IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, CJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE IJAZ UL AHSAN

CIVIL APPEALS NO.633 TO 637 OF 2007 **AND**
CIVIL APPEALS NO. 130 TO 145 OF 2009 **AND**
CIVIL APPEALS NO. 68-70 OF 2011 **AND**
CIVIL APPEAL NO. 1229 OF 2013 **AND**
CIVIL APPEALS NO. 158 TO 160, 983 TO 999 & 1025-1026 OF 2015 **AND**
CIVIL APPEALS NO. 1337 & 1353-1356 OF 2016 **AND**
CIVIL APPEALS NO. 172-174 OF 2017 **AND**
CIVIL PETITIONS NO. 261-P TO 265-P OF 2011 **AND**
CIVIL PETITIONS NO. 3697 & 3698 OF 2016

(on appeal from the judgments/orders dated 19.10.2006, 21.02.2002, 03.06.2002, 3-7-2002, 17-7-2003, 25.11.2004, 3-2-2005, 23-12-2005, 28-4-2006, 25-2-2003, 9-10-2003, 3-9-2003, 10-3-2004, 18-12-2009, 30.5.2013, 04.02.2016, 30.04.2015 ,14.05.2015, 27.05.2015, 28.01.2016, 14.01.2016, 20.07.2016, 24.02.2011, 13.10.2016 of the Peshawar High Court, Peshawar passed in W.P. Nos.1669/2004, 53/2006, 154, 1846 , 2023 /2005, 988/2001, 226/2002, 594/2003, W.P.1443/2003, 1826, 453, 453/2004, 589/2005, 657/2002, 662/2002, 1148/2002, 118/2003, 872/2003, 796/2003, 1008/2003, 1824/2004, 1134/2004, 1191/2004, 1246/2004, 1506/2001, 157 &158/2005, 854-P /2006, 1830-P /2014, 192-P,195-P, 194-P, 221-P/2015, 916-P to 917-P, 919-P, 920-P/2013,1644-P/2014,190-P/2015,2195-P,2196-P/2012,1831-P/2014, 191-P /2015, 193-P, 222-P/2015, 3643-P/2012,3644-P/12,220-P/2016, 3525-P, 3526-P/2015,5-P/2016, R.P.8/2016 In W.P.3526-P/2015, 2751-P, 2752-P, 3776-P /2015, 1845/05, 2212/06, 2213/06, 535,536/07, 2952-P and 2953-P /2016)

Pakistan through Chairman F.B.R. & others	(in CAs 633-637/07, 134/09)
Pakistan through Chairman Revenue etc.	(in CAs 130/09)
The Collector Customs etc	(in CAs 131 and 135/09)
Collector of Central Excise and Sales Tax and others	(in CAs 132/09)
Collector of Customs, Peshawar	(in CAs 133,142 to 144/09)
Govt. of Pakistan thr. Secy. Revenue Div. Islamabad and others	(in CAs 136/09)
M/s. Lal Ghee & Oil Mills Pvt. Ltd.	(in CAs 137/09, 158-160/15)
Collector of Customs & Central Excise & others	(in CAs 138/09)
The Central Board of Revenue & others	(in CAs 139 to 141/09)
Pakistan through Secy. Finance & others	(in CAs 141/09)
Govt. of Pakistan thr. Chairman Central Board of Revenue and others	(in CAs 145/09)
M/s Saadat Ghee & Oil Mills Pvt. Ltd.	(in CAs 68 to 70/11)
Commissioner Inland Revenue, RTO, Peshawar	(in CAs 1229/13, 983-999, 1025-

& others	1026, /15)
Federal Board of Revenue thr. its Chairman, Islamabad	(in CAs 1337/16, 174/17)
M/s Roshni Mate Industries	(in CP 261-P/11)
M/s Excellence Plastic	(in CPs 262-P, 263-P/11)
M/s Star Plastic Industries	(in CPs 264-P, 265-P/11)
The Chief Commissioner Inland Revenue, Regional Tax Office, Peshawar and another	(in CAs 1353-1356,172,173/16 & C.P.s 3697 & 3698/16)
	...Appellants/ Petitioners

VERSUS

Hazrat Hussain and others	(in CAs 633/07)
M/s Naveed Ghee Industries (Pvt). Ltd.	(in CAs 634/07)
M/s Lal Ghee Oil Mills (Pvt). Ltd.	(in CAs 635/07, 1337/16)
Roshni Mat Industries thr: Gul Sher, Proprietor	(in CAs 636/07)
M/s Nafees Plastic Industries	(in CAs 637/07)
M/s Gul Cooking Oil & Vegetable Ghee Dargai	(in CAs 130/09)
M/s PATA Packages & another	(in CAs 131/09)
Allied Rubber (Pvt.) Ltd.	(in CAs 132 and 142/09)
M/s Malakand Ghee & Oil Mills (Pvt.) Ltd. and others	(in CAs 133/09)
M/s Taj Vegetable Oil Processing Unit (Pvt.) Ltd.	(in CAs 134 and 145/09)
M/s Afridi Poly Propylene Industries (Pvt.) Ltd. and another	(in CAs 135 to 136/09)
Pakistan thr. Chairman CBR.& others.	(in CAs 137/09)
M/s Gul Cooking Oil & Vegetable (Pvt) Ltd.	(in CAs 138/09)
M/s Gul Cooking Oil & Ghee Mills Ltd. & another	(in CAs 143/09)
M/s Bara Ghee Mills (Pvt) Ltd.	(in CAs 139/09)
M/s Saadat Ghee Mills (Pvt) Ltd.	(in CAs 140/09)
Mahsood Ghee Industries (Pvt) LTd. & others	(in CAs 141/09)
Inamullah Khan Afridi	(in CAs 144/09)
Government of Pakistan thr. Secretary, Revenue Division & others	(in CAs 68 to 70/11 and 158 to 160/15)
M/s Cherat Cement Company Ltd & another	(CAs 1229/13)
M/s Sher Steel Furnace and Re-Rolling Mills & others	(in CAs 983 & 996/15)
M/s AK Tariq Foundry & others	(in CAs 984 & 998/15)
M/s Mohmand Moulding Works & others	(in CAs 985 to 986/15)
M/s Al Haj Foundry & others	(in CAs 987 & 999/15)
M/s Taj Packages Company Pvt Ltd & others	(in CAs 988 to 989/15)
M/s Taj Wood Board Mills (Pvt) Ltd & others	(in CAs 990-991/15)
M/s Taj Re Rolling & Steel Mills Pvt Ltd & others	(in CAs 1353-1354, 1356/16)

Umar Zada & others	(in CAs 992/15)
M/s Universal Steel Mills & others	(in CAs 993 & 997/15)
M/s Brilliant Plastic Manufacturer & others	(in CAs 994-995/15)
M/s Eagle Plastics Industries & others	(in CAs 1025-1026/15)
M/s Wasim Sharif Industries (Pvt) Ltd & others	(in CAs 1355/16)
M/s GMS Steel Foundry and others	(in CAs 172 to173/17)
M/s Muslim Steel Mills and others	(in CAs 174/17)
The Collector Custom & others	(in CP 261-P/11)
The Commissioner of Income Tax & others	(in CP 262-P, 264-P/11)
The Collector Sales Tax & others	(in CP 263-P, 265-P/11)
M/s Aitamad Steel Furnace and re-rolling Mills Ameerabad thr. its Director , Peshawar	(in CP 3697/16)
M/s Gul Shehzada Steel Mills thr. its Manager Import and others	(in CP 3698/16)

...Respondent(s)

For Appellant/Pet.(s):	
(in CA 633/07)	Mr. Khalid Abbas Khan, ASC
(in CAs 633-637/07 and 130-136,138-140/09)	Hafiz Ahsan Ahmad Khokhar, ASC
(in CAs 68-70/11 & 158-160/15)	Mr. Isaac Ali Qazi, ASC. Mr. M. S. Khattak, AOR.
(in CAs 1229/13)	Dr. Farhat Zafar, ASC. Mr. M. S. Khattak, AOR.
(in CAs 983-999/15, 1025, 1026/15 & 1337/16, 1353-1356/16 & C.P.s 3697 & 3698/16)	Mr. Ghulam Shoaib Jally, ASC. Syed Rifaqat Hussain Shah, AOR.
(in CAs 172-174/17)	Mr. Rehmanullah, ASC.
(in CAs 135,136/09)	Raja M. Iqbal, ASC. Raja Abdul Ghafoor, AOR.
(in CA 137/09)	Mr. Shumail Butt, ASC Mr. Tariq Aziz, AOR
(in CA 141/09)	Mr. Ahmed Raza Kasuri, Sr. ASC.
(in CP 261-265/11)	Nemo.
For the Respondent(s):	
(in CAs 983,996/15)	Mr. Khalid Anwar, Sr. ASC.
(in CAs 984-999/15 & 1025-1026/15 & 1229/13)	Mr. Issac Ali Qazi, ASC. (also in CA 134/09)

	Raja M. Iqbal, ASC.
(in CPs 263-P,265-P/11)	Dr. Farhat Zafar, ASC.
(in CPs 1353-1356/16)	Mr. Shumail Butt, ASC.
(in CAs 158-160/15)	Mr. Ghulam Shoaib Jally, ASC. Raja M. Iqbal, ASC. Mr. Farhat Nawaz Lodhi, ASC. Raja Abdul Ghafoor, AOR.
(in CA 137/09)	Raja M. Iqbal, ASC.
(in CAs 633,634,636 and 637/07 and 130-133/09)	Nemo.
(in CAs 635/07 & 137/09)	Mr. Shumail Butt, ASC.
(in CA 68-70/2011)	Mr. Habib Qureshi, ASC.`
On Court's notice	Mr. M. Waqar Rana, Addl. AGP.
Date of Hearing:	14.12.2017

JUDGMENT

MIAN SAQIB NISAR, CJ.- All these appeals with leave of the Court *vide* orders dated 15.1.2007 and 27.1.2009 involve akin questions of law, thus are being disposed of together. The facts relating to the present controversy can be set out within a brief compass by making reference to one appeal. The respondent No.1 in Civil Appeal No.983/2015 *(the respondent)* is carrying on the business of operating a steel furnace and re-rolling mill. Pursuant to the said business it imports iron and steel remeltable scrap from time to time as also machinery and plant. The importation takes place through the port of Karachi. At the time of importation, the respondent files the appropriate goods declaration along with each consignment *(Goods Declaration)*. In terms thereof, the respondent claims an exemption in relation to both advance income tax as well as sales tax on the ground that its plant is located in Dargai, Malakand Agency which is part of the Provincially Administered Tribal Areas *(PATA)*. The respondent does not dispute its liability to

pay Customs duty and thus there is no controversy regarding the same. The Goods Declarations filed in the present case clearly show that the customs duty has been duly paid. However, insofar as the advance income tax and sales tax are concerned, the same are strongly contested on the anvil of Article 247(3) of the Constitution of the Islamic Republic of Pakistan *(the Constitution)* which is reproduced below:-

> "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 situated, 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."

2. The Customs Department, however, refused to accede to the request of the respondent. Its stance was that both advance income tax and sales tax were payable under the Customs Act, 1969 *(Customs Act)* and accordingly the respondent, having no other effective, efficacious and expeditious remedy available to it, invoked the jurisdiction of the learned Peshawar High Court. The petition filed by it was ultimately succeeded, as further explained hereinafter. The Chief Commissioner, Inland Revenue *(appellant)* challenged this decision by filing petition for leave to appeal before this Court, which *(leave to appeal)* was granted and pursuant thereto the case has come up before us for final decision.

3. The case of the appellant is best set out in terms of the para-wise comments filed by it before this Court and the opening ground contains the following passage:-

> "That the petitioner (i.e. the Respondent herein) cannot claim territorial/constitutional exemption of sales tax on imports of raw materials/machinery as the activity "taxable imports" is taking place in the area to which tax laws are fully applicable irrespective of its transportation to taxable or non-taxable areas. Besides, the ruling of the Supreme Court of Pakistan in the judgment passed in the case of Master Foam (Pvt.) Ltd. as well as the ratio decided in Review Order dated 5.3.2007 in the case of Gul Cooking Oil this Honourable Court has also settled the matter in question, therefore, re-agitating the same at this stage and before this Honourable Court is extremely unwarranted. Consequently, the demand of sales tax at import stage is based upon the interpretation of apex court in the respective and concurrent decisions and the constitution as well. The charging and collection of sales tax on imports is not discriminatory or confiscatory as the petitioner had to add the element of sales tax being an indirect levy in the cost of finished products on its sales depending upon the market conditions."

4. As against the above argument the contention of the respondent is that the immunity granted to it under Article 247(3) of the Constitution cannot be taken away by the Department. This is the critical area of dispute between the parties which we have to decide.

5. We begin with the admitted position that the Customs Act applies in the matter. This is because, irrespective of the question as to whether the Customs Act applies to PATA or not,

there can be no doubt about the fact that it applies in Karachi which is the port of the importation of the goods. The above being the admitted position we now have to determine on what basis income tax and sales tax can be demanded from the respondent under the Customs Act. The applicable section in this regard of the Income Tax Ordinance, 2001 *(Income Tax Ordinance)* is Section 148 and the relevant provisions thereof are reproduced below:-

> "148. Imports (1) The Collector of Customs shall collect Advance Tax from every importer of goods on the value of the goods at the rates specified in Part-II of the First Schedule.
>
> ……..
>
> (5) Advance Tax shall be collected in the same manner and at the same time as the customs-duty payable in respect of import or, if the goods are exempt from customs duty, at the time customs-duty would be payable if the goods were dutiable."

The above provisions *prima facie* create the jurisdiction entitling the Customs Department to demand advance income tax from the importers.

6. Sub-section (1) thereof makes it clear beyond any iota of doubt that what is being collected by the Collector of Customs is advance income tax and not customs duty. This is a point of critical importance. Sub-section (5) *ibid* further clarifies that the role of the Customs Department is essentially that of a collecting agency. It has been statutorily conferred the power to collect advance income tax for and on behalf of the Income Tax Department. It is here that the appellant comes up against a constitutional barrier. It is not denied that the income tax law does not apply for, and in relation to PATA. Section 148 is an integral

part of the Income Tax Ordinance. Since the Income Tax Ordinance does not apply in toto it necessarily follows that Section 148 thereof will also not apply for, and in relation to, PATA. Thus, *ex facie*, the Department lacks the jurisdiction to collect advance income tax under the said section.

7. We now turn to the issue of demand for sales tax. The applicable provision of the Sales Tax Act, 1990 *(Sales Tax Act)* is Section 3 and the relevant part thereof is reproduced below:-

> "Scope of Tax. (1) Subject to the provisions of this Act, there shall be charged, levied and paid a tax known as sales tax at the rate of 17% of the value of—
>
> (a) taxable supplies made by a registered person in the course or furtherance of any taxable activity carried on by him;
> (b) goods imported into Pakistan."

Section 3 *(ibid.)* has to be read in juxtaposition with Section 6 of the Sales Tax Act and the relevant part thereof is reproduced below:-

> "6. Time and manner of payment. (1) The tax in respect of goods imported into Pakistan shall be charged and paid in the same manner and at the same time as if it were a duty of customs payable under the Customs Act 1969 and the provisions of the said Act including section 31A thereof, shall, so far as they relate to collection, payment and enforcement including recovery of tax under this Act on such goods where no specific provision exists in this Act, apply."

It may be observed that this section is a parallel section to the provisions contained in Section 148(1) and (5) of the Income Tax Ordinance. What is important to note here, once again, is that what has to be collected under Section 3 (1)(b) is not customs duty;

it is, and throughout remains, sales tax which is leviable on the imports of goods into Pakistan. It is merely that the machinery provisions of the Customs Act, insofar as they relate to the payment and recovery of tax under the said Act, have been made applicable.

8. Thus, in brief, both the Income Tax Ordinance and the Sales Tax Act contain provisions which enable the machinery of the Customs Act to be made applicable and also create jurisdiction in the Collector of Customs for the purpose of recovery of both advance income tax as well as sales tax. Both laws are clear beyond any dispute on the point that by so doing what is being collected is not customs duty but respectively income tax and sales tax.

It follows that by a parallel set of reasoning, as has been set out hereinabove, in relation to income tax, that the provisions of the Sales Tax Act will also not justify the levy and collection of sales tax on goods meant and intended for PATA. There is no dispute, as pointed out above that neither the Sales Tax Act nor the Income Tax Ordinance applies in relation thereto.

9. The above is the constitutional and legal background of the matter. The principle is clear, beyond any doubt. However, what has still to be resolved is the modality in terms of which this principle is to be applied. On the one hand the appellant claims that since the goods are being imported through Karachi, they are entitled to recover not merely the customs duty but also the income tax and the sales tax, since it is not known as to whether the goods will actually be delivered to PATA and processed and sold therein or not. That is a pure question of fact. No interpretation of law is involved therein. *The mere fact that a*

question of fact arises will not create a non-existent jurisdiction in the Revenue. As against this the stance of the respondent is that it is, as a matter of fact, transporting the imported scrap from Karachi to PATA, utilizing it therein for the purposes of manufacture of the goods made by it and thereafter the same are being sold in PATA.

10. We have to resolve this dilemma. While the entitlement of the respondent is clear, on the constitutional plane, there is also no doubt about the fact that the Department is entitled to conduct an investigation on the factual plane to determine whether the goods are indeed intended for PATA and whether thereafter these are processed and sold also in PATA. Bearing in mind the conflicting stands of the parties, the learned Peshawar High Court, by means of the impugned judgment, set out a mechanism for resolving the factual dispute. In essence, it provided that the respondent shall initially prepare and deposit a post-dated cheque in favour of the Department. Thereafter, on receipt of the cheque the Department releases the goods without insisting on payment of the claimed amnesty of tax. An elaborate procedure of checking and verification is carried out. This is illustrated by a set of documents which has been made part of the record and is available in CMA No.752 of 2015. The basic document is a letter addressed by the respondent to the Commissioner Inland Revenue bearing the heading “Request for issuance of consumption certificate.” The letter sets out the details of the raw materials which have been imported for utilization in the factory located in PATA. It ends with a request to the Commissioner Inland Revenue that he should verify the arrival of the above consignment at the factory, as well as its consumption therein, and issue consumption

certificates. Attached to the letter are a set of documents. These include the Goods Declaration filed with the Customs Department, the documents showing the production and consumption of material, the stock report of raw material, the stock report of finished goods, the statement of production and the statement of sale. The list of dealers is also shown to whom the sales have been made. Then follow up details in relation to the abovementioned transactions. The documents include the names of the firms to which the goods are sold and the amount recovered therefrom. There is also a date-wise statement showing the opening balance of raw materials, a receipt of raw material including the transportation documents, and the gate passes along with the quantities. Further particulars which are contained therein are the waste percentage, the quantity of goods in process, the quantity of material actually consumed, the quantity of goods produced/manufactured with the number of packages and the closing balance. The final document is a certificate issued by the Commissioner of Inland Revenue in response to the above mentioned documents which have been received by him and duly processed. It states that the arrival and consumption of the material was verified from the record by the audit staff of the Department, who has confirmed that the goods have arrived at the factory premises and have been processed therein. It is further certified that the imported goods have been consumed in the production of finished goods in the premises of the respondent in Dargai, Malakand Agency. This consumption certificate is, it is important to note, only issued after the sale has taken place to the buyers whose names and details of sales have been set out in the accompanying documents, which we have already referred to

hereinabove. It is a significant fact of the utmost importance that throughout the period in which the respondent was carrying on business, this process and procedure was carried out smoothly and at no point of time, including up until now, was there any discrepancy found in the documents and, indeed, it is not the case of the Commissioner Inland Revenue, that the raw materials imported have not been consumed at the factory at PATA and sold again in PATA, as evidenced by the documentation referred to hereinabove.

11. In the above circumstances, we are at a loss to understand why and how, on the factual plane, the present appeal has been filed. The learned counsel appearing on behalf of the respondent has raised a strong objection in relation thereto. On the face of it we are inclined to agree with him. It is to be noted that appeals should not be filed as a matter of routine or because a decision has been rendered against the Department. Decisions should be taken on a reasonable basis. It is not advisable for government departments to waste public time and money by filing appeals routinely. In the present case we have been informed that the respondent has suffered substantial financial loss since the factory was shut down for over a year as a consequence of the *ex parte* stay order obtained by the Department. This must have had serious consequences for the workers who lost gainful employment. The position would have been different if the respondent had been engaged in an illegal activity but that is not the case pleaded by the Department. The net result is that citizens of Pakistan have suffered substantial financial losses with no corresponding benefit to the Revenue Department. This can only be described as an undesirable status of affairs. When we raised

these questions the only response given on behalf of the Department was that the legal issues were involved especially those reported in the two main judgments, namely **Commissioner of Income Tax, Peshawar Vs. Gul Cooking Oil and Vegetable Ghee (Pvt.) Ltd (2008 PTD 169 Supreme Court)** and the case of **Master Foam Pvt. Ltd. Vs. Government of Pakistan (PLD 2005 SC 373)**. Accordingly, it is necessary that we should set out our views in relation thereto. Prior to doing so, it is imperative to summarize concisely the principle of law which is applicable on the conceptual plane. The Department lacks the jurisdiction in relation to an activity taking place in PATA. It does, however, have jurisdiction to carry out an enquiry in the settled areas of Pakistan where the tax laws apply. Thus the initial burden of proof rests on the importer to establish that the goods are intended for PATA and once that has been discharged, the burden shifts to the Department to establish that a fraud has been committed and the goods have, in fact, been processed or sold in the areas where the tax does apply. Unless it discharges that burden, it cannot raise demands against the importers. This principle safeguards the interests of both sides.

12. We now propose to discuss the case law. Before that, however, we would like to express our appreciation for the judgment of the Peshawar High Court *(authored by Yahya Afridi, J.)* which has not only set out the factual and legal contentions raised by both parties but has also summarized the applicable case law in the body of the judgment. This has saved us a great deal of time.

13. The **Gul Cooking Oil's case** *(supra)* went through three stages. The first was before the Peshawar High Court. The case pertained to a factory located in the Malakand Division and the

question was about recovery of advance income tax at the stage of importation of the goods into Pakistan. The notices issued to the company by the Department under sections 56 and 61 of the Income Tax Ordinance were declared illegal and a direction was given that the raw material of the company should be released without deducting withholding tax at the import stage. The second stage was when an appeal was lodged before the Supreme Court. The judgment in this case is reported in **(2003 PTD 1913 = PLD 2003 SC 614)**, whereby the judgment of the High Court was maintained. This judgment was delivered on 25.4.2003. The final stage was when a review petition was filed and for purposes of disposal of the matter a larger bench of five members was constituted. This judgment is reported in **(2008 PTD 169)** and was strongly relied upon by the Department.

14. In our opinion, the judgment does not support the stance adopted by the Department in the present case. In the first place it should be noted that the judgment expressly accepts the legal position as stated by the High Court and as also stated hereinabove. This is so clear from the following extract of the judgment:

> "16. There is no cavil to the legal position that exemption under the law from payment of income tax is available to a person or company carrying its business in tribal areas and income tax cannot be collected from such person or company by the tax collecting authorities of the Government unless the law relating to the collection of income tax is extended to the tribal areas by virtue of article 247 of the constitution……"

Secondly, the judgment goes on to state what it considered to be the real question which was to be decided in that case. The following extract indicates the said question:-

> "16……The exemption from payment of tax is certainly available on the business being carried in the tribal area in which income tax law is not applicable but the real question for determination in the present case would be that a company with its manufacturing unit and registered office in non-taxable area, if is also carrying business in taxable area, is exempted from payment of Income Tax of its income ***as a whole or only on the income being derived from the non-taxable areas.***" [Emphasis supplied]

In the above circumstances, the case was remanded to the Department to determine this question of fact. The findings on the legal aspect of the case were left untouched. We may note, in passing, at this point, that the facts of the present case are different. As the sequence of the events which has been set out hereinabove makes clear, the business in the present case was being carried on exclusively in PATA where both the factory is located and also where the sales take place. This case therefore is of no help to the Department.

15. The second main case on which reliance is placed is **Master Foam's case** *(supra)*. *(We may note that the High Court judgment under appeal incorrectly identifies the Master Foam judgment as having been delivered by a five members Bench. It was in fact a three members Bench.)*

16. The facts of **Master Foam's case** are clearly distinguishable since in that case the business was being carried on in Azad Jammu & Kashmir *(AJK)* which is, of course, technically an independent state with its own laws which is partially

administered by Pakistan *(as per Article 31(3) of the Azad Jammu and Kashmir Interim Constitution Act, 1974)*. The question in dispute related to the payment of sales tax at Karachi Port at the import stage. The demand was made in terms of section 3(1)(b) of the Sales Tax Act. At this point of time it is necessary to refer to a significant feature of the laws of AJK. In terms of the Sales Tax (Adoption) Act, 1993 *(Sales Tax (Adoption) Act)* it is provided in terms of section 2(4) as follows:-

> "In determining the input tax under sub-section (1) the amount paid as input tax at the import stage to the Customs authority in Pakistan shall be deemed to have been paid in Azad Jammu and Kashmir for the purpose of adjustment against the tax liability on the finished goods."

In our opinion there can be little doubt about the fact that this provision of law is both significant and detrimental to the case pleaded on behalf of the company. The grievance being made was that sales tax should not be charged on the goods since they were merely in transit through Pakistan. However, the feature which now emerges is that since the goods were intended for AJK the consequence of the above section 2(4) is that the amount paid to the Pakistan Customs would be deemed to have been paid to the AJK Government under the Sales Tax Act applicable therein. It would seem to follow that the company would not have a genuine cause of action in relation to the levy of the sales tax in Pakistan since in fact that tax would be deemed to have been paid to the AJK Government. Admittedly, the company was subject to the jurisdiction of the AJK Government and the provisions of the Sales

Tax (Adoption) Act applied to it. The question as to whether or not the company would be entitled or able to claim a refund from the AKJ Government relates only incidentally to Pakistan. The Company relied on an exemption notification issued by the AKJ Government and contended that it would be nullified if sales tax were levied on its goods by the Government of Pakistan. However, this by no means follows as a logical consequence. In fact, the finding on this point in the judgment is to the contrary: “The appellants have been granted sales tax exemption in AJK on the goods manufactured by them there. There is no exemption on import of raw material. In other words, they have been granted exemption only on the value addition they made to the raw material.” Thus theoretically it was possible for the matter to have been decided on this point. However, the reasoning in the judgment traverses a much wider field of enquiry. It relates to legal issues as well as to the question of constitutional interpretation.

17. The legal issue which was primarily raised on behalf of the company was as to the true meaning of the word “import”. Does the word import mean simply the passing of the goods into the territories of Pakistan i.e. by crossing the frontier, or, does it has a more extended meaning as was contended on behalf of the company i.e. that import means not merely the physical crossing of the goods but the entire legal procedure of importation including compliance with all the requisite formalities and excludes goods in transit. The specific contention which was raised was that goods which are in transit should not be considered as having been imported into Pakistan. After considering the matter in some depth, eventually the Court rejected the contention. Instead of giving a wider meaning to the term import it relied on the narrower

interpretation in terms of which import merely means the bringing of the goods into the country. For this purpose reliance was placed on an earlier decision of this court reported as **Pakistan Textile Mills Owners Association Karachi versus Administrator of Karachi (PLD 1963 SC 137)**. A number of decisions from the Indian jurisdiction were also considered and the contention raised on behalf of the company was rejected. The case law emanating from the United States was also taken into consideration while doing so. In our opinion the decision taken as to the meaning and concept of import in the **Master Foam's case** is correct and is to be followed. However, this does not end the matter. The Court then decided to embark upon the wider constitutional issue which perhaps it was not essential to do in the facts of that case.

18. In this connection, the Attorney General appearing on behalf of the Government referred to the case reported as **WAPDA versus Collector of Central Excise and Sales Tax (2002 PTD 2077 at 2082)**. Paragraph 11 thereof is reproduced below:-

> "11. … … The subject of sales tax was on the Provincial Legislative List at Serial No.48 in the Government of India Act, 1935 and was described as "Taxes on sales of goods and on advertising". In the Constitution, 1956, "tax on sales and purchases" was mentioned at Serial No.26 of the Federal Legislative List, and therefore, for the first time it became a Federal subject. The position was maintained in 1962 Constitution, which mentioned "tax on sales and purchases" on the Federal Legislative List as clause (j) at Serial No.43 in the Third-Schedule. In 1973 Constitution as originally adopted 'tax on sales and purchases' was kept on Federal Legislative List at Serial No.49 of Part I of the Federal Legislative List given in the Fourth Schedule. The item was, however,

completely substituted by Constitution 5th Amendment Act, 1976 with effect from September 13, 1976 to read "Taxes on sales and purchases of goods imported, exported, produced, manufactured or consumed". The second half of the amended entry appears to have been taken from the amendment made in Sales Tax Act, 1951 by Finance Ordinance, 1960. Through that amendment the words "consumption of goods" in the preamble were substituted by "importation, exportation, production, manufacture or consumption"."

19. The finding of the Court thereon is set out in para 20 of the **Master Foam's case** which is reproduced below:-

"20. The Act of 1990 was introduced as an amendment to the Act of 1950 vide section 13 of the Finance Act, 1990 which substituted chapters 1 to 16 of the Sales Tax Act, 1951 with the chapters set out in the Third Schedule to the Finance Act, 1990. Further, the preamble to the Sales Tax Act, 1951 was not substituted and was retained as the preamble to the Act of 1990. Relevant part of section 3 of the Act of 1951 reads as follows:-

3.(1) There shall be levied and collected a tax on the value of ---

(a) All goods produced or manufactured in Pakistan payable by the manufacturer or producer;

(b) All goods imported into Pakistan payable by the importer… ."

It is noted that anomaly in the law with reference to tax was rectified by replacing the original Entry 49 with the present one quoted above and this intent was noted in the case reported as 2002 PTD 2077. *Now as a result, import, export, production, manufacture and consumption are distinct taxable events*

> *independent and irrespective of sales of goods*. It is thus clear that the purpose of substituting of original Entry 49 with the present one was to expand its scope so as to include, *inter alia*, import as a separate taxable event as had been the position under the Act of 1951." *(Emphasis supplied)*.

20. The legislative history of the constitutional status of sales tax and the meaning to be applied thereto has been set out in the above. Thereafter, the further history of the constitutional amendments for, and in relation to, sales tax have been discussed. It has been noted that by means of the Finance Act, 1990 a thorough revision of the law was carried out in the Sales Tax Act, 1951. The argument was thereafter further developed in the following terms:-

> "29. Close scrutiny of Entry 49 and other laws referred to above reveal that acceptance of appellants' argument that Entry 49 authorizes tax on import only when it is followed by sale or purchase in Pakistan, will render the words 'imported, exported, produced, manufactured or consumed' redundant and also frustrate the whole purpose of substituting present entry for the original Entry 49, and the amendment inconsequential. If sale and purchase alone was taxable events, as argued by the learned counsel for the appellants, then there was no point in adding the words 'imported, exported, produced, manufactured or consumed'. *Clearly, no redundancy can be attributed to the Legislature and on this ground the argument of the appellants is repelled. It is also to be noted that, if above argument of the appellants is accepted, a situation would arise where import into Pakistan may not be taxed at all*. Besides, while examining the validity of a statute, the principle is that there is a presumption of constitutionality of a statute and that every explanation in favour of a statute must be found. Keeping in view the complexity of

> economic problems, great latitude is shown in favour of fiscal statutes." [Emphasis supplied]

21. It will be perceived that the central argument which was developed was that if we accept the proposition that sales tax on imports can only be levied when it is followed by sale or purchase in Pakistan the result will be to render the words "imported, exported, produced, manufactured or consumed," redundant. It was further urged that this would frustrate the whole purpose of substituting the present entry for the original entry 49 and make the amendment inconsequential and irrelevant.

22. The argument needs to be examined closely. To make the point clearer let us re-visit for a moment the earlier paragraph reproduced in para 17 above which essentially makes the point that the original entry in the constitution which was "tax on sales and purchases" would, in effect, be *restored* if the interpretation being advanced on behalf of the Company was accepted. In other words, the argument was based on the concept of redundancy.

23. But is this contention correct? A critically important aspect which has been missed in the above interpretation needs to be examined. What the Court, with all due respect, failed to notice was that the original Entry "taxes on sales and purchases" had one very important implication which seems to have completely eluded it. "Taxes on sales and purchases", as the Entry originally stood, has a wider connotation. Sales and purchases may not be merely of goods but *also of services*. Thus, prior to the making of the 5th Amendment to the Constitution in 1976, Entry 49, being open ended was wide enough to comprehend both the sales of goods and also sales of services. The fact that sales tax on services was, or

was not, imposed by the Legislature at that time is not relevant. The Entry was wide enough to cover both classes of sales. *However, after the 5th Amendment, the scope of the Entry was narrowed down to goods and only goods*. There is, therefore, no redundancy. With profound respect, the finding of the Court cannot be sustained on the plane of principle.

24. We can develop the principle further. The new Entry, as introduced in 1976, can now be analyzed further. It can be perceived that the Entry falls, broadly speaking, into two parts:

(i) The first part is the opening phrase "Taxes on the sales and purchases of goods". This phrase controls the ensuing second part.

(ii) The second part essentially answers the question as to which categories of goods are subject to the levy of sales tax. The answer is (a) goods which are imported, (b) goods which are exported, (c) goods which are produced, (d) goods which are manufactured, and finally, (e) goods which are consumed. In other words, the entire range of goods is covered. There is no redundancy.

25. The point can be re-stated from a different perspective by clarifying that the words "imported, exported manufactured, produced or consumed" *qualify the word "goods*". The goods are those which fall in the categories set out in the above, which are all covered. Neither the rules of syntax nor of grammar justify any other interpretation. The use of these words, does not, and cannot, alter the basic fact that *the levy is, and remains*, *on the sales and purchases of goods*. This is the essence of what a sales tax is, as is obvious from the lexical meaning of the term. It is *not* a tax on

import of goods, *per se* – that is levied by Entry 43 i.e. customs duty. Nor is it a tax on the manufacture or production of goods *per se* – that is excise duty, which is levied under Entry 44. *If the discussion is to centre around the doctrine of redundancy then this over-broad interpretation of sales tax leads to Entry 43 and Entry 44 becoming redundant which surely is a consequence which cannot be countenanced.* Can it seriously be contended that those words were added to Entry 49 so as to lead to the implied removal of the need for Entry 43 and 44. The question answers itself. The import of goods always has been, and is still, subject to customs duty. This is the normal structure of the Constitution of Pakistan and it is a normal structure of other constitutions also. Duties on import are called customs duty. They have been levied over the centuries in different Countries around the world. They have always been one of the principle modes of collection of revenue. Their importance cannot be underestimated.

The allied concept which requires consideration relates to duties on production or manufacture. These are covered by Entry 44 which deals with duties of excise. Excise duties have traditionally been duties which have been imposed on the act of manufacture or production. This has been true for a long period of time and reference may be made, by way of illustration, to the Central Excises and Salt Act, 1944, as well as its legislative predecessors. Thus the structure of the Constitution now becomes clear in relation to the all important fiscal entries. Entry 43 primarily relates to customs duty i.e. duties on importation, Entry 44 relates to excise duty or duties on manufacture or production and Entry 49 relates to duties on sales. Each entry has its own separate and clearly demarcated role and scope. The interpretation

given to Entry 49 in terms of the judgment unfortunately renders entry 43 and entry 44 virtually redundant. Thus the argument relating to redundancy which has been advanced in the judgment, in fact operates in the opposite direction. We are therefore regretfully unable to concur with the views expressed in the judgment.

26. The matter does not end here. There is yet another way of analyzing the status of the Entry which reinforces the above interpretation. Entry 49, as it existed prior to the 18th Amendment *(i.e. when the judgment was delivered)* reads as follows:-

> "Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed."

In effect, the Court has interpreted the Entry *as if the words in square brackets were omitted* i.e. as if the Entry read as "Taxes on goods imported, exported, produced, manufactured or consumed". If the Entry read as set out above then the interpretation placed by the court thereon would be correct. The act of importation would constitute an *independent* source of taxation, and the same would be the position in relation to each of the other categories of goods. But that is not so, if the words in square brackets are restored. Indeed they are vitally important words which encapsulate the central premise. This is indubitably a tax which is primarily on the sale of goods, irrespective of the category into which the goods in question fall. Surely no known, or accepted, principle of interpretation justifies the omission of the central part of an Entry. Therefore, with profound respect to the Court, we find ourselves unable to accede to the interpretation placed by it on Entry 49.

27. A consequential error in para 29 follows clearly on the basis of the above. It has been observed therein that *if above argument of the appellant is accepted, a situation would arise where import into Pakistan may not be taxed at all*. "With respect, surely that is a complete non-sequitur. The existence of Entry 43, which seems to have been lost sight of, enables *all imports* to be taxed by way of customs duty.

28. Finally, there is a reference in the judgment to the well known principle of the presumption of constitutionality of a statute. The principle is indeed well established. But an equally well established principle is that, if there is a conflict between the provisions of a statute and that of the Constitution, then it is the statute which must yield to the superior mandate of the basic law, which confers on parliament the power to enact laws. The offspring must necessarily be subservient to the parent and the lesser power must surrender before the greater one. There is no greater power known to any civilized polity then that which flows directly from the constitution.

In the above connection reference may be made to the following judgments:

(i) Abdul Aziz v. Province of West Pakistan (PLD 1958 SC 499 at 506)

"They (i.e. the High Court) went on to observe that "Courts should normally lean in favour of constitutionality of statutes and if two interpretations of a constitutional provision are possible, one of which would invalidate a statute while the other would support its validity, the second interpretation should be preferred". That observation appears to us, speaking with due respect, to call for comment. If what is meant is that constitutional provisions may be stretched by

interpretation with the object of saving the validity of statutes, which ex facie contravene the Constitution, it must be said at once that this view cannot be accepted. The correct view is that a constitutional provision must be interpreted, as befits an organic instrument, in the widest possible sense. It is not permissible to place narrow constructions upon provisions contained in a Constitution, if the result be that thereby the validity of a statute is prejudiced. *In all circumstances, the full scope and extent of the constitutional provision must first be determined, and if the statute in question is capable of a construction which is conformable to the true meaning of the relevant constitutional provision, then that construction should be accepted.* It is possible that the learned Judges meant to convey this impression by the words which they have employed, and we have only found it necessary to comment upon these words to ensure that they should not be interpreted as allowing Courts to adapt the Constitution for the purpose of saving a statute when in fact the requirement is that all statutes and more generally, all sub-constitutional laws should conform to the Constitution. [Emphasis supplied]"

(ii) Inamur Rehman v. Federation of Pakistan (1992 SCMR 563 at 589)

"He has relied on the proposition that one of the cardinal principles of interpretation is that law should be saved rather than destroyed and the Court must lean in favour of upholding the Constitutionality of a legislation. (Mehreen Zaibun Nisa v. Land Commissioner, Multan PLD 1975 SC 397). There can be no cavil against this proposition as it is a well-recognized rule of Constitutional interpretation that there is a presumption in favour of the Constitutionality of a legislative enactment but if there is on the face of a statute no classification at all and no visible differentia, with reference to the object of the enactment as regards the person or persons subjected to its provisions, then

> the presumption is displaced. We cannot be asked to presume that there must be some undisclosed or unknown reasons for subjecting certain individuals to discriminatory treatment, for, in that case we will be making a travesty of the fundamental right of equality before law enshrined in the Constitution."

29. At the time of hearing of this case it was not our intention to delve into the constitutional issues referred to above. However, when we came to writing this judgment we concluded that it was necessary to deal with the judgment in **Master Foam's case** *(supra)* because of the importance attached to it by the appellant's counsel. In the circumstances, we have arrived at the conclusion that this judgment may have to be considered either *per incuriam*, or, at the very least, be confined to the facts of the case which were linked with AJK.

30. We next take up the issue relating to the security mechanism to be placed in position by the Government so as to ensure that the facility is not misused by unscrupulous importers. In the judgment under appeal, we have noticed that in paragraph 14 the learned High Court has set out a large number of exemption notifications issued, from time to time, by the Government/Federal Board of Revenue granting exemptions as well as the conditions for ensuring that the facility is not misused. By way of illustration we may refer to Entry 5 contained therein. It relates to manufacturing in bond. In this case the condition for exemption laid down is that the imports are to be made against a bond. Similarly, in entry No.6 of the said table a reference has been made to the duty and tax remission for exporters under Rules 296 and 297 of the Customs Rules 2001, in terms whereof exporters are allowed the facility not

to pay duty in advance but furnish post-dated cheques. The same facility has been granted under Entry No.7 which relates to common Bonded Warehouses. In this case too, goods can be imported under bond or post-dated cheques.

31. The point we make is that since the above relate to exemptions granted by the Government in its discretion, from time to time, the case for granting the facility of not demanding advance payment in the present case rests on a much stronger foundation. The Constitution itself grants a complete immunity for, and in relation to, sales tax and income tax in FATA/PATA. Obviously persons carrying on business in these areas cannot be subjected to discriminatory treatment. The High Court, after reviewing the facts and circumstances of the case, was, in our opinion, completely justified in allowing the release of goods without prior payment of tax/duty against deposit of post-dated cheques. It has also been found, as a matter of fact, that the facility was not misused or abused by the importers of the raw materials. The High Court has recommended that the Federal Government should lay down a uniform policy.

32. We are unable to understand what possible objection can be raised by the Federal Government in this behalf. In fact, it is worth noting that no appeal has been filed against the judgment by the Federal Government and it is only the Chief Commissioner of Inland Revenue who has preferred the present appeal. *Prima facie*, this appears to be a case of being more loyal than the King. We have no hesitation in deciding that, in the above facts and circumstances, the Federal Government should lay down a uniform policy in terms whereof the facility for importation against post-dated cheques is extended to all the manufacturers in

FATA/PATA. It does not require any argument to establish that the policies in relation to grant of exemptions should be applied on a uniform and a non-discriminatory basis. While it is perfectly true that the power of granting exemptions is discretionary, it is equally true that the said power cannot be exercised in a discriminatory manner. Exemptions are to be granted and regulated in terms of consistent policies for sound reasons. There is no justification for granting or refusing exemptions arbitrarily or on the *ipse dixit* of the concerned officials. The power to grant an exemption or to decline to grant an exemption, must be exercised in accordance with the general principles relating to good governance. In this connection, reference may be made to the following well known judgment pertaining to the exercise of discretionary powers:-

> **Abid Hassan vs. PHC (2005 SCMR 25 at 35)**
>
> "14. In his Treatise 'Discretionary Powers' which is Legal Study of Official Discretion D.J. Galligan has acknowledged that "the general principles that discretionary decisions should be made according to rational reasons means; (a) that there be findings of primary facts based on good evidence, and (b) that decisions about the facts be made for reasons which serve the purposes of the statute in an intelligible and reasonable manner". According to the celebrated author, the actions which do not meet these threshold requirements are arbitrary, and may be considered a misuse of powers. (Emphasis provided)."
>
> 15. In Amanullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others PLD 1990 SC 1092 Shafiur Rehman, J. who was sitting in the Full Bench has very ably propounded the well-known doctrine of 'Structuring the discretion' in the report at page 1147 "Wherever wide-worded powers conferring discretion

exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Clup Davis (page 94) that the structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure (Emphasis provided). Somehow, in our context, the wide-worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalize it and regulate it by Rules, or policy statements or precedents, the Courts have to intervene more often than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times. "Government of N.W.F.P. v. Mejee Flour and General Mills (Pvt.) Ltd. 1997 SCMR 1804.

16. The judicial consensus seems to be that the functionaries of any organization or establishment cannot be allowed to exercise discretion at their whims, sweet-will or in an arbitrary manner; rather they are bound to act fairly, evenly and justly. Aman Ullah Khan v. Federal Government of Pakistan PLD 1990 SC 1092, Chairman R.T.A. v. Pakistan Mutual Insurance Company PLD 1991 SC 14, Pacific Multinational (Pvt.) Ltd. V. I.G. of Police PLD 1992 Kar. 283, Presson Manufacturing Ltd. V. Secretary, Ministry of Petroleum and Natural Resources 1995 MLD 15, Ramana v. I.A. Authority of India AIR 1979 SC 1628, Dwarka Nath Prasad Atal v. Ram Rati Devi AIR 1980 SC 1992, Ram and Shyam Company v. State of Haryana AIR 1985 SC 1147 and Nizamuddin v. Civil Aviation Authority 1999 SCMR 467."

33. At the conclusion of the hearing we dismissed Civil Appeals No.633 to 637 of 2007, 130 to 136 & 138 to 145 of 2009, 1229 of 2013, 983 to 999 & 1025 & 1026 of 2015, 1337 & 1353 to 1356 of 2016, 172 to 174 of 2017 and Civil Petitions No. 3697 & 3698 of 2016 *(filed by the department)*; whereas, Civil Appeals No. 137 of 2009, 68 to 70 of 2011 and 158 to 160 of 2015 *(filed by the private parties)* were allowed. As regards Civil Petitions No. 261-P to 265-P of 2011 *(filed by the private parties)*, the same were converted into appeals and allowed.

34. The above are the reasons of our short order of even date.

CHIEF JUSTICE

JUDGE

JUDGE

ISLAMABAD.
14th December, 2017.
Approved for reporting
Waqas/*