

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Sr.No.	ICA No.	Title
1.	176-W-2012	M/s Indus Rags etc. vs. Government of Pakistan etc.
2.	177-W-2012	M/s Tasneem International & Another vs. Government of Pakistan etc.
3.	185-W-2012	M/s 3-Star Trading Company etc. vs. Government of Pakistan etc.
4.	186-W-2012	M/s Platinum Trading Company & Another vs. Government of Pakistan etc.
5.	187-W-2012	M/s M.S. Trading Company vs. Government of Pakistan etc.
6.	188-W-2012	M/s Umer Trading Company vs. Government of Pakistan etc.
7.	189-W-2012	M/s M.I. Sanitary Store etc. vs. Government of Pakistan etc.
8.	190-W-2012	M/s Warriach Traders etc. vs. Government of Pakistan etc.
9.	191-W-2012	M/s Chaudhry Art vs. Government of Pakistan etc.
10.	192-W-2012	M/s M/s MZ Ceramics vs. Government of Pakistan etc.
11.	193-W-2012	M/s Arshad & Sons vs. Government of Pakistan etc.
12.	194-W-2012	M/s Abdullah Tiles etc. vs. Government of Pakistan etc.
13.	195-W-2012	M/s Mian Sons etc. vs. Government of Pakistan etc.
14.	196-W-2012	M/s Zohaib Ali & Co. etc. vs. Government of Pakistan etc.
15.	197-W-2012	M/s Home Life vs. Government of Pakistan etc.
16.	198-W-2012	M/s Home Life etc. vs. Government of Pakistan etc.
17.	199-W-2012	M/s Makhah Enterprises etc. vs. Government of Pakistan etc.
18.	200-W-2012	M/s Muhammad Trading Company & Another vs. Government of Pakistan etc.
19.	201-W-2012	M/s Golden Enterprises vs. Government of Pakistan etc.
20.	202-W-2012	M/s Waheed Sons etc. vs. Government of Pakistan etc.
21.	203-W-2012	M/s S. Abdullah & Co. & Another vs. Government of Pakistan etc.
22.	204-W-2012	M/s Khaliq Trading Co. vs. Government of Pakistan etc.
23.	208-W-2012	M/s Dotview Importer etc. Vs. Ministry of Commerce, Government of Pakistan etc.
24.	230-W-2012	M/s Umer Corporation vs. Government of Pakistan etc.
25.	231-W-2012	M/s W.H. Traders etc. vs. Government of Pakistan etc.

Date of hearing : **21.05.2012**
Appellants' by : **Mr. Shafqat Mahmood Chohan, Advocate**
Mr. Munam Sultan, Advocate
Barrister Babar Ali Khan
Ch. Arshad Mahmood, Advocate
Respondents by : **Rana Muhammad Shamim, Advocate**
Raja Muhammad Iqbal, Advocate

NOOR-UL-HAQ N. QURESHI J. Through this consolidated

judgment, above titled ICAs are being decided, which are directed against the judgment dated 27.04.2012, whereby learned Single Judge-in-Chamber, dismissed the writ petitions by a single order. Therefore, instant ICAs have been preferred challenging the said order.

2. Facts briefly stated in the writ petitions as well as in ICA are that appellants used to import tiles, sanitary goods etc from Peoples Republic of China covered under Category-V of Free Trade Agreement (FTA) (hereinafter termed as FTA) an

International Treaty executed between Islamic Republic of Pakistan and Government of Peoples Republic of China called as "Pak-China FTA" on 24.11.2006, which is applicable w.e.f. its date of execution. Government of Pakistan issued SRO No.1286/2005 dated 26.12.2005 for implementation of the said Treaty and also framed rules for the purpose. Six categories of the commodities to be imported from China, same incorporated in Section II of the said Treaty. However, a custom duty at 25% was imposed at the time of execution of the Treaty against PTC Headings and sub-headings. Category-V specifies no concession, whereas Category-VI speaks exclusion from the Treaty.

The Government of Pakistan increased custom duty initially from 25% to 35% w.e.f. 01.07.2008 through SRO No.497(1) dated 13.06.2009 against the said PTC headings and further increase up to 37.5% including part of regulatory duty through SRO No.497(1)/09 & SRO No.595(1)/09 against levy of duty at 25% of PTC headings referred therein covered under Category-V of the Treaty, therefore, were challenged before this Court by filing writ petitions seeking thereby declaration, the same as illegal, without lawful authority and fragrant violation of the International Treaty "Pak-China FTA".

Learned Single Judge-in-Chamber while declining relief prayed for observed as under: -

13. *In addition to the above, if the petitioners feel that u/s 18(c) ibid they are entitled to reduce rate of duty, they can raise this objection before the Customs Authorities in appeal. In this respect, the petitioners have got alternate and adequate remedy and on that score too, writ cannot be issued.*

14. In view of the aforementioned facts, I find no force in these petitions and accordingly all the writ petitions are dismissed.

3. Learned counsel for the appellants' argued that learned Single Judge-in-Chamber ignored the delegated legislation, issuance of SRO dated 26.12.2005 by Government of Pakistan under provisions of Section 18(c) of Customs Act, 1969. They also argued that learned Judge has erred in deciding as to Treaty, unless legislated by the Parliament cannot be implemented as law of land. He argued that rights of the appellants are protected under Article 18 of the Constitution and conditions of very Trade Agreement, its violation to execute by the Government, constrained the appellants' to seek relief by invoking writ jurisdiction.

Question was raised, as to whether Section 18(c) of the Customs Act exclusively deals Categories for decrease in rates of preferential duty of the Free Trade

Agreement, it is also emphasized that learned Single Judge, while ignoring the legal aspects that the violation of the Treaty affecting the rights of appellants, can only be challenged through constitutional jurisdiction of this Court. It was also argued that increase of the custom duty rate from 25% to 37.5% against the Treaty Pak-China (FTA) validly executed between two Governments and thus issuance of Notifications at increased rate, are thus illegal, ultra-vires and without lawful authority. Learned counsel argued on like nature issues that learned Single Judge-in-Chamber, while deciding the writ petitions, has failed to consider the distinction between law of land and Treaty executed between two Governments, having a specification, which being binding upon the Federal Government, cannot empower to increase such custom duty. It was earlier by Notification, was imposed @ 25%. He, in support of his contentions, referred relevant provisions of Treaty as well as Notifications issued by the respondents thereby reiterated the claim of appellants that such increase by imposition being contrary to the relevant clauses of Treaty, is an illegal and unlawful act, which directly affects the rights of appellants'. He, in support of his contentions, submitted following case law: -

- i) **PLD 1988 Supreme Court 670 (M/s Sh. Abdur Rahim, Aliah Ditta Vs. Federation of Pakistan etc.)**
- ii) **PLD 1971 Supreme Court 205 (M/s Usmania Glass Sheet Factory Vs. Sales Tax Officer, Chittagong)**
- iii) **2002 CLC 1819 (Muzaffar Khan and Others Vs. Evacuee Trust Property through Deputy Administrator)**
- iv) **2010 PTD 2012 (Commissioner of Income Tax, Karachi Vs. M/s Grindlay Bank PLC, Karachi)**
- v) **2009 PTD 1791 (M/s American Express Bank Limited, Karachi Vs. Commissioner of Income Tax, Coys-I, Karachi)**
- vi) **2004 PTD 1994 (Commissioner of Income Tax Vs. Ghazi Brothers Construction).**

He, therefore, submits a request that while accepting these ICAs, writ petitions dismissed by the learned Single Judge-in-Chamber, may also be allowed.

4. On the very day, when the matter was placed before the Court, Rana Shamim Ahmed, Advocate & Raja Muhammad Iqbal, Advocate recorded their presence, submitted power of attorney on behalf of respondents and shown their willingness to proceed with the case.

5. Learned counsel for the respondents Rana Shamim Ahmed, Advocate referred Section 18 (c)(4) of Customs Act, 1969. He, by referring the said Act, argued that Section

18(c) drives international treaties. Simultaneously, it proves the prerogative of the Government for discontinuing or increasing the preferential rates, not exceeding the standard rates or decreasing the preferential rates. He also argued that Section 31A of the Customs Act, 1969 in furtherance of it, also gives power of the withdrawal of whole or any part of sanction or concession of duty. He argued that infact the appellants have challenged SRO issued by the Government under the Finance Act, as such, appellants in fact should have challenged the same before the setup provided by the law, where concerned forums are provided powers even to examine the issuance of SRO. Therefore, appellants have wrongly invoked writ jurisdiction. He argued that ICAs, by itself, are not maintainable on several counts, because writ cannot be issued on a Treaty, which unless became law of land by the act of Parliament, which cannot be challenged through writ jurisdiction. He argued that Customs Act provides a complete hierarchy to deal with such type of matters and appeals, instead of enjoying proper jurisdiction, they have wrongly approached this Court. He argued that right of appeal is available to the petitioners, but instead of filing appeal, they have directly invoked constitutional jurisdiction.

In this regard, he referred case law reported in **1993 SCMR 39**, which enunciates the principle that legislation when provides a hierarchy for determination of a dispute, a complete procedure for such disputes, writ would be not maintainable.

With regard to the Treaty, Hon'ble Supreme Court of Pakistan in a reported case **PLD 1994 SC 693** (Ms. Shehla Zia & Others V. WAPDA) has elaborately discussed such issue and decide the same with a view that without framing law in terms of international agreements, the covenants of such agreement cannot be implemented as a law nor they bind down any party.

In this regard, he has also submitted a case law reported in **2002 SCMR 1694** (Societe Generale De Surveillance S.A. Vs. Pakistan through Secretary, Ministry of Finance, Revenue Division, Islamabad), wherein similar question of law was also elaborately discussed and formed an opinion that provisions of Treaty were not incorporated through legislation into the law of country, therefore, same have no effect of altering the existing law as such, rights arising there-from, called treaty rights, cannot be enforced through Courts, as in such a situation, the Court was not vested with the power to do so. He also argued that in this regard, through legislation by amending the

Customs Act, Section 19(3) was enacted. He argued that even certain rights accrued in favour of petitioners, same stood wiped out by enactment of Section 19(3) of Customs Act, 1969.

In this regard, he referred **2005 PTD 495** (Nishat Mills Limited Vs. Federation of Pakistan through Secretary, Finance Division, Federal Secretariat and 02-Others). In the said judgment, Hon'ble Division Bench of Sindh High Court have discussed the time bound, did not grant any exemption from payment of duty for a specific period of time, but merely stated certain preconditions to be fulfilled for qualifying to the benefit of exemption, but when such period is not expired, the petitioners even if acquired right of exemption through question of withdrawal will be altogether irrelevant. Though, it is observed that executive was bound to representation made under the doctrine a promissory estoppel, but there could be no estoppel against exercise of legislative power.

He also argued, while referring case law **PLD 1997 SC 334** (Sandalbar Enterprises Pvt. Ltd. Vs. Central Board of Revenue and others), whereby the Division Bench of Hon'ble Supreme Court has observed that High Court has to see the dominant object of filing of constitutional petitions, if it was not to pay the duty assessed by a customs officer at Karachi, Supreme Court declined petition for leave to appeal. In such cases, petitions were filed at other places on the plea of publication of relevant notification at such places. He argued that in the instant case, a similar feature exists and appellants since were charged at Karachi Port and they have wrongly chosen the jurisdiction of this Court. Therefore, if any grievance they have, they may agitate the same before Hon'ble High Court at Karachi.

6. Mr. Raja Muhammad Iqbal, Advocate, while arguing, submitted certain case law. He while relying upon **2005 SCMR 37** (Collector of Customs, Lahore & Others Vs. Universal Gateway Trading Corporation & Another), argued that under such circumstances, without efficacious remedy available u/s 179, 193, 194-A, 196 of the Customs Act, 1969, the importers instead of approaching concerned forum available in the hierarchy of Customs Law, cannot seek relief under the garb of Article 199 of the Constitution.

Similar was the view drawn by the Hon'ble Supreme Court in a reported case **1993 SCMR 1108** (Income Tax Officer & Another Vs. M/s Chappal Builders).

He argued that Customs Collector has not been joined as a party, therefore, view formed by the Hon'ble Supreme Court in a reported case **2004 PTD 2217** (Collector of Sales Tax Vs. Muhammad Tahir & Others), the availing of constitutional jurisdiction is totally inelidable.

He argued that in the instant case, Collector Customs, levying the duty, has not been impleaded as a party, therefore, controversy cannot be resolved properly and effectively.

In this regard, he also referred a case law reported as **PLD 1992 SC 847** (Commissioner of Income Tax, Coys-II & Another Vs. Hamdard Dawakhan (Waqf), Karachi, wherein Hon'ble Supreme Court observed that when alternate remedy up to High Court is available, such practice was thus disapproved by the Hon'ble Supreme Court.

He, while relying upon **2012 PTD 541** (Collector of Customs & Another Vs. Maple Leaf Cement Factory Limited & Others), has argued that Full Bench of Hon'ble Supreme Court has decided such an issue when a show cause notice was issued by the authority demanding customs duty, when on the plea that respondents have prepared to file reply of such notice by raising pleas available to him under the law, the authority would decide the same accordingly, as a result whereof, the decision of Hon'ble High Court was set aside and concerned party was directed to file reply, which was ordered to be decided in accordance with law.

So far the concern of exemption within a certain period or period not fixed, he relied upon reported case law **PTCL 1998 CL 450** (M/s M.Y. Electronics Industries Pvt. Ltd. Through Manager & Others Vs. Government of Pakistan through Secretary Finance, Islamabad and Others). The Hon'ble Supreme Court while discussing compliance of deletion programme under S.R.O. 517(I)/89 within a period of five years, exemption availing thereby imposed no obligation of the authority to keep exemption allowed for full five years. Thus withdrawal of exemption before expiry of five years was not declared illegal and arbitrary.

He, while drawing our attention in continuity whereof that Hon'ble Supreme Court, while holding the Notification granting exemptions do not contain any time limit during which these exemptions were to remain operative nor there was any

representation from the Government that these exemptions will remain operative for any specified period, the doctrine of promissory estoppel cannot be invoked.

He too relied upon Section 18(c) & 31-A of Customs Act, 1969 in support of his contentions and both learned counsel have strongly supported the judgment passed by learned Single Judge-in-Chamber.

7. We have carefully heard the arguments, examined the record available and the authorities referred by either sides.

8. From the record, it appears that learned Single Judge-in-Chamber, while interpreting law, has properly formed his opinion about the agreement in between two countries, unless made the law of land, cannot be called in question by invoking writ jurisdiction.

9. We also observed the strong opinion set forth by the learned counsel for respondents with regard to the hierarchy, which provides a complete system of complete legislation for entertaining such disputes.

It is well settled law as a basic principle of jurisprudence that in case of any conflict between treaty and settlement, law of land has to prevail.

10. We are also impressed with the view that Act prevails over the legislation by issuing notification and thus, Section 18(c), particularly subsection (4) empowers the Federal Government to either increase or decrease the preferential rate, but it should not be exceeding the standard rates. For convenience, Section 18(c)(4) of the Customs Act, 1969 is reproduced hereunder: -

“(4) Notwithstanding anything contained in subsection (1) and (2), where the Federal Government is satisfied that, in the interest of trade including promotion of exports, it is necessary to take immediate action for discontinuing the preferential rate or increasing the preferential rate to a rate not exceeding the standard rate, or decreasing the preferential rate, in respect of an article specified in the First Schedule, the Federal Government may, by notification in the official Gazette, direct discontinuation of, or increase or decrease, as the case may be, the preferential rate”.

11. Like-wise, Section 31-A provides the effective rate of duty, which is also reproduced hereunder: -

“31-A. Effective rate of duty.- (1) *Notwithstanding anything contained in any other law for the time being in force or any decision of any Court, for the purposes of Section 30, 30-A and 31, the rate of duty applicable to any goods shall include any amount of duty imposed under section 18, 18A and 18C and the amount of duty that may have become payable in consequence of the withdrawal of the whole or any part of the exemption or*

concession from duty whether before or after the conclusion of a contract or agreement for the sale of such goods or opening of a letter of credit in respect thereof".

12. The arguments advanced by the learned counsel for the appellants thus carry no weight nor the authorities referred by the learned counsel for the appellants having any nexus with the dispute in hand. Therefore, we are not persuaded by the arguments advanced by the learned counsel for the appellants.

13. However to a query raised by the Court, as to whether the Notification can also be challenged before the appellate authorities to which, learned counsel for the appellants did not controvert it.

14. Therefore, under the circumstances, factual and legal position enumerated above, we are of the view that judgment passed by the learned Single Judge-in-Chamber is based upon sound reasoning as such, same does not require any interference. As a result whereof, instant ICAs are hereby dismissed, with no order as to costs.

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

(NOOR-UL-HAQ N. QURESHI)
JUDGE

Announced in Open Court on 28.05.2012.

JUDGE

JUDGE.