IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE ANWAR ZAHEER JAMALI, CJ
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE MANZOOR AHMAD MALIK

CIVIL APPEAL NOs.158 & 159/2006
(Against the judgment dated 6.1.2003 of the Lahore High Court, Rawalpindi Bench passed in W.Ps. No.542 of 1995&1220 of 1993)

Zila Council Jehlum through District Coordination Officer

...Appellant(s)
(in both cases)

VERSUS

M/s Pakistan Tobacco Company Ltd. and another . . . C.A.No.158/2006
ICI Pakistan, Soda Ash Works and another . . . C.A.No.159/2006

...Respondent(s)

* * * * *

For the appellant(s): Malik Qamar Afzal, ASC
(in both cases)

For the respondent(s): Mr. Farrukh Jawad Panni, ASC
(In C.A.No.158/2006)

Mr. Shahid Hamid, Sr. ASC
(In C.A.No.159/2006)

Date of hearing: 11.2.2016.

...

ORDER

MIAN SAQIB NISAR, J.- These appeals, by leave of the Court, entail the facts, in that, the appellant is a Zila Council constituted under the provisions of the Punjab Local Government Ordinance, 1979 *(the Ordinance)* and is empowered to levy and collect various taxes including goods exit tax *(formerly known as export tax)*, whereas the respondents operate manufacturing plants of cigarettes *(in CA No.158/2006)* and soda ash *(in CA No.159/2006)* within the territorial limits of District Jhelum. The appellant had earlier levied tax on the export of goods and animals from its territorial limits on several items including the products of the respondents in accordance with Rule 5(1) read with Rule 5(5) of the Punjab Zila Council (Goods Exit Tax) Rules, 1990. Aggrieved of the said

levy, the respondents agitated the matter through the constitutional jurisdiction of the High Court, which ultimately came to this Court and was resolved *[in the judgment reported as **Zila Council, Jhelum Vs. I.C.I. Pakistan Ltd. (Formerly ICI Pakistan Manufacturers Limited), Khewra, District Jhelum and another** **(1993 SCMR 454)**]* as under:

> *"As per the Notification dated 24-4-1990, referred to above, even goods in transit have been declared liable to payment of export tax if they remained in the limits of Zila Council beyond certain time limit which might have been fixed by now. As such, the burden of proof regarding each item of export of soda ash while in transit is on the exporter to satisfy the authorities of the Zila Council at the terminal that the goods are in transit and are being exported within the prescribed time limit. The impugned notification was not without lawful authority and the learned High Court has legally erred in declaring it as such."*

Subsequently, the respondents again approached the High Court in its constitutional jurisdiction on the ground that despite the judgment of this Court in **Zila Council, Jhelum** *(supra)* the appellant continued to raise demands for goods exit tax even on those goods with respect to which the respondents were able to furnish proof that they remained within the territorial limits of the appellant for less than 24 hours. It was during the pendency of the said constitutional petitions that the Punjab Local Government (Fourth Amendment) Ordinance, 1996 (Ordinance II of 1996) *(the Amendment Ordinance)* and then the Punjab Local Government (Fourth Amendment) Act, 1996 (Act I of 1996) *(the Amendment Act)* were promulgated on 4.2.1996 and 21.5.1996 respectively amending the definition of 'zila' in the Ordinance to include urban areas for the purposes of goods exit tax. The original and the amended definition(s) of 'zila' are reproduced herein below:-

> *Original definition*
>
> *"**3(1)(Ix)** **'zila'** means a Revenue District as notified under the Punjab Land Revenue Act, 1967 (XVII of 1967) but* ***excluding its urban areas*** *and Cantonment areas."*
>
> *Amended definition*
>
> *"**3(1)(Ix)** **'zila'** means the Revenue District as notified under the Punjab Land Revenue Act, 1967 (XVII of 1967)* ***excluding its urban areas but for purposes of tax on the export of goods and animals the zila, including its urban areas****; and"*
>
> *(Emphasis supplied)*

The effect of the amendment has been to bring the respondents within the territorial jurisdiction of the appellant for the purposes of goods exit tax *(it is undisputed that the respondents fall within the urban areas)*. It is pertinent to mention that this amendment has been given retrospective effect by virtue of Section 1(2) of both the Amendment Ordinance and Amendment Act, which *(sections)* read as follows *(as they are identical, they are being reproduced once to avoid repetition)*:-

> *"**1(2)** It shall come into force at once and shall be deemed to have taken effect on the 1st day of July 1990."*

As a result of the aforesaid developments, the respondents amended their petitions so as to challenge the amended law. It is pertinent to mention that the goods exit tax was abolished on 29.6.1999 *vide* the Punjab Local Government (Amendment for Abolition of Certain Taxes) Ordinance, 1999 (Ordinance XXIX of 1999) *(the Abolition Ordinance)*. The two main questions involved in the matter before the High Court were, firstly whether the appellant was competent to levy and recover goods exit tax from the respondents on goods in transit and secondly whether the amendment could be given retrospective effect. The learned High Court has, through the impugned judgment, answered the first question

against the respondents by holding that the appellant was authorized to levy and collect goods exit tax from the respondents' goods in transit from 21.5.1996 to 29.6.1999 *(the period between the promulgation of the Amendment Act and the Abolition Ordinance)*, whereas in the second question, it was held that the amendment could not have been given retrospective effect. Thereafter the appellant approached this Court and leave was granted *vide* order dated 31.1.2006 to consider the following propositions:-

> *"(i) Whether a legislative enactment can be promulgated with retrospective effect and if so, whether a fiscal liability can be created retrospectively?*
>
> *(ii) What is the effect of repeal of the amending statute within the contemplation of section 6 of the West Pakistan General Clauses Act, 1956?*
>
> *(iii) Whether petitioner Zila Council would be entitled to enforce the recovery of tax for the intervening period during which the law authorized it to levy and collect export tax on goods?*
>
> *(iv)Whether ICA was competent against the judgment rendered in these writ petitions by learned Single Judge and as to what is legal impact of not filing such appeal before a Division Bench of the High Court?"*

However, during the course of hearing, learned counsel for the appellant candidly conceded that the only question to be resolved in these matters is whether the amendment brought by the Amendment Ordinance would have retrospective effect or not.

2. Learned counsel for the appellant states that the goods exit tax could be validly levied and collected retrospectively in light of the judgment reported as **Zila Council, Jhang, District Jhang through Administrator and others Vs. Messrs Daewoo Corporation, Kot Ranjeet, Sheikhupura through Director Contract and others (2001**

SCMR 1012) wherein the definition of 'zila' *(as amended)* was examined. He also relied on **Zila Council, Sialkot through Administrator Vs. Abdul Ghani Proprietor Iqbal Brothers, Sialkot and others (PLD 2004 SC 425)** and **Molasses Trading & Export (Pvt.) Limited Vs. Federation of Pakistan and others (1993 SCMR 1905)** to support his contention that retrospective application of a fiscal statute is permissible. He argued that where the wording of a statute is clear, the literal meaning is to be taken and since retrospective application has been expressly provided for in Sections 1(2) of the Amendment Ordinance and Amendment Act, hence the goods exit tax will take effect from 1.7.1990. Further, the only protection which could be available to the respondents is regarding past and closed transaction(s) and this has not been proved by them. Learned counsel also argued that having collected tax from the consumer, the incidence of tax has been passed onto them, and consequently the respondents cannot retain the benefit and be enriched on that account, which *(benefit)* was the right of the appellant.

3. Mr. Shahid Hamid, learned counsel for the respondent *(in CA No.159/2006)* has categorically stated that no amount was included in the bills to the consumers nor collected from them on the basis of the goods exit tax for the period prior to 21.5.1996, the date of the Amendment Act, rather the said respondent has paid all its goods exit tax from 21.5.1996 till 29.6.1999, the date of abolishment of the said tax. In support of his contention that retrospective effect cannot be given to the amending law he relied upon the judgments reported as **Zila Council, Jhang** *(supra)*, **Zakaria H. A. Sattar Bilwani and another Vs. Inspecting Additional Commissioner of Wealth Tax, Range-II, Karachi (2003 SCMR 271)** and **Molasses Trading** *(supra)*. He further argued that considering the subsequent amendments in the law which do not provide for such retrospective effect, the intent of the legislature is clear in that it did not

want retrospective application of the said tax. Learned counsel for the respondent *(in CA No.158/2006)* has argued that the said respondent's product was sold at its retail price which is the maximum price and therefore, they could not and did not collect or pass on any goods exit tax to the consumer *(unlike sales and/or excise tax)*. He further submitted that any enactment passed during the pendency of a case would not apply to such a case unless clearly provided in the enactment itself. In this regard reliance was placed upon **Muhammad Hussain and others Vs. Muhammad and others (2000 SCMR 367), Nabi Ahmed and another Vs. Home Secretary, Government of West Pakistan, Lahore and 4 others (PLD 1969 SC 599)** and **Income-Tax Officer, Central Circle II, Karachi and another Vs. Cement Agencies Ltd. (PLD 1969 SC 322)**.

4. Heard. As conceded by the learned counsel for the appellant the foundational question involved in these cases is whether the goods exit tax could be levied and collected retrospectively by virtue of the Amendment Ordinance and Amendment Act. In order to answer this question, we find it necessary to elucidate the law regarding interpretation of fiscal statutes and retrospective operation of laws. Although the Legislature can legislate prospectively and retrospectively, such power is subject to certain constitutional and judicially recognised restrictions. According to the canons of construction, every statute including amendatory statutes is *prima facie* prospective, based on the principle of *nova constitutio futuris formam imponere debet, non praeteritis (which means 'a new law ought to regulate what is to follow, not the past' as per Osborn: Concise Law Dictionary);* unless it is given retrospective effect either expressly or by necessary implication. In other words, a statute is not to be applied retrospectively in the absence of express enactment or necessary intendment, especially where the statute is to affect vested rights, past and closed transactions or facts or events that have already occurred.

This principle(s) is attracted to fiscal statutes which have to be construed strictly, for they tend to impose liability and are therefore burdensome *(as opposed to beneficial legislation)*. Furthermore, it is not only the wording/text of the statute which is to be considered in isolation; we are not to examine *simpliciter* whether such law has a retrospective effect or not, rather it has to be examined holistically by considering several factors such as, the dominant intention of the legislature which is to be gathered from the language used, the object indicated or the mischief meant to be cured, the nature of rights affected, and the circumstances under which the statute is passed.

A bare reading of the Amendment Ordinance and the Amendment Act including the preamble and particularly Section(s) 1(2) *(reproduced above),* which is the section providing for retrospective effect, does not reflect a clear intendment or a rationale for the levy and collection of goods exit tax retrospectively through amendment of the definition of 'zila' so as to include urban areas. Rather, such amendment is a precise indication of the fact that it was perhaps done to fill in a supposed lacuna which developed as a result of this Court's judgment in **Zila Council, Jhelum** *(supra)* whereby entities including the respondents who fell outside the territorial limits of the appellant could avoid payment of goods exit tax by establishing that their goods-in-transit remained within the territorial limits of the appellant for less than 24 hours. It may be pertinent to mention here that according to the settled rules of interpretation of a fiscal part of a statute, the charging section is the key and pivotal provision which imposes a fiscal liability upon a taxpayer/person, thus it should be strictly construed and applied. If a person does not clearly fall within the four corners of the charging section of such a statute he cannot be saddled with a tax liability. Thus, mere amendment of the definition clause of 3(1)(Ix) of the Ordinance and

inclusion of the urban areas as a part of a zila for the purposes of goods exit tax, with effect from 1.7.1990 does not express a clear intent. For expression of clear intent it would be necessary to change the relevant charging provision for the purposes of retrospective tax liability. The change *ibid*, restricted as it is to a change in the definition clause, cannot be considered to reflect the requisite intendment of the legislature to impose the said tax with retrospective effect. Reliance may be placed upon the case cited as **Nagina Silk Mill, Lyallpur Vs. The Income Tax Officer, a-Ward Lyallpur (PLD 1963 SC 322)** wherein a five member bench of this Court held as under:-

> *"The Court must lean against giving a statute retrospective operation on the presumption that the Legislature does not intend what is unjust. It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair existing contracts, that the rule in question prevails. Reference may be made in this connection to page 206 of Maxwell on the Interpretation of Statutes, Eleventh Edition. Even if two interpretations are equally possible, the one that saves vested rights would be adopted in the interest of justice, specially where we are dealing with a taxing statute."*

Reliance placed upon the **Molasses Trading** case *(supra)* by the learned counsel for the appellant is misplaced as that case involved the interpretation and retrospectivity of the charging sections itself, which is not the situation in the instant matters. Furthermore, the law recognises that provisions of statute should not be read in a way that would lead to obliteration of rights and liabilities that have accrued as a result of past and closed transactions. In this respect this Court has held in **Province of East Pakistan Vs. Sharafatullah (PLD 1970 SC 514)** as under:-

> *"In other words liabilities that are fixed or rights that have been obtained by the operation of law upon facts or events for or perhaps it should be said against which the existing law*

> *provided are not to be disturbed by a general law governing future rights and liabilities unless the law so intends."*

In the case of **Molasses Trading** *(supra)*, a five member bench of this Court by a three to two majority, was of the opinion that since the Bills of Entries of the imported goods were presented prior to 1.7.1988 which was the date on which Section 31-A of the Customs Act, 1969 *(which section essentially provided for a rate of duty applicable to certain goods)* was enacted and enforced, thus they were past and closed transactions which could not be destroyed or reopened by applying Section 31-A *ibid* retrospectively. In this regard the Court held:-

> *"Inevitably therefore a vested right has been created and the transaction is closed by the quantification of the tax, if any, or by the discharge of liability on that date…Viewed in this perspective, if effect is given to the provisions of section 31-A so as to undo the discharge of the liability which had already taken effect, it will amount to re-opening a past and closed transaction. The simple reason is that under the existing law there was no further liability to pay the tax and by giving retrospective operation to the new dispensation a liability is being created for the payment of the tax. I cannot see anything in the language of section 31-A, expressly or by necessary intendment, to that effect. Such result is therefore not a necessary corollary of the fiction created by the deeming provisions of section 5 of the Finance Act, 1988. Otherwise also it will be contrary of the principle, mentioned above, namely, that liabilities once fixed or rights created by operation of law upon facts or events, must not be disturbed by a general provisions given retrospective effect unless such intention is clearly manifested by the language employed."*

In any event, as the goods of the respondents have come and gone through the terminals of the appellant in transit over several years and such goods having passed through numerous hands and being sold to

various persons including wholesalers, retailers and consumers culminating into several binding contracts prior to the amendment in the definition of 'zila', thus this is clearly a fit case of past and closed transaction(s) and it has been conceded by the learned counsel for the appellant that a past and closed transaction cannot be reopened by a retrospective interpretation of the impugned provision *(subject to the clear, unequivocal and explicit intention of the Legislature which as we have held above is not the case in the instant matters).* Viewed from this perspective, we are not persuaded to give such effect to the provisions of the amended law so as to undo all of the concluded transactions mentioned above as it would amount to re-opening of past and closed transactions and that would disrupt of rights and liabilities that have been created in the past. We observe that the finding of the learned High Court in this regard is correct.

5. With respect to the reliance placed upon **Zila Council, Jhang** case *(supra)* by the learned counsel for the appellant, suffice it to say that the following opinion of the judgment goes against the appellant, which is reproduced as under:-

> *"…thus, the question of its realization with effect from 1.7.1990 does not arise because* ***retrospective effect could be given to the definition of 'Zila' but no liability can be created retrospectively****."*
>
> *(Emphasis supplied)*

As far as the case of **Zila Council, Sialkot** *(supra)* is concerned, it may be mentioned that the earlier view of this Court in **Muhammad Hussain**'s case *(supra)* has not been taken into account, wherein while interpreting the provisions of an identically phrased section *(except for the date)* of an amendatory statute giving retrospective effect to an amendment, the Court came to the conclusion that:-

> *"However, the question which arises for consideration is, whether the words used in section 1(2) of Act X of 1992 are wide enough to take away the vested rights or to undo past and closed transactions. In our view, by merely providing in subsection (2) of section 1 ibid that the "provisions of the Act shall be deemed to have taken effect from 31-12-1991", the suits already filed in accordance with the existing provision of section 31 of Act of 1987 could not be rendered not-maintainable."*

Obviously, on this account the judgment of **Zila Council, Sialkot** *(supra)* is *per incuriam*, as it has failed to take into consideration the principles of interpretation laid down by this Court to the effect that while the Legislature can enact statutes retrospectively, where the vested rights of certain persons may be affected, such retrospective enactments must be construed strictly. This principle has been succinctly enunciated by the five member bench of this Court in **Muhammad Hussain** *(supra)* as follows:-

> *"It is a well-settled principle of interpretation that there is a strong presumption against the retrospectivity of a legislation which touches or destroys the vested rights of the parties. No doubt the Legislature is competent to give retrospective effect to an Act and can also take away the vested rights of the parties, but to provide for such consequences, the Legislature must use the words which are clear, unambiguous and are not capable of any other interpretation or such interpretation follows as a necessary implication from the words used in the enactment. Therefore, while construing a legislation which has been given retrospective effect and interferes with the vested rights of the parties, the words used therein must be construed strictly and no case should be allowed to fall within the letter and spirit of Act which is not covered by the plain language of the legislation."*

Additionally, the learned counsel for the appellant has not been able to show us any evidence to the effect that any amount(s) of the disputed tax

was/were collected by the respondents from the consumers on the basis of goods exit tax for the period prior to 1.7.1996. Even otherwise, we find it contrary to logic and fail to understand as to how the respondents could have conceivably collected from and thereby passed on the incidence of such tax to the consumers, when it was not even levied and payable as per the law at that time *(prior to the amendment)* by the respondents who, being in the urban areas, stood excluded from the territorial ambit of the appellant as per the earlier definition of 'zila'.

6. In view of the foregoing, we find that the goods exit tax cannot be levied with retrospective effect in the circumstances, and the learned High Court was correct in so holding.

7. For the aforesaid detailed reasons the appellant's civil appeals were dismissed vide short order of even date, which reads as:-

> *"Arguments heard. For reasons to be recorded separately, these appeals are dismissed."*

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

JUDGE

Islamabad, the
11th February, 2016
Approved For Reporting
*Ghulam Raza/**