

Form No: HCJD/C.

**JUDGMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

**Case No: Writ Petition No. 3367 of 2011**

**M/s Bannu Woolen Mills Ltd.**

**Vs.**

**Federation of Pakistan and 2 others**

**Petitioner by:** Mr. Ishtiaq Ahmed, Advocate.  
**Respondent No.3 by:** Mr. Saeed ur Rehman, Advocate.  
**Respondent No.2 by:** Naziran Malik, Advocate.  
**Respondent No.1 by:** Syed Hasnain Ibrahim Kazmi, Deputy Attorney-General.

**Date of Decision:** 17.02.2015.

**AAMER FAROOQ, J.-** Through this consolidated judgment I intend to decide the instant writ petition as well as Writ Petition No.3371/2011 and Writ Petition No.3368/2011, as common question of law is involved.

2. The petitioners are engaged in business relating to textile having their units in the Province of Khyber Pakhtunkhwa (KPK). Due to war on terror business activities in the Province of KPK were adversely affected and the Government considered it appropriate to grant relief/concessions to the industries situated there. In this behalf Prime Minister in the year 2010 announced a Relief Package in accordance with the categorization of the affected areas. In this regard Government of Pakistan (Finance Division) categorized the areas into three categories which are as follows:

- i. Most Affected Areas
- ii. Moderate Affected Areas
- iii. Lesser Affected Areas

In pursuance of its policies respondent No.1 announced various concessions in payment of income tax, electricity bills, sales tax etc. One such measure was providing of concession with respect to the levy of sales tax. Government of Pakistan through notification dated 10.03.2010 bearing SRO No.165(I)/2010 reduced the rate of sales tax to 50% of the rate levyable on the supplies of goods made in Districts of *inter alia* Bannu and Kohat. The referred notification was issued under clause A of subsection (2) of section 13 of the Sales Tax Act, 1990. The said notification was superseded by another notification bearing SRO No.180(I)/2011 dated 05.03.2011 issued under clause B of subsection (2) of section

3 of the Sales Income Tax Act, 1990. In the referred notification rate of sales tax was to be charged at the lower rate of 50% of the rates levyable under subsection (1) of the said section on the supplies made of goods in Districts *inter alia* Bannu, Kohat and Peshawar. The textile manufacturers have been subjected to sales tax @ 6% & 4% on the supplies made of Yarn and Fabric to unregistered persons in terms of notification No.SRO No.283(I)/2011.

3. The petitioners, in the instant petitions, are aggrieved of SRO No.180(I)/2011 dated 05.03.2011. Through the abovementioned writ petitions the petitioners seek declaration to the effect that SRO No.180(I)/2011 dated 05.03.2011 has been issued with *mala fide* and that SRO No.165(I)/2010 dated 10.03.2010 has been superseded without jurisdiction.

4. Learned counsel for the petitioners *inter alia* submitted that supersession of SRO No.165(I)/2010 with SRO No.180(I)/2011 is based on *mala fide*. The basic purpose for the issuance of the latter SRO was to exclude the petitioners from exemption available under SRO No.165(I)/2010 extended to all registered persons across the board within specified Districts of KPK and tribal areas. It was further submitted that the tax exemption announced by Prime Minister of Pakistan in the Province of KPK was given practical shape in the form of SRO No.165(I)/2010 whereby exemptions were allowed to the registered persons. The learned counsel placed on record the copy of judgment by the Hon'ble Peshawar High Court in Writ Petition No.3036/2011 whereby SRO No.180(I)/2011 has been declared to be illegal and requested striking down SRO No.180(I)/2011 on the basis of above submissions and judgment of the Hon'ble Peshawar High Court.

6. Learned counsels for the respondents opposed the writ petition.

7. The Hon'ble Peshawar High Court in the abovementioned judgment has elaborately discussed the controversy which is same in the instant writ petition. Relevant portion of the judgment reads as follows:

32. It is an admitted position that '*rights*' had accrued in favour of the petitioners, when the Prime Minister announced the *Package* for providing incentives to businesses in "*Affected Areas*". These '*rights*' matured into '*vested rights*', when the Federal Government issued SRO 165 under Section 13 of the Act, exempting 50% of the leviable sales tax. As the said exemption was not time bound and was withdrawn by the competent authority, the same was *intra vires*. However, this would not absolve the Federal Government to ignore the cumulative effect of striking features protecting the '*benefits*' to the petitioners provided in the *Package* and clearly reflected in the SROs 165 and 180, particularly the following:

- i. *The petitioners are admittedly carrying on their business in the "Affected Areas" expressly stated in SRO 180"*
- ii. *SRO 180 does not declare 'textile' as other sectors, have been expressly excluded from the 'benefits' extended therein.*
- iii. *SRO 283 does not supersede the 'benefit' of SRO 180.*

*Essentially, the 'rationale' behind the Package and SRO 165 was aimed to give persons, such as the petitioners, an advantage over others engaged in the same business, elsewhere in the country.*

*33. It is also a settled principle of interpreting fiscal provisions relating to grant of 'benefits' that the same have to be positively and liberally construed in order to ensure that the 'benefits' intended to be granted are actually given effect to in a meaningful manner.*

*34. Now, when we compare the incidence of sale tax flowing out of SRO 165 and SRO 180, it is noted that the effect therefrom is the same. SRO 165 is granting an exemption of 50% of the leviable sales tax, while SRO 180 is imposing sales tax at the rate of 50% of the rate of sales tax under sub-section 3 of the Act. The incidence of sales tax on the person making taxable supplies under both the SROs, as stated earlier, would have been the same.*

*35. To clarify this crucial issue, the representative and the learned counsel for the Revenue were confronted to explain the need for superseding SRO 165 by issuance of SRO 180, when the incidence of sales tax flowing from both the SROs was the same, there had no explanation. However, they insisted that though the incidence of sales tax flowing from both SROs was the same, they were validly issued by the competent authority under the policy of Federal Government, which was non-justiciable.*

*36. Another striking feature to note is the timing of issuance of SROs. On 05.03.2011, SRO 180 superseded SRO 165 and less than a month later SRO 283 was issued. Had SRO 180 not superseded SRO 165, the petitioners would have availed exemption of 50% of sales tax, without it being restricted to the standard rate of sub-section (1) of section 3 of the Act. When the learned counsel and representative of the Revenue were further asked to explain, if any sector other than textile was effected by the restriction imposed in SRO 180 to the standard rate of sales tax under sub-section (1) of section 3 of the Act, their response was again in the negative.*

*37. There being no reason, muchless justifiable forthcoming from the Revenue for the issuance, timing and the final affect of SRO 180 in superseding the exemption provided to the petitioners under SRO 165, throw a very negative light on the basis and 'rationale' behind the impugned action of the Federal Government. This conspicuous silence of the Revenue to provide any justifiable reason, for the issuance, timing and the exclusive affect upon the 'textile sector' carrying on their businesses in the "Affected Areas" made by SRO 180 would surely expose the impugned action of the Revenue to come within the mischief of being declared "malafide in law.*

*40. Accordingly, for the reasons stated hereinabove, this Court would:*

- i. Declare that SRO 180 to be illgal, being based on 'malafide in law'.*
- ii. The petitioners being entitled to benefits provided under SRO 165 and SRO 283 and the effect thereto has to be duly extended to the petitioners.*
- iii. The petitioners from 1.4.2011 are to be charged 50% of the rate of sales tax provided under SRO 283.*

*These Writ Petitions are disposed of in the above terms."*

8. Since by virtue of abovementioned judgment SRO No.180(I)/2011 has already been declared illegal, therefore, the same does not hold the field. However,

learned counsel for the petitioners pleaded that the department is interpreting the judgment by Hon'ble Peshawar High Court otherwise and is of the view that the referred SRO is applicable in cases of the petitioners. The judgment passed by the Hon'ble Peshawar High Court declaring the SRO No.180(I)/2011 illegal is not a judgment *in personam* but is *in rem*. In this regard the Hon'ble Supreme Court of Pakistan in case titled *Pir Bukhsh v. Chairman Allotment Committee* (PLD 1987 SC 145) elucidated the concept of judgment *in rem* and the judgment *in personam* and observed as follows:

*The High Court in dislodging the appellants held that the judgment of the Supreme Court was not a judgment in rem, but in personam. The terms "in rem" and "in personam" are of Roman Law used in connection with actin, that is, actin . in rem and actio in personam to denote the nature of actions, and with the disappearance of the Roman forms of procedure, each of the two terms "in rem" and "in personam" got tagged with the word judgments to denote the end-products of actions in rem and actions in personam. Thus, according to the civil law an actin in which a' claim of ownership was made against all other persons was an action in rem and the judgment pronounced in such action was a judgment in re and binding upon all persons whom the Court was competent to bind, but if the claim was made against a particular person or persons, it was an action in personam and the decree was a decree in personam and binding only upon the particular person or persons against whom the claim was preferred or persons who were privies to them."*

9. Similarly the Hon'ble Lahore High Court, Lahore in case titled *Ijaz Rasool v. Member National Industrial Relations Commission and 5 others* (2014 PLC (C.S.) 288 observed as under:

*The dictums laid down by the Hon'ble Supreme Court of Pakistan show that "judgment in rem is a different from the judgment in personam". A judgment in rem is a judgment against a thing as contradistinguished from a judgment against a person or a judgment whereby a status is determined. A judgment in rem is an adjudication pronounced upon the status of some particular subject-matter by a Tribunal/Court having competent authority for that purpose. It differs from a judgment in personam as this judgment is in form as well as substance between the parties claiming the right, and that it is so inter parties appears by the record itself. A judgment in rem is founded on a proceeding instituted, not against the person as such, but against or upon the thing or subject-matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is solemn declaration of the status of the thing, and it ipso facto renders it what it declares it to be."*

10. The effect of the judgment of the Hon'ble Peshawar High Court is that SRO No.180(I)/2011 has been declared to be illegal and the operation is *in rem*

however, keeping in view the submissions made by the learned counsel for the petitioners a specific order is being passed through the present judgment.

11. In view of above, the aforesaid writ petitions are allowed and it is declared that SRO No.180(I)/2011 dated 05.03.2011 is illegal and the petitioners are entitled to the benefit under SRO No.165(I)/2010.

*Approved for Reporting*

(AAMER FAROOQ)  
JUDGE

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