

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, MINGORA
BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

W.P No.1346-M/2020

*M/S. Sardar Wali khan Carriage Contractor Village Zitoor, Post Office
Garam Chashma, Tehsil & District Chitral through proprietor Mr.
Sardar Wali Khan son of Ahmad Bai.Petitioner.*

Versus

1. *Government of Pakistan, through Federal Secretary Finance and Revenue Division, Islamabad.*
2. *The Chairman, Federal Board of Revenue, Constitutional Avenue, Islamabad.*
3. *Secretary Food Department Government of Khyber Pakhtunkhwa, Haji Camp. G.T Road Peshawar.*
4. *Director Food Department, Government of Khyber Pakhtunkhwa, Haji Camp. G.T Road, Peshawar.*
5. *Director Accounts, Food Department, Government of Khyber Pakhtunkhwa, Haji Camp, G.T Road, Peshawar*
6. *District Food Controller, Food Department, Government of Khyber Pakhtunkhwa, Dargai, Swat.*
7. *Chief Commissioner / Commissioner Inland Revenue, Regional Tax Office, University Road, Peshawar.....petitioner.*

Present: Mr. Isaac Ali Qazi, Advocate for Petitioner through Video Link.

Mr. Ishtiaq Ahmad (Junior) Advocate through Video Link for Respondent/ Tax Department and on behalf of Mr. Rehman Ullah, Advocate representing the Respondents.

Mr. Iftikhar Ahmad (Senior) DAG for Federation.

Raza Uddin Khan, Additional Advocate General for Provincial Government.

Date of hearing: 15.03.2023.

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- By invoking Writ jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, the petitioner being the resident and services provider in erstwhile Tribal Area seeks the following prayers:

- (i) Declare that the profit and gains / income of the Petitioner from the carriage business accrue to the Petitioner within the territorial limits of erstwhile PATA is immune/exempted from payment of Income Tax:

- (ii) Declare that payments made to the Petitioner by the Respondent Food Department are not liable to be subjected to withholding tax u/s 153 ibid.
- (iii) Declare that Petitioner to avail exemption u/s 153 ibid not required to provide any Exemption Certificate u/s 159 of the Income Tax Ordinance, 2001 and such denied from the Petitioner is unjustified and without lawful cause and authority, thus, of no legal effect; and
- (iv) Declare that if any tax deducted and collected u/s 153 of the Income Tax Ordinance, 2001 in advance from the Petitioner is liable to be refunded;

2. Precisely, the facts of this petition as per the contents of the petition are that Petitioner is a government carriage contractor is Sole Proprietorship running its business under the name and style of MS. Sardar Wali Khan Carriage Contractor situated at Chitral, (erstwhile Tribal area). That Petitioner was awarded a contract for supply of essential food products in District Swat, for which a formal contract was executed on 30th September 2020 between petitioner and Respondent-4. Grievance of the petitioner is that through vide SRO No. 1213(1)/2020 dated 05.10.2018 Federal Government has granted exemption from the Income Tax to the residents of erstwhile triable area but the benefit of the same has ben refused to the petitioner regarding his services i.e., supply of imported wheat for consumption in Swat. Respondents being directed by this Court have furnished Para-wise comments, who have resisted and opposed the issuance of writ on different legal and factual objections.


3. Arguments heard and record perused.

4. It is not disputed that erstwhile PATA (Provincially Administered Tribal Areas) was a region in Pakistan that was merged with the Khyber Pakhtunkhwa province in 2018. The exemption from tax in erstwhile PATA refers to the tax exemptions that were granted to the residents of the area before the merger. Previously, the region was governed by a separate set of laws, including the Frontier Crimes Regulation (FCR), which granted certain exemptions from taxes and other financial obligations to the residents of the area. These exemptions were intended to compensate for the lack of basic amenities and infrastructure in the region and to address the unique economic and social conditions of the area. Article 247 of the Constitution of Pakistan was for special status of the Provincially Administered Tribal Areas (PATA). Under this article, the President of Pakistan had the power to regulate the affairs of PATA, including its administration, political system, and judicial system. However, in 2018, the Constitution of Pakistan was amended to omit Article 247 and merge PATA with the Khyber Pakhtunkhwa province, thereby bringing it under the same administrative and political system as the rest of the country. The omission of Article 247 represents a significant shift in the governance and administration of PATA, as it brings the region under the same legal and constitutional framework as the rest of the country. This is expected to have a positive impact on the region's development, as it will now have access to the same resources and

infrastructure as other provinces in Pakistan. However, the transition to the new system is also likely to present certain challenges, as the region adapts to the new legal and administrative structures. In such an eventuality, SRO No. 1213(1)2018 being a Statutory Regulatory Order (SRO) was issued by the Federal Board of Revenue (FBR) in Pakistan on 05.10.2018. It has several significances, including:

- i) **Simplifying tax procedures:** The SRO streamlines certain tax procedures, such as the issuance of sales tax invoices and the submission of sales tax returns. This is intended to make it easier for businesses to comply with tax laws and regulations.
- ii) **Providing relief to taxpayers:** The SRO provides relief to taxpayers by waiving penalties and late fees for the late filing of tax returns, and by allowing taxpayers to adjust any excess tax paid against future liabilities.

Overall, SRO No. 1213(1)2018 is a significant statutory regulatory order that has implications for businesses and taxpayers in Pakistan. It provides tax relief and simplifies tax procedures, which is likely to have a positive impact on the economy and on taxpayers.

 **5.** Legal background of SRO 1213 is that by 25th Constitutional amendment and by the omission of article 247, all the laws of the country were extended to the merged districts, however, Second Schedule Parts I, II, III and IV pertains to exemption and tax concessions. Accordingly, Chapter IV of Second Schedule of Income Tax Ordinance, 2001 provides exemption from specific provisions, wherein clause 110 relates to the controversy in hand, which for convenience is reproduced as under:

“(110) The provisions of sections in Division III of Part V of Chapter X and Chapter XII of the Ordinance for deduction or collection of withholding tax which were not applicable prior to commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 (XXXVII of 2018) shall not apply to individual domiciled or company and association of person resident in the Tribal Areas forming part of the Provinces of Khyber Pakhtunkhwa and Baluchistan under paragraph (d) of Article 246 of the Constitution with effect from the 1st day of June, 2018 to the 30th day of June, 2023 (both days inclusive).

6. The aforesaid reproduced clause reflects that not only the exemption is provided to a particular group of persons, individual domiciled or company or association of person but also provide exemptions of certain other provisions of law in this part of the Country. Now, Division III of Part V of Chapter X of the Ordinance of 2001 embarks upon deduction of tax at source i.e., Salary, dividends, profit on debts, payments to non-residents, payments for good, services and contracts, Exports, Export of services, rent of immovable property, prizes and winnings, petroleum products and Time of deduction of Tax, which has been exempted completely, without any exception.

7. More-so, Division IV of Part V of Chapter X i.e., section 159 from the very beginning starts with, that where the Commissioner is satisfied that an amount to which Division II or Division III of Part apply: (a) exempt from the tax under the Income Tax Ordinance, 2001. Thus, when Division III of Part V of Chapter X is not applicable to the to individual domiciled or company or

person resident in Triable Area forming part of the Province for the purpose of deduction or collection of withholding tax from 01.06.2018 to 30.06.2023, therefore, demanding of exemption of tax certificate or grant thereof on profit and gain is not only unwarranted, illegal and unconstitutional but also inconsistent with the provisions of section 53 (1) of Chapter III of the Ordinance, which is reproduced as under:

"53. Exemptions and tax concessions in the Second Schedule: (1)
The income or classes of income, or persons or classes of persons specified in the Second Schedule shall be:
exempt from tax under this Ordinance, subject to any condition and to the extent specified therein; subject to tax under this Ordinance at such rates, which are less than the rates specified in the First Schedule, as are specified therein;
allowed a reduction in tax liability under this Ordinance, subject to conditions and to the extent specified therein; or
exempted from the operation of any provision of this Ordinance, subject to any conditions and to the extent specified therein."

8. More particularly, Clause 106 of the Part I of Second Schedule has been omitted and clause 110 of Second Schedule Part IV has been inserted in the Ordinance by SRO No.1213(1)/2018 dated 05.10.2018. The effect of clause 110 in Part IV of the Second Schedule was that the provisions of sections in Division III of Part V of Chapter X and Chapter XII of the Ordinance for deduction or collection of withholding taxes were not applicable to the individual domiciled or association of person located in the erstwhile tribal area. This Court in judgment dated 03.03.2020 rendered in W.P

886-M/2019 titled "M/s. Ikram Ullah Associates and 08 others Vs. Government of Khyber Pakhtunkhwa through Chief Secretary and 17 others" has held that:

"Indeed, this provision i.e., Section 153 makes the Provincial Government responsible to deduct advance tax from the contractors involved in the construction of business. Section 149 to Section 158 fall within Division III of Chapter X of the Ordinance and application of sections of Division III of Part-V of Chapter X are not applicable to the individuals domiciled or corporate entities situated within the territorial limits of erstwhile tribal areas in view of Clause 110 in Part-IV of the 2nd Schedule. Thus, when section 159 itself excludes the amount/ income of the present petitioners for obtaining exemption certificate then the demand of the Revenue/FBR that the present petitioners should obtain exemption certificates from the Commissioner concerned, is beyond comprehension."

9. The afore said discussion can well conclude that:

- a) The profit and gain/income of the present petitioners from the construction business which is completely located within the territorial limits of erstwhile PATA is immune from payment of income tax;
- b. The present petitioners are not required to obtain exemption certificate u/s 159 of the Ordinance from the Commissioner Income Tax/FBR; and
- c. The respondent Government has no authority to collect income tax from payment to the petitioners in respect of their work which they are executing within the territorial limits of erstwhile PATA.

This Court in W.P No: 226-M of 2021 decided on 25.05.2022

has laid to rest this controversy, wherein it was held that:

“The demand of exemption certificate from any individual, company or association of person from this very particular area has been put to rest once for all, therefore, the argument of learned counsel for the respondents regarding mechanism that they should get exemption certificate from authority concern, is without any force and is of no legal effect. When learned counsel for the respondents was confronted with this legal aspect, he was unable to explain the demand and assertion of the respondents for obtaining exemption certificate by the petitioners, which is in negation of clause 110 of the Second Schedule of Part IV of Income Tax Ordinance, 2001.”

10. Adverting to another significant aspect, whereby Khyber Pakhtunkhwa Revenue Authority, (KPRA) with the prior approval of the Government, granted exemption from the whole of sales tax leviable thereunder, to the service providers of the erstwhile Federally or Provincially Administered Tribal Areas (FATA and PATA) through notification dated 15th March 2019, with the following conditions, namely: -

- a) the service providers are the bonafide residents of,
- b) their service providing businesses are located in, and
- c) they are providing services for consumption exclusively within the territory of the said areas;

However, the effect of the notification was given retrospectively i.e., from the date of 25th Constitutional amendment, with the sealing date of exemption as 30th June 2023.

11. No doubt that the notification (*supra*) in explicit, clear and unequivocal terms provided exemption to all *bona fide* residents who are providing services for consumption and their business located in the erstwhile triable area. Whoever fulfills these three conditions shall

be extended the exemption of notification. On the touchstone of criteria set for exemption, when the case of the petitioner is looked into, it transpires that not only the petitioner is the resident of the exempted area but he fulfills the next two conditions. He is providing services for consumption exclusively within the territory of erstwhile tribal area as reflected from his agreement and the letter of respondent No. 4 with the subject (Tender for the transportation of imported wheat from Karachi/Gwadar Ports to KPK for the year 2020-21) with further clarification in column No.2 as Provincial Reserve Center as "SWAT" at serial No. 14, leaving no doubt for fulfillment of all the conditions for the benefit of notification. The objection of the learned counsel for contesting respondents that at serial No. 3.3 of the contract it was agreed by the petitioner that he will be bound to pay Khyber Pakhtunkhwa Revenue Authority Taxes on services, Income Tax, Professional Tax, Stamp Duty and disable person rehabilitation Funds, is misconceived because the contract or the settled terms and condition cannot bypass the law, regulation of notification for the period mentioned therein. There is one exception that the exemptions of the notification shall not apply on telecommunication services which is neither the case of petitioner nor he seeks the exemption on the services of telecommunication. The respondents being the government functionary are bound to abide by the law in its letter and spirit. However, it is worthwhile to mention that the exemption claimed and as discussed above is restricted to the transportation of



wheat and its delivery for consumption at Swat being reflected in letter "No. 3596/AC-117/TCP/2020-21 dated 16th September 2020" in juxtaposition with the agreement dated "30th September 2020". The wording of the notification is in line with the benefit of SRO 1213 (1) 2018 dated 05.12.2018 and the notification of the KPRA dated 15th of March 2019 are same and both hold the field till 30th June, 2023. Therefore, for the reasons discussed above on two-fold aspects, the petitioner has made out a case for issuance of writ, hence this petition is allowed as prayed for.

Announced.
15.03.2023.



JUDGE



JUDGE

office

17/4/2023

Sabz Ali/* (D.B)

HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR
HON'BLE MR. JUSTICE MUHAMMAD IJAZ KHAN.