/2023)*

Commissioner Inland Revenue
(Peshawar Zone) Regional Tax Office,
Peshawar v. M/s Syed Ashad Ullah
and another

For the petitioner(s):	Mr. Isaac Ali Qazi ASC Mr. Shumail Butt, ASC Ghulam Shoab Jally, ASC Mr. Mudassar Khalid Abbasi, ASC
For the Commissioner Inland Revenue Peshawar:	Mr. Rehman Ullah, ASC Sharif Ullah, Asstt. Director (L)
For respondents No. 3 to 5 (in CP 649 & 1090/23):	Ms. Neelam Azra Khan, ASC
For TESCO	Mr. Aamir Nawaz, Dy. Director
For respondent No. 1 (in CPs 3692, 3693/23)	Syed Asadullah Sher Ghani
On court's notice:	Ch. Aamir Rehman, Addl. AGP
Date of hearing:	05.12.2023

ORDER

Syed Mansoor Ali Shah, J.- The issues involved in the present petitions are:

Whether Entry 152 of the Sixth Schedule to the Sales Tax Act 1990 ("Sales Tax Act") to the extent of exclusion of steel and ghee or cooking oil industries is discriminatory and violative of Article 25 of the Constitution of Pakistan 1973 ("Constitution")?

and

Whether impugned judgment of the High Court to the extent of declaration, that the cut-off date of 31.05.2018 for the grant of exemption under Entry 152 of the Sixth Schedule to the Sales Tax Act is discriminatory, is legally maintainable?

2. These petitions have been preferred against the common impugned judgment of the High Court delivered in the writ petitions filed by the private petitioners.

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Senior Counsel/Associate
Supreme Court of Pakistan
Islamabad

3. The brief facts leading to these petitions are that the private petitioners own manufacturing units in the erstwhile tribal areas now forming part of the province of Khyber Pakhtunkhwa. Historically these areas were not part of the province of Khyber Pakhtunkhwa and were governed by a distinctive arrangement outlined in the now-repealed Article 247 of the Constitution. Of particular relevance to the present matter is the legal consequence arising from this historical context, namely that the Sales Tax Act was never extended to these areas. Consequently, the people of these areas were not subject to the obligation of payment of sales tax leviable under the Sales Tax Act. The situation changed with the enactment of the Twenty-Fifth Amendment to the Constitution: Article 247 of the Constitution was omitted and these areas became part of the province of Khyber Pakhtunkhwa under paragraph (d) (i) (a) of Article 246 of the Constitution with effect from 31.05.2018.

4. With this constitutional development, the Sales Tax Act stood extended to the former tribal areas. However, the Federal Government while exercising powers under Section 13 (2) (a) of the Sales Tax Act provided exemption from the payment of sales tax to the former tribal areas through SROs No. 888(I)/2018, 889(I)/2018 and 890(I)/2018, all dated 23.07.2018. Subsequently, the Federal Government, taking note of the concerns raised by the trading community of the former tribal areas regarding the inadequacy of the afore-referred three SROs in restoring the pre-constitutional status quo, reiterated that a phased approach was needed for the full application of fiscal laws to the erstwhile tribal areas. Consequently, the Federal Government vide SRO No. 1212(I)/2018, dated 05.10.2018, ab-initio rescinded its earlier three SROs and granted exemption from the whole of sales tax applicable to supplies made till 30.06.2023, mirroring the scenario under Article 247 of the Constitution as if it had not been omitted by the Twenty-Fifth Constitutional Amendment Act.

5. Thereafter, invoking section 13 (1) of the Sales Tax Act, the legislature introduced new entries i.e. 151, 152 and 153 in the Sixth Schedule to the Sales Tax Act vide the Finance Act 2019. Entry 151 provided for exemptions and the method of claiming such exemptions at the stage of imports of goods, machinery and industrial inputs for industrial units situated in former tribal areas. Entry 152 provided for exemptions of sales tax on electricity consumption of domestic and commercial consumers which included industrial units situated in the

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Senior Counsel Associate
Supreme Court of Pakistan
Islamabad

former tribal areas which were set up and had started their industrial production before 31.05.2018 with the exception of steel and ghee or cooking oil industries. These exemptions were to last till 30.06.2023. The Finance Act 2023 has extended this period to 30.06.2024.

6. The impugned judgment of the High Court arose out of writ petitions challenging the constitutional vires of Entry 152 of the Sixth Schedule to the Sales Tax Act. The grievance was twofold: the cut-off date of 31.05.2018 for the grant of exemption and exclusion of steel and ghee or cooking oil industries are discriminatory. The High Court accepted the first contention and declared Entry 152 of the Sixth Schedule to the Sales Tax Act ultra vires the Constitution to the extent of making a distinction between consumers on the basis of the cut-off date. However, the second contention with respect to exclusion of steel and ghee or cooking oil industries was rejected. It is against this rejection of the contention as regards exclusion of steel and ghee or cooking oil industries that the private petitioners have filed petitions for leave to appeal before this Court while the Department seeks leave to appeal against the declaration of the High Court that the cut-off date of 31.05.2018 for the grant of exemption under Entry 152 of the Sixth Schedule to the Sales Tax Act is ultra vires the Constitution.

7. We have heard the learned counsel for the parties and perused the record.

8. The challenge in the present case is directed at two types of classifications envisaged in Entry 152 of the Sixth Schedule to the Sales Tax Act. The first excludes from the benefit of exemption some industries i.e. steel and ghee or cooking oil while the other excludes the industries which were set up and started industrial production after the specified cut-off date. We are cognizant that the State enjoys greater latitude in the matter of a taxing statute. It may impose a tax on a class of people, whereas it may not do so in respect of the other class. It is also true that wide discretion is available to the State in the matter of granting, curtailing, withholding, modifying or repealing tax exemptions. It has the authority to choose whom to exempt from tax under the Sales Tax Act and exemption decisions, related to specific individuals or products, are entirely at its discretion. However, even a taxing statute is not beyond the pale of constitutional challenge. Two conditions must be fulfilled in order to muster the test of permissible classification i.e. the classification must be founded on an intelligible

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Supreme Court of Pakistan
Islamabad

differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute in question. If the State fails to support its action of classification on the touchstone of the principle whether the classification is reasonable having an intelligible differentia and a rational basis germane to the purpose, the classification cannot stand.¹

9. It needs to be seen whether the classification envisaged in Entry 152 is a reasonable classification having an intelligible differential and a rational basis germane to the purpose. We see that the exemption under consideration was provided with a purpose, namely, to provide a breather to the former tribal areas before full application of fiscal laws was extended to such areas. This benefit was extended to a specific geographical area, with eligibility based solely on the location of individuals and businesses in that area. A distinction was drawn between the former tribal areas and the rest of the country. This classification was based on the consideration that a phased approach was to be adopted for the extension of fiscal laws to the erstwhile tribal areas. For attaining this objective, it is not clear why the legislature excluded two industries i.e. steel and ghee or cooking oil from the exemption. All persons and industries of the former tribal areas which formed a particular class by reason of being located in the former tribal areas were to reap the benefit of this concession. The issue is not of granting or not granting the exemption. Once the legislature exercises the choice of extending a concessional right to the people and businesses of an area for the reason of being located in that area, excluding some merely because they are engaged in two specific industries would not provide rational basis for their exclusion.

10. The classification must be based on some qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the class.² When the exemption is granted to a particular class of persons, the benefit thereof is to be extended to all similarly situated persons.³ There does not remain any room for creating sub-classification thereby excluding one sub-category

¹ *I. A. Sharwari v Government of Pakistan* 1991 SCMR 1041, *Commissioner Inland Revenue, Peshawar v Tariq Mehmood* 2021 SCMR 440, *Lucky Cement Limited v Khyber Pakhtunkhwa* 2022 SCMR 1994, *Aashirwad Films v Union of India* (2007) 6 SCC 624.

² *Pakcom Limited v Federation of Pakistan* PLD 2011 SC 44, *Federation of Hotel & Restaurant Association of India v Union of India* (1989) 3 SCC 634.

³ *Union of India v N.S. Rathnam & Sons* (2015) 10 SCC 681.

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Islamabad

CS-119-2021

without adopting any differentia having a rational relation to the object of exemption. The record does not exhibit any rational distinction on the basis of which two industries of steel and ghee or cooking oil were deprived of the benefit of exemption envisaged under Entry 152 of the Sixth Schedule to the Sales Tax Act. There cannot be any discriminatory treatment of some persons who fall in the same category for it would then be violating the equality clause enshrined in Article 25 of the Constitution. The exclusion of steel and ghee or cooking oil industries has no nexus with the object that is sought to be achieved i.e. providing a time specific relief to the people and industry of the former tribal areas. It appears to be a case of clear and palpable discrimination without any rational basis. We do not agree with the view of the High Court with regard to the steel and ghee or cooking oil industries and declare that the exclusion of steel and ghee or cooking oil industries in Entry 152 of the Sixth Schedule to the Sales Tax Act is ultra vires Articles 25 and 18 of the Constitution and is, therefore, struck down.

11. Likewise, we discern no rational basis for distinguishing between two categories of persons with business concerns in the same area solely based on a cut-off date. As emphasized earlier, the purpose of the sales tax exemption was to offer temporary relief to industries situated in the former tribal areas. To withhold this benefit from industries that share a similar context - being located in the same area - merely because they came into existence after a specific cut-off date introduces an arbitrary and artificial differentiation. This distinction lacks a meaningful connection with the intended objective of the exemption and is, therefore, without a logical basis. The High Court aptly observed that classifying industries based on a cut-off date implies that both sets of industries would operate within the same market, producing similar goods, and competing for a share within the confined geographical boundaries of the former tribal areas, yet one group would be entitled to the concession of exemption from sales tax on electricity supply while the same benefit would be denied to the other group solely due to the latter's establishment after a specific date. We agree with the High Court that it would undeniably impact the latter group's earnings and could hinder their ability to compete effectively. Such a classification fails to meet the criteria of an intelligible differentia and, as a result, we uphold the declaration of the High Court that classifying the industry on the basis of a cut-off date in Entry 152 of the Sixth

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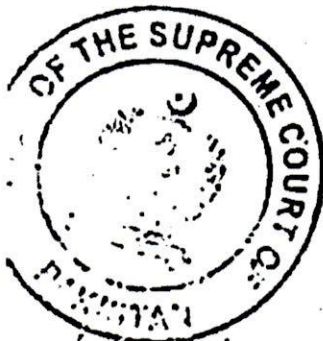
Schedule to the Sales Tax Act contradicts the principles outlined in Article 25 as well as Article 18 of the Constitution.

12. Accordingly, the petitions filed by the private petitioners are converted into appeals and allowed; the impugned judgment of the High Court to the extent of maintaining the constitutionality of exclusion of steel and ghee or cooking oil industries in Entry 152 of the Sixth Schedule to the Sales Tax Act is set aside with the result that their writ petitions are accepted in the terms that the exclusion of steel and ghee or cooking oil industries in Entry 152 of the Sixth Schedule to the Sales Tax Act is declared ultra vires Articles 25 and 18 of the Constitution and is, therefore, struck down. Whereas, the petitions filed by the Department i.e., Civil Petitions No.1271 to 1282, 3197, 3692 and 3693 of 2023, are dismissed, and leave is refused; the declaration of the High Court that classifying the industry on the basis of a cut-off date in Entry 152 of the Sixth Schedule to the Sales Tax Act contradicts the principles outlined in Article 25 as well as Article 18 of the Constitution is upheld.

Sd/-Syed Mansoor Ali Shah, J
Sd/-Sayyed Mazahar Ali Akbar Naqvi, J
Sd/-Jamal Khan Mandokhail, J
Sd/-Muhammad Ali Mazhar, J

Certified to be True Copy

Senior Court Associate
Supreme Court of Pakistan
Islamabad



Islamabad,
5th December, 2023
Not approved for reporting.
Sadaqat

13/11/24

535/24

Urgent/Criminal

Writ No. _____

Date of Presentation: 10.1.24

No of Voids: _____

No of Folders: 660

Requisition Fee Rs: 500

Copy Fee In: 2790

Court Fee Stamp: 3380

Date of Completion of Case: 11/10/24

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