

PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

W.P No.3614-P/2023 with IR with CM No. 1815/2023 with CM
No.1093/2025

M/S Khyber Tobacco Company Ltd, through its authorized representatives, Mr. Khurshid Wahab and others.

Versus

Pakistan through Federal Secretary, Ministry of Finance, Revenue and Economic Affairs, Islamabad and others.

Petitioner(s) by:	Mr. Isaac Ali Qazi, Advocate
Respondent(s) by:	M/S Sanaullah, Additional Attorney General, Muhammad Inam Khan Yousafzai, Additional Advocate General, Rehmanullah, and Abdul Qayyum Khattak, Advocates alongwith Syed Mehmood Ali Shah, AD (Audit)/Law Officer, Sharifullah Khan, Assistant Director (Legal)
Research by:	Mazhar Ali Khan, Research & Reference Officer
Dates of hearing:	03.06.2025, 04.06.2025 & 05.06.2025

J U D G M E N T

SYED ARSHAD ALI, J.

INTRODUCTION

1. The present batch of petitions brings into question the legislative competence of both the Federation and the Province of Khyber Pakhtunkhwa in relation to the levy of excise duty on unmanufactured tobacco. This commodity, being a major cash crop of the region and a significant source of revenue, has repeatedly been subjected to varying rates of duty by the federal as well as the provincial legislatures, resulting in a conflict of legislative competence which lies at the heart of these proceedings. The controversy, therefore, requires determination as to whether the imposition of duty in the manner adopted under the impugned enactments is within the constitutional framework or otherwise.

FACTS OF THE CASE

2. Unmanufactured tobacco stands classified under Head No. 24.01, Table–I of the First Schedule to the Federal Excise Act, 2005 (**“the Act of 2005”**), thereby attracting excise duty under the federal law. Initially, through the Finance Supplementary (Amendment) Act, 2018, the rate of such duty was enhanced from Rs.10 per kilogram to Rs.300 per kilogram. This enhancement, however, was short-lived, as the Finance Act, 2020 brought the rate back to Rs.10 per kilogram. Subsequently, the Tax Laws (Second Amendment) Ordinance, 2022 (**“the Impugned Federal Legislation”**) once again revised the rate upward, fixing it at Rs.390 per kilogram with effect from 22.08.2022.

3. Alongside these federal measures, the Province of Khyber Pakhtunkhwa, through Section 15 of the Khyber Pakhtunkhwa Finance Act, 2024 (**“the Impugned Provincial Act”**), introduced an additional levy by imposing excise duty on all unmanufactured tobacco produced within the Province at the rate of Rs.50 per kilogram.

4. Aggrieved by these parallel fiscal interventions, two sets of writ petitions came to be instituted. The first set, comprising W.P. Nos. 3614, 3317, and 5605-P of 2023 along with W.P. No. 702-P of 2024, challenges the vires of the Federal Excise Act, 2005 as amended through the Finance Supplementary (Amendment) Act, 2018. In these petitions, the grievance primarily rests on the ground that unmanufactured tobacco, being an agricultural produce, does not properly fall within the scope of excise taxation. It has, therefore, been asserted that the imposition of excise duty thereon is unconstitutional and beyond the competence of Parliament. On the other hand, the second set, comprising W.P. Nos. 3490, 3309, 3326, 3327, 3480, 3728, 4175, 4349, and 3317-P of 2024, calls into

question the legislative competence of the Province of Khyber Pakhtunkhwa to impose duty on unmanufactured tobacco under the Impugned Provincial Act.

CONTENTIONS OF THE PARTIES

5. Mr. Ijaz Ahmad Zahid, Advocate, appearing on behalf of Phillip Morris Pakistan Limited, has assailed the vires of the Impugned Provincial Act. Learned counsel submits that the Province lacks legislative competence to impose excise duty on unmanufactured tobacco, as the field stands exclusively occupied by federal legislation. Referring to Article 142 of the Constitution of the Islamic Republic of Pakistan, 1973 (“**the Constitution**”) read with Entries No. 43, 44, and 47 to 53 of the Federal Legislative List, it has been contended that legislative entries are to be interpreted in their broadest sense, as they define the entire field of legislative authority. In aid of his submissions, reliance has been placed upon Islamabad High Court Bar Association and others v. Election Commission of Pakistan and others (PLD 2023 SC 720); Government of Sindh and others v. Dr. Nadeem Rizvi and others (2020 SCMR 1); Khurshid Soap and Chemical Industries (Pvt) Ltd. and others v. Federation of Pakistan and others (PLD 2020 SC 641); and Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others (2018 SCMR 802). Learned counsel has also traced the constitutional history of excise duty from the Government of India Act, 1935, through the Constitutions of 1956 and 1962, up to the present Constitution of 1973. In addition, reliance has been placed on Hirjina & Co. v. Islamic Republic of Pakistan and another (1993 SCMR 1342), wherein the scope of excise duty and the federal jurisdiction in relation thereto was comprehensively examined by the Apex Court.

6. Mr. Isaac Ali Qazi, Advocate, representing M/S. Khyber Tobacco Company Limited, has adopted an altogether different line

of argument. He submits that tobacco, being an agricultural produce, does not fall within the permissible domain of excise taxation. Learned counsel has further argued that tobacco also falls within the definition of a narcotic substance, thereby placing it outside the scope of federal legislation. On this premise, he has contended that the impugned enactments, whether federal or provincial, are ultra vires the Constitution.

7. Conversely, Mr. Waqas Ahmad Rana, learned counsel for the Province, has defended the Impugned Provincial Act with great emphasis. Referring to the relevant legislative entries under the Government of India Act, 1935, and the successive Constitutions of 1956, 1962, and 1973, he has argued that the Province is well within its competence to levy excise duty on unmanufactured tobacco.

8. Learned counsel for the Provincial Government, while defending the Impugned Provincial Act, has further contended that the Impugned Provincial Act is not inconsistent with the Federal Excise Act, 2005, as the two legislations operate in distinct spheres. According to him, the provincial levy is essentially a regulatory duty enacted in furtherance of public health objectives, thereby falling outside the ambit of Entry No. 44 of the Federal Legislative List. He has also supported the provincial competence by reiterating the argument that tobacco constitutes a narcotic substance, hence forming an exclusive provincial subject. In support of these submissions, reliance has been placed upon Government of Pakistan v. Syed Akhlaque Hussain and another (PLD 1965 SC 527); Government of Sindh and others v. Dr. Nadeem Rizvi and others (2020 SCMR 1); Lahore Development Authority and others v. Imrana Tiwana and others (2015 SCMR 1739); Pakistan Tobacco Company Limited and others v. Government of N.-W.F.P. and others (PLD 2002 SC 460); Lakson Tobacco Company Limited and others v. Government of N.-W.F.P. and others (2023 SCMR 33); and the Federal

Court judgment in *In the matter of Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* (AIR 1939 FC 1).

9. We have heard both sides and gone through the record with the valuable assistance of learned counsels.

THE FIELD OF LEGISLATION RELATING TO IMPOSITION OF EXCISE DUTY AND ITS HISTORICAL CONSTITUTIONAL BACKGROUND

The Government of India Act, 1935

10. The Government of India Act, 1935 (“**the Act of 1935**”) provided the foundational scheme of legislative competence for the subcontinent. The Seventh Schedule to the Act contained three distinct lists: the Federal Legislative List, enumerating matters within the exclusive authority of the federation; the Provincial Legislative List, conferring exclusive competence upon the provinces; and the Concurrent Legislative List, setting out subjects upon which both levels of government were empowered to legislate. This allocation of authority was governed by Section 100 of the Act of 1935.

11. Section 107 of the Act of 1935 further established the principle relating to conflict between federal and provincial laws. It stipulated that where a Provincial law was inconsistent with a Federal law, whether enacted before or after the Provincial law, or with any existing Indian law relating to a matter enumerated in the Concurrent Legislative List, the Federal law would prevail, and the Provincial law would, to the extent of such repugnancy, be rendered void.

12. Within this constitutional scheme, duties of excise on tobacco and other goods manufactured or produced in India were expressly placed within the field of federal legislation. This

legislative arrangement was subsequently carried forward into Pakistan by virtue of the Provisional Constitution Order, 1947, whereby the Act of 1935 was adopted as the interim constitutional framework. The relevant entries, as adopted, read as follows:

Entry 45 – List I, Seventh Schedule

“45. Duties of excise on tobacco and other goods manufactured or produced in Pakistan except-

- (a) Alcoholic liquors for human consumption;
- (b) Opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;
- (c) Medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry.”

The Constitution of 1956

13. With the coming into force of the 1956 Constitution, the scheme of fiscal powers was consolidated under the Federation. The Federal List in the Fifth Schedule carried forward and expanded the fields of taxation. The relevant entry 26 read as follow:

Entry 26 – Federal List, Fifth Schedule

“26. Duties of customs (including export duties); duties of excise (including duties on salt, but excluding alcoholic liquor, opium and other narcotics), corporation taxes and taxes on income other than agricultural income; estate and succession duties in respect of property other than agricultural land; taxes on the capital value of assets exclusive of agricultural land; taxes on sales and purchase; terminal taxes on goods or passengers carried by sea or air; taxes on their fares and freights; taxes on mineral oil and natural gas.”

The Constitution of 1962

14. The 1962 Constitution continued the federal predominance over taxation, vesting exclusive legislative competence in the Central Legislature under Entry 43 of the Third Schedule, which read as follow:

Entry 43, Matters with respect to which the Central Legislature has exclusive power to make laws –Third Schedule

“43. Duties and taxes, as follows:

- (a) duties of customs (including export duties);
- (b) duties of excise (including duties on salt, but not including duties on alcoholic liquor, opium or other narcotics);
- (c) corporation taxes and taxes on income other than agricultural income,
- (d) estate and succession duties;
- (e) taxes on the capital value of assets, not including taxes on capital gains on immovable property;
- (f) taxes on sales and purchases;
- (g) terminal taxes on goods or passengers carried by sea or air, and taxes on their fares and freights; and
- (h) taxes on mineral oil, natural gas and minerals for use in the generation of nuclear energy."

The Constitution of 1973

15. The 1973 Constitution, while adopting a more elaborate federal framework, retained the essence of federal control in the sphere of excise duties. The relevant entry is reproduced below for ready reference:

Entry 44, Part I, Federal Legislative List, Fourth Schedule

44. Duties of excise, including duties on salt, but not including duties on alcoholic liquors, opium and other narcotics.

16. It is manifest from the foregoing constitutional trajectory that the legislative competence to levy duties of excise has consistently remained within the federal domain. What is, however, significant to note is that while Entry No. 45 of the Act of 1935 expressly included excise duties on tobacco along with other manufactured or produced goods, this express reference to “tobacco” disappears from the corresponding provisions of the subsequent constitutional instruments. Neither the Constitution of 1956, nor that of 1962, nor even the Constitution of 1973, make a specific mention of tobacco in their respective entries relating to excise duties, thereby marking a notable shift in the drafting approach, albeit without disturbing the overall federal competence in the matter.

DUTY OF EXCISE: MEANING AND SCOPE

17. In the first constitutional framework, namely the Act of 1935, as already noted, the field of legislation between the Federation and the Provinces/units was identified. The imposition of excise duty on tobacco and other goods manufactured or produced in India was placed within the exclusive competence of the Federation, whereas the levy of sales tax on goods and instruments was reserved for the Provinces. Within this constitutional scheme, jurisprudence developed by the Privy Council emphasized that provincial legislatures were not subordinate to the federal legislature, but independent within the field allocated to them. Within their prescribed sphere, they were considered coordinate governments, endowed with full legislative authority and capacity to enact laws, particularly in respect of matters entrusted to them exclusively or those intimately connected with the affairs of the province.

18. In matters of complexity where competing jurisdictions of the Federation and the Provinces arose, particularly in determining whether a given tax fell within the field of taxation reserved for one or the other, their lordships were of the view that overlapping of legislative spheres was never the intention of the lawmakers. As Sir Maurice Gwyer C.J. said in 1940 F.C.R. 188¹ that *“It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the*

1. *Subramanyam Chettiar v. Mulluswami Coundan* (AIR 1941 FC 47).

impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determining whether it is legislation with respect to matters in this list or in that.” Similarly, it was also a consistent view that where necessary, recourse could be taken to the doctrine of “pith and substance” for resolving the conflict. It was in this context that their lordships, in the case concerning the *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* (AIR 1939 FC 1), declined to extend the scope of excise duty beyond the process of manufacture or production of goods.

19. In 1948, the first Constituent Assembly of Pakistan promulgated the Pakistan General Sales Tax Act, 1948, which was later repealed and successively re-enacted as the Sales Tax Act, 1951, and the Sales Tax Act, 1990. By virtue of these enactments, the levy of taxes on the sale and purchase of goods was brought within the exclusive domain of the Federation. Consequently, after partition, the earlier possibility of overlapping between excise duty and sales tax on goods ceased to exist. It appears for this very reason that the term “tobacco” was omitted from the subsequent constitutional entries relating to the legislative competence of the Federation to impose duties of excise.

20. The intricate position prevailing in India with respect to the imposition of excise duty has not been accepted by the Supreme Court of Pakistan. In *Colony Sarhad Textile Mills Ltd., Nowshera v. Superintendent, Central Excise and Land Customs* (1979 SCMR 640), the Apex Court held that the term “excise” is one of wide import and, owing to its flexible meaning, excise duty may also be levied upon goods locally manufactured and subsequently exported. On this reasoning, the contention that excise duty could not be imposed on the export of goods was expressly repelled. Accordingly, the arguments advanced by the learned counsel in defence of the

impugned Provincial Legislation, premised upon reliance on Indian jurisprudence, including *Union of India v. Delhi Cloth and General Mills* (AIR 1963 SC 791); *Prafulla Kumar Mukherjee and others v. Bank of Commerce Ltd., Khulna* (AIR 1947 (34) Privy Council 60); & *Atlantic Smoke Shops Ltd. v. Conlon and others, Attorney General of Canada and others* (1943 2 All ER 393), are of no avail to the respondents.

21. Similarly, the contention that excise duty is confined strictly to the production or manufacture of goods, and that its ambit cannot be extended to matters beyond such processes, was also repelled by the Apex Court in the case of *Hirjina & Co.* (supra), and held as below:

4. The main contention on behalf of the appellants in these appeals was that the Ordinance, inasmuch as it brought the excisable services to tax, was beyond the competence of the Central Legislature and as such it was ultra vires to that extent. It was stated that the duty of excise primarily and fundamentally was relatable only to production or manufacture of goods and that its scope could not be expanded to encompass matters which did not entail production or manufacture of goods. In support of this contention reliance was placed on law lexicons and some judgments of the Federal Court of India.

5. The expression 'duties of excise' has no precise content. In its narrowest sense it is used in contradistinction to the expression 'duties of customs' thus the levy on goods imported into the country would fall under the heading 'duties of customs' whereas the goods locally produced or manufactured for home consumption would fall under the heading 'duties of excise'. In a comparatively larger sense 'duties of excise' would relate to levy made at any stage falling between the production or manufacture of goods and their sale to the ultimate consumer. In a still wider sense it would cover a diverse variety of indirect taxes which have no nexus with the production or manufacture of goods. Similarly, the word 'excise' has no precise or definite meaning.

22. In addition to, in *Hirjina & Co.*'s case (supra), the Hon'ble Supreme Court was of the considered view that the framers of the Constitution had, by design, omitted the expression "tobacco and other goods manufactured or produced in Pakistan." It was further the opinion of the Apex Court that since the Constitution does not define the term "excise duty," no restrictive construction can be

imposed so as to curtail the legislative competence of the Federal Legislature in this regard.

23. The learned counsel for the respondents contended that the omission of the expression “tobacco” from the subsequent entries relating to the legislative competence of the Federation to levy excise duty, confers upon the Provinces the authority to impose a regulatory duty thereon. We are unable to accede to this submission. It is by now a well-settled principle of constitutional jurisprudence that the power of taxation constitutes a distinct and independent field of legislative competence, separate from the general subjects of legislation. The constitutional scheme, both under the earlier instruments and the present framework, unmistakably demonstrates that while general subjects of legislation are dealt under one set of entries, the fields of taxation are delineated in a separate set of entries. The competence to levy a tax cannot be deduced or implied from a general legislative entry, for it is treated as an ancillary power that can only be exercised within the parameters expressly conferred. In this regard, reference may usefully be made to the dictum of the Supreme Court of India in State of West Bengal and another v. Kesoram Industries Ltd. and others (AIR 2005 SC 1646). Accordingly, the omission of the term “tobacco” cannot be construed as enlarging the legislative domain of the Provinces in respect of the imposition of excise duty. Nevertheless, Article 142 of the Constitution delineates the constitutional scheme relating to the legislative field of the Federation vis-à-vis the Province. The determination of legislative competence hinges upon a single criterion: whether the subject of legislation falls outside the enumerated domain of the Federation as envisaged in the Federal Legislative List. If the answer is in the affirmative, the Provinces possess exclusive authority, by virtue of Article 142(c), to legislate in respect of all matters lying beyond the purview of Article 142(a). In this context, it follows that where a legislative entry does not fall within the federal domain, the conclusion is straightforward, the Provinces alone are competent to

legislate on such matters, and no constitutional embargo or limitation is imposed upon the exercise of that power.²

CONSTITUTIONAL FRAMEWORK REGARDING THE LEGISLATIVE POWERS OF PARLIAMENT VIS-À-VIS PROVINCIAL ASSEMBLIES

24. The distribution of legislative powers between the Federation and the Provinces is explicitly delineated in the Constitution. Article 142 of the Constitution is the fountainhead of legislative authority, prescribing the scope within which Parliament and the Provincial Assemblies may exercise their respective law-making powers. Under the said Article, Parliament is vested with exclusive authority to enact laws on matters enumerated in the Federal Legislative List, while the Provincial Assemblies are empowered to legislate upon subjects not so included. In addition, concurrent competence is conferred upon both in relation to criminal law, criminal procedure, and evidence. Reference in this regard may be made to *Commissioner Inland Revenue and others v. Mekotex (Pvt.) Limited and others* (PLD 2024 SC 1168).

25. Undoubtedly, the imposition of excise duties, as provided under Entry No. 44, constitutes a field of legislation reserved exclusively for Parliament. The Constitution of the Islamic Republic of Pakistan is federal in character, and the division of legislative fields is structured under Article 142 read with the Fourth Schedule thereto. In terms of the said framework, the Federation enjoys exclusive competence in respect of taxation powers specifically enumerated in Entries Nos. 43, 44, and 47 to 53 of the Federal Legislative List. It is now firmly settled law that the Provinces do not share concurrent competence with the Federation over such entries. Moreover, legislative entries concerning taxation are to be construed in their broadest amplitude, consistent with the

2. *Pakistan Floor Mills Association v. Government of Sindh* (2003 SCMR 162).

well-established principle that entries in the Legislative Lists demarcate the field of legislative competence and must receive a liberal construction. This principle of interpretation has been comprehensively examined by the Apex Court in *Messrs Sui Southern Gas Company Ltd.* (supra), wherein the Court upheld the vires of the Industrial Relations Act, 2012, and expounded the following principles for construing legislative entries:

- i. The entries in the Legislative List of the constitution are not power of legislation but only fields of legislative heads;
- ii. In construing the words in an Entry conferring legislative power and a legislative authority, the most liberal construction should be put upon the word;
- iii. While interpreting an Entry, in a Legislative List, it should be given widest possible meaning and should not be read in a narrow and restricted sense;
- iv. Each general word in an Entry should be considered to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

26. Moving on to the controversy arising in the present batch of petitions, the central issue is the constitutional vires of both the Federal and the Provincial legislations under challenge. In order to resolve this question, it is necessary to test the impugned enactments by placing these next to the constitutional scheme as prescribed by Article 142 read with the Federal Legislative List in the Fourth Schedule. Undertaking such a comparative exercise, by juxtaposing the impugned provisions with the relevant constitutional entries, will enable us to determine whether the respective legislatures have acted within the limits of their competence or whether the impugned fiscal measures transgress the constitutional framework. For ease of reference the relevant provisions are reproduced below in tabulated form:

Federal Excise Act, 2005	The Khyber Pakhtunkhwa Provincial Excise Duty (Un-manufactured Tobacco) Act, 2024
<u>Sub-section (9) of Section 2.</u> “duty” means any sum payable under the	<u>Sub-section (f) of Section 2.</u> “excise duty” means the

<p>provisions of this Act or the rules made thereunder and includes the default surcharge and the duty chargeable at the rate of zero per cent excluding fee and service charges imposed and collected under section 49.</p> <p><u>Sub-section (24A) of Section 2.</u> “un-manufactured tobacco” means tobacco useable for manufacture of cigarettes as manufactured by Green Leaf Threshing Units after processing and conversion of tobacco green leaf;</p> <p><u>Section 3(1). Duties specified in the First Schedule to be levied.-</u> (1) Subject to the provisions of this Act and rules made thereunder, there shall be levied and collected in such manner as may be prescribed duties of excise on,</p> <p>(a) goods produced or manufactured in Pakistan;</p> <p>(b) goods imported into Pakistan, irrespective of their final destination in territories of Pakistan;</p> <p>(c) such goods as the [Federal Government] may, by notification in the official Gazette, specify, as are produced or manufactured in the non-tariff areas and are brought to the tariff areas for sale or consumption therein;</p> <p>(d) services provided in Pakistan including the services originated outside but rendered in Pakistan; [and]</p> <p>(e) any item not covered in clause (a) to (d) above and specified in the First Schedule.]</p> <p>at the rate of fifteen per cent ad valorem except the goods and services specified in the First Schedule, which shall be charged to Federal excise duty as, and at the rates, set-forth therein.</p>					<p>Provincial excise duty, imposed on un-manufactured tobacco under this Act and the rules made thereunder;</p> <p><u>Sub-section (h) of Section 2.</u> “Green Leaf Threshing Unit” means the machinery, infrastructure and arrangements, wherein tobacco leaves are subjected to processing, before the manufacture of cigarette, export, storage or transportation;</p> <p><u>Sub-section (p) of Section 2.</u> “un-manufactured tobacco” means raw or bulk tobacco that has not been processed into consumer products, such as cigarettes, cigars or smokeless tobacco, including various forms of tobacco leaf, such as whole leaf, stripped leaf or partially processed leaf that retains its natural state and characteristics. This product is distinguished from manufactured tobacco products, which are ready for consumption and have undergone significant processing and packaging.</p> <p><u>Section 3. Levy and collection of excise duty. ---</u> (1) There shall be levied and collected an excise duty on all un-manufactured tobacco produced within the Province, at the rate of rupees fifty (50) per kilogram.</p> <p>(2) The excise duty shall be payable by the person at the time of removal of the un-manufactured tobacco from the Green Leaf Threshing Unit.</p> <p>(3) No un-manufactured tobacco shall be removed outside the Province, unless excise duty is paid thereon by the Green Leaf Threshing Unit.</p> <p>(4) The raw tobacco, on which the excise duty is not paid, shall be subjected to such penalty as specified under section 7 of this Act.</p>				
<u>Entries No.7, 8 and 8c of the First Schedule. (Federal Excise Act, 2005)</u>									
S. N o	Description of goods		Heading/sub-heading Number		Rate of duty				
	7.	Unmanufactured tobacco	24.01		Three hundred and ninety rupees per kilogram				
	8.	Cigarettes of tobacco or tobacco substitutes	24.02		Sixty five percent of retail price or the rate				

		excluding locally produced cigarettes		of duty as prescribed against S.No.9 whichever is higher.				
	8c.	Tobacco mixture in an electrically heated tobacco product by whatever name called, intended for consumption by using a tobacco heating system without combustion	Respective headings	Rupees sixteen thousand five hundred per kg.				

27. It has been the contention of the learned counsel for the respondents, while placing reliance upon the preamble of the Act of 2024, that the levy in question is in the nature of a healthcare regulatory duty and, therefore, its imposition is sustainable. In support of this submission, he has referred not only to the judgment reported as Pakistan Tobacco Company Limited and others v. Government of N.-W.F.P. and others (PLD 2002 SC 460), but also to statutes such as the Tobacco Development Cess under the N.W.F.P. Finance Act, 1996, which, according to him, recognize the competence of the Province to regulate tobacco and levy fees. In his view, the power to regulate and control is distinct from the power to legislate as laid down in *Kesoram* (supra). He further invoked the doctrine of double aspect, submitting that where there is an overlap, Courts are to examine the object of the tax, be it person, goods or activity, and if more than one taxing event can be discerned, both laws may operate concurrently in their respective domains. Proceeding on this premise, he argued that under the Federal law, the object and purpose is revenue generation, whereas under the impugned Provincial legislation, the object is health

regulation, prevention of addiction, and control of agricultural produce.

28. The definition of “un-manufactured tobacco” under the Act of 2005 is couched in broad terms, referring to tobacco usable for the manufacture of cigarettes after being processed and converted by Green Leaf Threshing Units. Thus, the taxable event under Section 3 of the Act of 2005 arises at the stage when tobacco, having undergone the threshing process, becomes capable of being used in cigarette manufacture. Similarly, the Impugned Provincial Act defines “un-manufactured tobacco” as raw or bulk tobacco which has not yet reached the stage of a finished product, such as cigarettes or cigars. The object of both levies is to charge excise duty on un-manufactured tobacco, and the said duty becomes part of the federal as well as the provincial revenue. There are three stages in the imposition of a tax; declaration of liability, which is the part of the statute that determines which persons are liable in respect of what property; assessment; and recovery. Tax could only be charged and levied when the taxing event squarely falls within the purview of the charging section. The concept of a taxing event is central to any fiscal statute, for it delineates and circumscribes the legislative field. Under our constitutional framework, taxing powers are not shared between the Federation and the Provinces; they are divided and allocated with precision. Once it is established that a particular taxing event falls within the exclusive domain of Parliament, the inevitable corollary flowing from Article 142(d) of the Constitution of 1973, is that the Provinces are precluded from legislating in respect thereof or imposing a parallel levy upon the same taxable event.

29. Let us examine whether the taxing event in both the competing statutes is one and the same. The charging section in both the statutes is triggered when the green leaf of tobacco

undergoes the process of threshing as Green Leaf Threshing (“GLT”) Unit. How the process of GLT is undertaken is described by A. Manickavasagan *et al.* as follows: *“Tobacco threshing is an important stage in the post-harvest processing of tobacco because at this stage, the tobacco is packed for the final consumption from its raw form. In a threshing factory, different grades of tobacco are blended at the feeding table. Since the stem in the tip portion (Called as “tips”) of the tobacco leaves are thin, the tips are cut and separated, and not sent for threshing. This process is called as tipping, and normally carried out immediately after blending. The remaining portion of the leaves, after tipping, is called as “butts”. The tobacco leaves always form pads due to waxy material on the surface. The leaves are conditioned to high moisture by adding steam, hot air and water, to open the pads and make the leaves more pliable for better threshing. The threshed products (containing lamina, stem and un-threshed leaves) are subjected to pneumatic classification. Threshing and classifications are repeated several times till different products are classified thoroughly. Then threshed lamina and tips are blended together and dried, and conditioned to 12% moisture content. Threshed and dried lamina is packed in corrugated fibre board (CFB) cartons (180 to 200 kg) or bale board packs (80 to 100 kg).”*³

The chargeability of excise duty under the Act of 2005 is triggered at the time of production of unmanufactured tobacco. Similarly, Section 3(1) of the Impugned Provincial Act also charges excise duty on all un-manufactured tobacco at the time of production at the GLT Unit. However, slightest contrast under the Impugned Provincial Act is that the duty is payable by a person at the time of removal of un-manufactured tobacco from the GLT

3. A. Manickavasagan *et al.*, “Trends in Indian Flue Cured Virginia Tobacco (*Nicotiana tabacum*) Processing: II. Threshing, Packing and Warehousing,” *Research Journal of Agriculture and Biological Sciences*, 3(6): (2007), 682-686.

Unit. This slightest departure of the Impugned Provincial Act is of no consequence because the impugned levy in both legislations is on the goods and not on the person. Once it is established that the taxable activity of a person is subject to imposition of excise duty under the Act of 2005, then in view of the constitutional command in terms of Article 142(d), the province has no authority to tax the said activity.

30. The learned counsel for the respondents, by making reference to Entry No. 44, further contended that tobacco falls within the category of narcotics and, therefore, legislation on the subject is beyond the competence of the Federal Legislature. In this regard, both sides have invited our attention to the definitions of the term “narcotic” as provided in various dictionaries and statutes, including the Control of Narcotics Substances Act, 1997, and the Khyber Pakhtunkhwa Control of Narcotics Substances Act, 2019. We are, however, not inclined to detain ourselves with the semantics of the term “narcotic” for the obvious reason that the impugned Provincial legislation does not purport to regulate tobacco as a narcotic substance and as such the same has been made subject to the impost of excise duty. Rather, its scheme is confined to the imposition of a tax/duty, the proceeds of which are credited to the Provincial Consolidated Fund. In addition, the Constitution expressly excludes only alcoholic liquors, opium, and narcotics from the field of federal excise. Tobacco, however, has not been so excluded and has historically been treated as a taxable good. Accordingly, the contention advanced by the learned counsel for the respondents, premised on treating tobacco as a narcotic, is misconceived and is therefore, repelled.

VALIDITY OF THE FEDERAL LEVY ON UNMANUFACTURED TOBACCO

31. Having considered the matter, we are unable to accede to the contention that the federal levy is ultra vires the Constitution. The constitutional scheme, traced consistently from the Act of 1935 through to Article 142 read with Entry No. 44 of the Fourth Schedule to the Constitution of 1973, leaves no room for doubt that the competence to impose duties of excise is vested exclusively in Parliament. The omission of an express reference to “tobacco” in the later constitutional instruments does not dilute or curtail this power. On the contrary, the jurisprudence of this Court, particularly in *Hirjina & Co.* (supra) and *Colony Sarhad Textile Mills* (supra), has recognized the wide and flexible scope of excise duties, extending to goods manufactured or produced in Pakistan at any stage falling short of consumption.

32. In this backdrop, the classification of unmanufactured tobacco under Head 24.01 of the First Schedule to the Act of 2005 is a matter falling squarely within the legislative field reserved for Parliament. The contention that tobacco, being an agricultural crop, stands outside the ambit of excise taxation overlooks the settled principle that the incidence of excise duty is not upon the agricultural process of cultivation but upon the event of production or processing of goods for further commercial use. The fact that unmanufactured tobacco, once threshed and made usable for cigarette manufacture, constitutes a distinct commodity is sufficient to attract excise duty in terms of Entry No. 44. For the sake of brevity, it needs to be observed that the duty in question is not an independent impost but rather an adjustable tax, capable of being set off against sales tax/excise duty under the statutory scheme. Its

character, therefore, remains fiscal and falls squarely within the mandate of Parliament.

FINDING AND CONCLUSION

33. In the light of the foregoing observations and findings, we hold that the Khyber Pakhtunkhwa Provincial Excise Duty (Un-manufactured Tobacco) Act, 2024, travels beyond the legislative competence of the Provincial Assembly and is accordingly declared ultra vires the Constitution and struck down. The imposition of excise duty on un-manufactured tobacco is a matter falling exclusively within the field of legislation reserved for the Federation under Entry No. 44 of the Federal Legislative List, read with Article 142 of the Constitution.

34. As regards the Federal Excise Act, 2005, and the amendments carried therein, we are satisfied in view of the observations made hereinbefore, that the levy contemplated thereunder is intra vires the Constitution.

35. For these reasons, the impugned provincial legislation is struck down, while the challenge to the federal enactment fails. The petitions are disposed of in the above terms. No order as to costs.

Sd/--
J U D G E

J U D G E

Dates of hearing: 03.06.2025, 04.06.2025 & 05.06.2025

Date of announcement: 10.10.2025

(D.B) Hon'ble Mr. Justice Syed Arshad Ali & Hon'ble Mr. Justice Wiqar Ahmad

Mahmood Shah, SSS