JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

I.C.A No.83099 of 2022

Millat Tractors Limited

Versus

Federal Board of Revenue & others

J U D G M E N T

Date of Hearing.	08-03-2023
APPELLANTS BY:	M/s Imtiaz Rashid Siddiqui, Shahryar Kasuri, Raza Imtiaz Siddiqui and Muhammad Hamza, Advocates.
RESPONDENTS BY:	M/s Ahmad Pervaiz, Saffi ul Hassan Advocates. Mr. Asad Ali Bajwa, Deputy Attorney General for Pakistan.

Shahid Karim, J:-. This is an appeal under Section 3 of the Law Reforms Ordinance, 1972 and brings a challenge to the order dated 20.12.2022 passed in W.P No.80856 of 2022 by a learned Single Judge of this Court (**"the impugned order"**).

2. The relief claimed in the constitutional petition was for seeking a declaration regarding SRO No.563(I)/2022 dated 29.04.2022 (**SRO 563**) to be struck down as having been issued without lawful authority. Further reliefs were claimed on the basis of the former SRO No.363(I)/2012 dated 13.04.2012 (**SRO 363**) under which the appellant claimed the benefit of refund for the months of July 2021, September 2021, November 2021, December 2021 and February 2022 which accumulates to PKR 3,806,855,796/- (**the refund amount claim**). The appellant before the learned Single Judge sought to restrain any action to be taken either by the Federal Board of Revenue (FBR) or any of its officials under

SRO 563 as also the proceedings before respondent No.8 in respect of the show cause notice issued on 31.5.2022 was sought to be quashed.

3. The historical facts would lend actuality to the analysis. There is no quarrel that SRO 363 was issued by FBR which enacted the rules called 'Refund Claims of Recognized Agricultural Tractor Manufacturers Rules, 2012' (**Rules, 2012**) which prescribe a procedure for filing of refund application to the Commissioner Inland Revenue. Rules 2, 3 and 4 have relevance to the issue at hand and are set out below:

> *2. Filing of refund application.- The refund claimant shall file a refund application to the Commissioner, Inland Revenue having jurisdiction, along with the following documents, namely:-*
>
> *(a) a copy of tax paid and e-filed sales tax return:*
>
> *(b) an undertaking affirming the genuineness of refund as per Sales Tax Act, 1990 and relevant rules made thereunder: and*
>
> *(c) a revolving bank guarantee valid for at least ninety days issued by a scheduled bank, to the satisfaction of the Commissioner, Inland Revenue having jurisdiction, of an amount not less than the average monthly refund claim during last twelve months.*
>
> *3. Refund of Input tax.- The refund of admissible excess input tax shall be allowed on the basis of above documents within three days of receipt thereof.*
>
> *4. Filing of complete, refund claim.- Within fifteen days of the sanctioning of refund, the claimant shall file a complete refund claim along with the requisite supportive documents prescribed in rule 38 of the Sales Tax Rules, 2006, except the statement prescribed in clause (e) of sub-rule (1) of the said rule which shall be submitted biannually. A soft copy of the claim on the prescribed format shall also be submitted which shall be scrutinized under the Sales Tax Act, 1990 and the rules made thereunder and the objections, if any, related to the refund claim shall be conveyed to the claimant within thirty days of the receipt of claim."*

4. According to rule 3 the refund of admissible excess input tax shall be allowed on the basis of documents mentioned in rule 2 within three days of receipt thereof. It is not the case of the Sales Tax Department that the appellant's application was deficient in any manner and according to rule 3 set out above the refund of admissible excess input tax would be deemed to have been sanctioned within three days of the receipt. Clearly this was not done and the Department kept dillydallying on one pretext or the other. Prior to this it is the case of the appellant that the Department has always reneged on the terms of SRO 363 and did not sanction the refund of input tax within the time stipulated in rule 3. The appellant was, therefore, constrained to approach the Federal Tax Ombudsman (FTO) which by its order dated 21.09.2021 made the following recommendations:

> *"Recommendations:*
>
> *8. FBR to direct the Chief Commissioner-IR, LTO, Lahore to-*
>
> > *(i). Process and settle the due refund to the Complaint as contained in the Refund Claims of Recognized Agricultural Tractors Manufacturers Rules, 2012 notified vide SRO 363(I)2012 dated 13.04.2012, as per law;*
> >
> > *(ii) For future application, FBR may recommend to the Government to define the term "Agricultural Tractors" in column 5 of Table-1 of Eighth Schedule to the Sales Tax Act, 1990, against S. No.25, in case it intends to restrict the exemption beyond 5 percent to some other use of tractors (agriculture purpose); and*
> >
> > *(iii). Report compliance within 45 days."*

5. A representation to the President was also dismissed. Hence, FTO directed the Chief Commissioner LTO Lahore to process and settle the due refund of the appellant in terms of

the Rules, 2012. It was further recommended for future applications, FBR may recommend to the Government to define the term "Agricultural Tractors" in the Sales Tax Act, 1990 in case it intended to restrict the exemption beyond 5 percent to some other use of tractors. Pursuant to the recommendations some of the refunds were disbursed to the appellant and therefore to that extent the refund claims stood satisfied. However, the refund amount claim remained outstanding and for which the appellant kept requesting FBR and its relevant officials to approve the claim of the appellant but to no avail. This according to the appellant's counsel, showed an unmistakable partisan slant on the part of FBR.

6. On 29.04.2022, SRO 563 was issued by FBR and a new Chapter was inserted in the Sales Tax Rules, 2006 namely 'Chapter V-C' relating to refund to Agricultural Tractor Manufacturers. Rule 39O is engaged in this opinion and states that:

> ***"39O. Application.—(1) This Chapter shall apply to existing and future refund claims as filed by the registered agricultural tractor manufacturers engaged in supply of agricultural tractors.***
>
> ***(2) The provisions of these rules shall apply only if the incidence of tax sought to be refunded has not been passed on to the consumers."***

7. Rule 39P is the definition clause and defines 'eligible person' to be the following:

> *"(b) "eligible person" means manufacturer of agricultural tractors who supplies tractors to a person holding a valid proof of land holding such as agriculture pass book and copy of record of rights of agricultural land duly verified from Provincial Land Revenue Authorities."*

8. SRO 563 defined agricultural tractor to mean '**a tractor used by farmers or growers engaged in production**

of agricultural produce through tractor'. It also laid down the procedure for filing of refund application. Further, by rule 39Z Rules, 2012 were repealed.

9. The arguments in this Court centred on Rule 39O inserted through SRO 563 which made applicable the Chapter to **existing** and future refund claims as filed by the registered agricultural tractor manufacturers engaged in supply of agricultural tractors. At first blush, this rule is actuated by bad faith and doubtless intended to stall and prevent the disbursement of refund claims which were already pending. It is a well-worn rule that a mala fide act is an act without jurisdiction and is a fraud on the statute. (See PLD 1965 SC 671). As to what is meant by bad faith and its true sense, the following statement from *Wade & Forsyth's Administrative Law (Twelfth edition),* has this to say:

> *"It is extremely rare for public authorities to be found guilty of intentional dishonestly; normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context 'in good faith' means merely 'for legitimate reasons'. Contrary to the natural sense of the words, they impute no moral obliquity."*

And the effect of an act in bad faith and with improper motives is explained in De smith's *Judicial Review (seventh edition*, p.290) in the following terms:

> *"Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonestly, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be*

taken for an improper purpose and thus take it outside the permissible parameters of the power."

10. There is no contention that the appellant had filed its refund claims prior to the enactment of SRO 563 and in terms of SRO 363 and rule 3 in particular the refund of admissible input tax would be deemed to have been allowed within three days of receipt. Since the Commissioner Inland Revenue sat on the refund claims of the appellant and did not sanction them, this was used as a lever by FBR to delay the sanction of refund claims and thereafter proceeded to issue a Notification to stunt the claim entirely. SRO 563 sought to apply the notification to existing refund claims as well. As explicated, the narration of historical facts above clearly shows that SRO 563 in its application to existing refund claims is a *mala fide* and unreasonable exercise of power by FBR. Secondly, FBR neither has the power to take away vested rights and to upset past transactions nor to apply a notification retrospectively under the purported powers conferred by section 50 of the Sales Tax Act, 1990. Section 50 does not confer power upon FBR to make retrospective application of an amendment made in the Sales Tax Rules, 2006. Moreover, it does not possess the power in any case to upend rights which have come to vest in a registered person such as the appellant who was entitled to excess input tax and for its refund on the basis of SRO 363. The appellant applied for the refund claims timeously and these claims should have been allowed within the mandate of SRO 363.

11. Learned counsel for the appellant also referred to a letter dated 5.11.2021 issued in compliance of decision made

by this Court in ICA No.53020 of 2021 which was previously filed by the appellant. These proceedings had been brought seeking compliance of FTO's order dated 21.9.2021. Pursuant to the direction of this Court, the following decision was issued by FBR (**the decision**):

> *"02. Issue of applicability of payment of refund of sales tax to M/s Millat Tractors Limited under Chapter V of the Sales Tax Rules, 2006 or procedure prescribed for processing of refund claims of Recognised Agricultural Tractor Manufacturers vide SRO 363(I)/2012 dated 13-4-2012 has been examined.*
>
> *03. It is intimated that Chapter V of the Sales Tax Rules, 2006 deals with payment of refund of sales tax for all registered person. However, the Board has prescribed special procedure for processing of refund claims of Recognised Agricultural Tractor Manufacturers vide SRO 363(I)/2012 dated 13-4-2012.*
>
> ***04. In the light of above, for processing of refund claims of Recognised Agricultural Tractor Manufacturers , SRO 363 (I)/2012 dated 13-4-2012 is applicable."***

12. Doubtless, in view of the above statement made by FBR, SRO 363 was applicable for processing of refund claims of recognized agricultural tractor manufacturers. This works as an estoppel on FBR which cannot now turn around and assert otherwise on the basis of SRO 563. Until SRO 563 was brought into effect, the refund claims already pending with FBR ought to have been sanctioned in terms of SRO 363. This was the question before the learned Single Judge and which was not adverted to in the impugned order. Therefore, to the extent of word "existing" used in rule 39O of SRO 563, it is held to be inapplicable to the case of appellant. There is no need to set aside the entire SRO 563 as FBR clearly has the power to amend the Rules, 2006 or to substitute the existing Chapter with a new Chapter. However,

that must apply prospectively and not retrospectively. The right had come to inhere in the appellant and became crystallized as soon as documents under rule 2 of SRO 363 had been filed. The appalling act of delay cannot be attributed to the appellant. It would be a devious machination on FBR's part to firstly, delay the refund, and thereafter stonewalling it on the premise of SRO 563. We have no doubt in our mind that even if the word 'existing' was allowed to stand in SRO 563, it would have no application in the case of appellant. The ancillary argument whether section 50 of the Act, 1990 contains power of retrospective rule-making is moot and we leave it to be decided in another case.

13. A reference to definition of the term 'eligible person' would also be apt under the circumstances. According to the definition an eligible person mean a manufacturer of agricultural tractors who supplies tractors to a person holding a valid proof of land holding such as agricultural pass book and copy of record of rights of agricultural land. Undoubtedly, this condition could not have been fulfilled retrospectively by the appellant who had already made the supplies under SRO 363. The definition of eligible person as set out above and mentioned in SRO 563 also lends credence to the argument that SRO 563 was designed to apply prospectively and not retrospectively.

14. In our jurisprudence the rule is now settled and vouched by respectable authority that an enactment which prejudicially affects vested rights or the legality of past transactions cannot be given retrospective operation. This

rule is based on the principle of *promissory estoppel* and legitimate expectation and was articulated in *Al-Samrez Enterprise v. The Federation of Pakistan* (**1986 SCMR 1917**) in which while relying upon Maxwell's Interpretation of Statutes, 1962 Edition, it was held that:

> *"The subsequent notification impugned in this case was issued in exercise of statutory power and has the force of a statutory instrument. Accordingly the Rules of a statutory construction are attracted to the interpretation and determination of its legal effect. It is well-settled that an enactment which prejudicially affected vested rights or the legality of past transactions, or impairs contracts cannot be given retrospective operation. Thus, Maxwell's Interpretation of Statutes, 1962 Edition at page 206 observed:*
>
> > *"Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation."*
>
> *The principle of law enunciated above has been recognised in Corpus Juris of this country and also statutorily in section 6 of the General Clauses Act. For instances of the application of this rule of interpretation reference may be made to In re : March Mander v. Harris (1884) 27 Ch. D. 166 and Jones v. Ogle (1872) L.R. 8 Ch. A. 192. 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 creating 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****, one the ground that under section 21 of the General Clauses Act, the Government could exercise the power of modification.* ***The question before us is not whether the second notification was ultra vires the powers of the Government but whether the second notification would be applicable to the case of the appellants resulting in taking away the exemption already granted."***

15. This rule was affirmed in *Molasses Trading & Export (Pvt.) Limited v. Federation of Pakistan and others* (**PTCL 1994 CL 222**) although the question was regarding the precise scope of Sectin 31A of the Customs Act, 1969 which

had been brought in by the legislature to stunt the effect of *Al-Samrez*. This rule was once again reiterated in *M/s. M.Y. Electronics Industries (Pvt.) Ltd. through Manager and others v. Government of Pakistan, through Secretary Finance, Islamabad and others* (**PTCL 1998 CL 450**) after the extensive reference to the doctrine of *promissory estoppel* and its origins. The observations were to the following effect:

> *"…The observations of this Court in Azizuddin Industries Limited's case that the vested right under the exemption notification could not be taken away by an executive action are therefore, applicable only to a case where the Government first granted exemption for a specified period and then attempt to withdraw the same thus defeating the vested right through an executive action. However, even vested right under an exemption notification which is a time-bound, could be taken away by a legislature measure as held by this Court in Army Welfare Sugar Mills Ltd.' case…"*

16. The question came up for discussion in *M/s Army Welfare Sugar Mills Ltd. and others v. Federation of Pakistan and others* (**PTCL 1993 CL 188**) and the Supreme Court of Pakistan once again delved into the doctrine of *promissory estoppel* and went on to hold that a representation through a statutory regulatory order (SRO) could only be withdrawn by a legislative act. In *M/s Army Welfare Sugar Mills* too the benefit granted by a notification was sought to be withdrawn by a subsequent notification and it was concluded that the earlier notification contained a representation which could have been rescinded before it was acted upon or if it was acted upon, its effect could have been nullified by statutory provision and not by an executive act. This means that vested rights could not be impaired either by an executive act or by the exercise of powers delegated by the legislature unless the legislature has specifically granted delegation to enact

retrospective measures. Recently, the Supreme Court of Pakistan was confronted with a similar issue in *Muhammad Rafique and others v. Federation of Pakistan and others* (**PTCL 2015 CL 219**) and the following answer was returned with regard to the principle laid down in *Al-Samrez*:

> *"15. That we are afraid that we cannot agree with Mr. Kashif Nazeer's contention that the principle laid down in Al-Samrez is no longer applicable after the insertion of section 31A of Customs Act, 1969. Section 31A is limited in application, as it itself states, to "the rate of duty applicable to any goods" which "shall include amount of duty imposed under Sections 18, 18A and 18C and the duty that may have become payable in consequence of the withdrawal of the whole or any part of the exemption or concession from duty whether before or after the conclusion of a contract or agreement for the sale of such goods or opening of a letter of credit in respect thereof." The said section does not refer to income tax or advance income tax therefore it can not be made applicable to the same. Therefore, whilst the application of Al-Samrez with regard to customs duty has been undone, but the legal principle enunciated in Al-Samrez will continue to have effect with regard to advance income tax, with which we are concerned."*

17. It is clear from the case law referred above that the rule has respectable origins and has not undertaken any change. In the present case rights had come to vest in the appellant which could not have been impaired or taken away by FBR while substituting the rules and while exercising rule-making power delegated upon it by the legislature. In the guise of making rules, vested and concluded rights could not have been taken away by the enactment of a notification which was to take effect retrospectively. This could only have been done by the legislature under its primary power to legislate.

18. Learned counsel for the respondent-department raised a threshold objection regarding maintainability of this appeal. Suffice to say that the challenge before the learned Single Judge was to SRO 563 through which rules were enacted and

a Chapter was added to the existing Rules, 2006. This power to undo the rules or to hold them unlawful did not vest in the adjudicating authority under the law. Although in a previous constitution petition W.P No.39228 of 2022, a direction was indeed issued to consider the question regarding legality of SRO 563, that question in our opinion could not have been considered by the Deputy Commissioner Inland Revenue while passing the impugned order on 21.11.2022. In any case the Deputy Commissioner Inland Revenue did advert to this aspect in the impugned order dated 21.11.2022 for obvious reasons. In the final analysis it was concluded that:

> *"Therefore, the rules issued vide SRO 563(I)/2022 has legal validity under the Sales Tax Act, 1990."*

19. There is no discussion on the grounds taken by the appellant regarding retrospectivity. The Deputy Commissioner misdirected himself in assuming that SRO 563 applied to the appellant's claims and so proceeded to upend valid claims. A challenge to SRO 563 was a recurring cause of action and the appellant was constrained to approach this Court once again not only to challenge SRO 563 but also to challenge the proceedings before Deputy Commissioner Inland Revenue and the failure on the part of Deputy Commissioner to consider and adjudicate the question regarding competence of FBR to issue SRO 563 retrospectively. The entire proceedings in the show cause notice dated 31.5.2022 as well as the ensuing order dated 21.11.2022 have also been brought under challenge. This could have been done by direct recourse to this Court by making a collateral challenge which view finds support from

the holding of Supreme Court of Pakistan in *Pakistan International Airlines Corporation through Chairman and others v. Samina Masood and others* (**PLD 2005 Supreme Court 831**):

> *"…We are, therefore, of the considered view that when a civil servant challenges the vires of law or rule being ultra vires the Constitution without the same having been violated by the departmental authority, the remedy lies before the High Court under Article 199 of the Constitution and not before the Service Tribunal."*

20. By the impugned order dated 21.11.2022 the Deputy Commissioner Inland Revenue has held the appellant disentitled to the refund claim in respect of the period mentioned above. Since we have held that SRO 563 does not apply retrospectively and have struck down the word 'existing' in rule 39O of SRO 563, the show cause notice dated 31.5.2022 as well as the order passed by the Deputy Commissioner Inland Revenue dated 21.11.2022 are also held to have been passed without lawful authority and of no legal effect. We cannot permit the appellant to go through the rigors of long drawn litigation process for the refund claim to be made over to the appellant. The entire exercise in the issuance of SRO 563 and for it to apply retrospectively was a *mala fide* act on the part of FBR and clearly meant to deprive the appellant of its due refund claim. Therefore, we do not deem it appropriate to refuse to adjudicate and decide the instant appeal on the misplaced notion that the appellant must go through the appellate procedures provided under the law to answer the allegations made in the show cause notice which has no basis in law and is illegal.

21. In view of the above, the impugned order is set aside. It is held that:

i. SRO 563 does not apply to the refund claims of the appellant which must be processed and disbursed expeditiously under SRO 363.

ii. The impugned show-cause notice dated 31.05.2022 as well as the impugned order dated 21.11.2022 passed by the Deputy Commissioner are held to be null and of no effect.

Appeal allowed.

(RAHEEL KAMRAN) **JUDGE**

(SHAHID KARIM) **JUDGE**

Approved for reporting

JUDGE **JUDGE**

✯

Rafaqat Ali`