

2. W.M.

SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Gulzar Ahmed
Mr. Justice Qazi Faez Isa
Mr. Justice Maqbool Baqar

Civil Appeals No.1475 & 1476 of 2007

[On appeal against the judgment dated 16.11.2006
passed by the High Court of Sindh, Karachi, in
C.P.Nos.D-1965 & D-1966 of 1992]

Al-Noor Sugar Mills Limited [in C.A.No.1475]

Mirpurkhas Sugar Mills Limited [in C.A.No.1476]

Appellant(s)

VERSUS

Federation of Pakistan & others [in both cases]
Respondent(s)

For the Appellant(s) : Mr. Khalid Anwar, Senior ASC
[In both appeals] Syed Rifaqat Hussain Shah, AOR

For the Federation : Mr. Muhammad Waqar Rana
[In both appeals] Additional Attorney General for Pakistan

For Respondent No.2 : Mr. M. Bilal, Senior ASC
[In both appeals] Mr. Babar Bilal, ASC
Mr. Mehr Khan Malik, AOR

For Respondents No.3-4 : Mr. Shakeel Ahmed, ASC
[In both appeals] Mr. A.S.K. Ghori, AOR (Absent)

Date of Hearing : 20.09.2017

JUDGMENT

GULZAR AHMED, J.— These two appeals are with the leave of this Court. The appellants have Sugar Factories and are engaged in manufacturing of sugar. In terms of Section 3 of the Central Excises & Salt Act, 1944 ("the Act"), under Entry No.02.02, the excise duty on sugar is levied at the rate of Rs.2.15 per K.G. Section 12-A of the Act gives power to the Federal Government to grant exemption on payment of excise duty by notification in the Official Gazette. Through

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SRO No.555(I)/79 dated 28.06.1979, exemption was granted on manufactured sugar in a factory in a financial year, which exceeds annual production of the preceding five financial years and the rate provided was 68 paisa per K.G. Changes in the exemption kept on taking place through subsequent SROs. By means of SRO No.555(I)/89 dated 03.06.1989, the exemption on manufactured sugar was altogether omitted. By SRO No.505(I)/90 dated 07.06.1990 exemption was again granted to the sugar factories on manufactured sugar. Such SRO No.505(I)/90 dated 07.06.1990 reads as follows: -

"In exercise of the powers conferred by sub-section (1) of section 12A of the Central Excises and Salt Act, 1944 (I of 1944), the Federal Government is pleased to direct that the following further amendments shall be made in its Notification No.SRO.555(I)/79 dated the 28th June, 1979, namely: -

In the aforesaid Notification, —

4. In Table I, —

- (1) in item No.02.02 in column (1), in clause (f) in column (2), for the figure "1989-90" the figure "1992-93" shall be substituted:
- (2) Against item No.02.02 in column (1), after clause (f) in column (2) and the entry relating thereto in column (3), the following new clause and entry relating thereto shall be added, namely:-
 - (g) Sugar manufactured in a factory in a financial year which exceeds the production for the preceding year in that factory provided the factory had worked for a full crushing season in the preceding year." One rupee and eight paisa per kg.

By SRO No.823(I)/91 dated 24.08.1991 further amendment was made and such SRO is as follows: -

"In exercise of the powers conferred by sub-section (1) of section 12-A of the Central Excises and Salt Act, 1944 (I of 1944), the Federal Government is pleased to direct that the following further amendment shall be made in this Division Notification No.SRO.555(I)/79, dated the 28th June, 1979, namely:—

In the aforesaid Notification, in Table 1, against item 02.02 after clause (g) in column (2), the following Explanation shall be added and shall be deemed always to have been so added, namely: -

"Explanation.— In respect of the Province of the Punjab, "full crushing season" means a period which is not less than one hundred and sixty days."

Yet by another SRO No.1264(I)/91 dated 23.12.1991 more amendment was made and such SRO is as follows: -

"In exercise of the powers conferred by sub-section (1) of section 12-A of the Central Excises and Salt Act, 1944 (I of 1944), the Federal Government is pleased to direct that the following further amendment shall be made in this Division's Notification No.S.R.O.555(I)/79 dated the 28th June, 1979, namely: -

In the aforesaid Notification, in Table 1, against item 02.02 after clause (g) in column (2), for the Explanation the following shall be substituted, namely:-

"Explanation.— "Full crushing season" means a period which is not less than---

- (i) One hundred and sixty days in respect of the Province of the Punjab
- (ii) One hundred and eighty days in respect of the Province of Sindh; and
- (iii) One hundred and fifty days in respect of the Province of North-West Frontier."

2. The dispute before us is with regard to the applicability of SRO No.1264(I)/91 dated 23.12.1991, on the sugar manufactured in the sugar factory in the financial year 1991-92 or whether the appellants will be entitled to exemption on manufactured sugar in the financial year 1991-92 purely on the basis of SRO No.505(I)/90 dated 07.06.1990.

3. We have heard learned counsel for the parties. Learned counsel for the parties have also submitted their written note of arguments.

4. We have considered the submissions of the learned counsel for the parties and have also gone through the record of the cases.

5. Mr. Khalid Anwar, learned Senior ASC for the appellants has contended that no retrospectivity can be given to SRO No.1264(I)/91 dated 23.12.1991 and the benefit of exemption accrued to the appellants under SRO No.505(I)/90 dated 07.06.1990 cannot be taken away from them. He further contended that the financial year 1991-92, for the accounting purposes, commenced from 1st July, 1991, while the crushing season started from 1st October, 1991 and the appellants have geared up themselves for entering into production from the beginning of financial year 1991-92 and crushing season commencing from 1st October, 1991 and such was done keeping in view the exemption as notified by SRO dated 07.06.1990, which was then holding the field for the Province of Sindh. He contended that the explanation defining full crushing season of 180 days in respect of Province of Sindh vide SRO dated 23.12.1991 will not apply to the financial year 1991-92, rather its operation will be prospective commencing from financial year 1992-93. In support of his submissions, learned Senior ASC has relied upon the cases of M/s Army Welfare Sugar Mills Ltd. & others v. Federation of Pakistan & others [1992 SCMR 1652] and Government of Pakistan through Ministry of Commerce, Pak Secretariat, Islamabad v. M/s Village Development Organization, VPO Landrwan, District Laki Marwat through Sher Adam [2005 SCMR 492].

6. On the other hand, Mr. Shakeel Ahmed, learned ASC appearing on behalf of Respondents No.3-4 has supported the impugned judgment and has contended that the appellants have

already availed benefit of exemption of financial year 1990-91 under SRO dated 07.06.1990 and they cannot take benefit of the same SRO for the financial year 1991-92 as for this financial year the condition of SRO dated 23.12.1991 has to be fulfilled for claiming exemption for this financial year. In support of his submissions, learned counsel has relied upon the cases of Abdur Rashid v. Central Board of Revenue and others [PLD 1965 (W.P.) Peshawar 249], Government of Pakistan and another v. M/s Mardan Industries Limited, Sakha Kot & another [PTCL 1988 CL 50] and Messrs Ashraf Sugar Mills Ltd. and another v. Government of Pakistan and others [2007 PTD 2303 (S.C)].

7. Mr. M. Bilal, learned Senior ASC appearing for respondent No.2 (CBR) has mainly challenged maintainability of both the appeals on the ground that CPLAs out of which these appeals have arisen, were not competently filed as the Board Resolution dated 01.01.1999 filed in C.A.No.1475 of 2007 is in favour of Mr. Muhammad Iqbal Umar Kotharia Wala while PLA was filed by one Mr. Suleman Ayub, in whose favour there is no Board Resolution. He has relied upon the cases of Telecard Limited v. Pakistan Telecommunication Authority [2014 CLD 415] and Muhammad Siddiq Muhammad Umar & another v. The Australasia Bank Limited [PLD 1966 Supreme Court 684] to support his submission that Board Resolution cannot be looked into at belated stage in a proceeding. He has relied upon the case of Trading Corporation of Pakistan Limited v. Haji Khuda Bux Amir Umar Limited [YLR 2007 Karachi 1745] and while referring to the scope of Order XXIX Rule 1 CPC has relied upon the case of Government of Pakistan v. Premier Sugar Mills [PLD 1991 Lahore 381].

8. Mr. Muhammad Waqar Rana, learned Additional Attorney General for Pakistan, has relied upon Section 2(h) of the Sugar

Factories Control Act, 1950 (**the Act of 1950**) and contended that the crushing season for the sugar factories have been defined not in days but from 1st October in any year and ending on the 30th June next year. He contended that Federal Government can calculate and prescribe days counting for the full crushing season.

9. We may note that the question of maintainability of these appeals appears to have been raised by Mr. M. Bilal, learned Senior ASC before this Court on 31.03.2015 and on such objection the Court has observed as follows:-

"Besides the above, Mr. M. Bilal, learned Senior ASC has raised an objection that the present appeals have not been filed by authorized persons as no article of association authorizing anyone on behalf of the appellants or resolution of the Board has been appended with the appeals. Let the appellants also file some documents to establish due authority on behalf of the appellants in initiating the present appeals."

The appellants in C.A.No.1475 of 2007 has filed copy of Resolution of its Board of Directors dated 01.01.1999 with CMA No.2623 of 2015.

The appellant in C.A.No.1476 of 2007 has filed copy of Resolution of its Board of Directors dated 10.07.1992 with CMA No.2624 of 2015.

10. Mr. Khalid Anwar, learned Senior ASC for the appellants has filed written submissions on the issue of maintainability. His submission is that for filing of a suit by a Company in terms of Order XXIX Rule 1 CPC a Director or other Officer who is well versed with the facts of the case and can depose to the same can institute a suit by signing the plaint and there is no requirement of filing or annexing with the plaint the Resolution of the Board of Directors of the Company. The learned Senior ASC has relied upon the case of Muhammad Siddiq Muhammad Umar & another v. The Australasia Bank Limited [PLD 1966 Supreme Court 684]. He distinguished the

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case of Iftikhar Hussain Khan of Mamdot v. M/s Ghulam Nabi Corporation Limited [PLD 1971 Supreme Court 550] and emphasized that this judgment, which was of a three member bench of this Court, did not consider the earlier decision of four member bench of this Court in the case of Australasia Bank. He has contended that Australasia Bank case was followed by this Court in the case of Central Bank of India Ltd v. Taj ud Din Abdur Rauf & others [1992 SCMR 846]. He has also relied upon the case of Pak Turk Enterprises (Pvt) Ltd v. Turk Hava Yolları (Turkish Airlines Inc. [2015 CLC 1].

11. First we will take up the question of maintainability of these two appeals. Mr. M. Bilal, learned Senior ASC in the first place argued that Civil Appeal No.1475 of 2007 is filed by one Mr. Suleman Ayub while the Board Resolution filed by the appellant Al-Noor Sugar Mills Limited is in favour of Mr. Muhammad Iqbal Umar Kotharia Wala. This submission of the learned ASC should not detain us for long for that we find that in Civil Appeal No.1475 of 2007 there are two appellants, one is Al-Noor Sugar Mills Limited while the other is Mr. Suleman Ayub, Director of Al-Noor Sugar Mills Limited. The Power of Attorney dated 06.03.2007 of Mr. K.A. Wahab, AOR is available on record which shows that it is signed by two persons one by Mr. Suleman Ayub and the other signature is on behalf of Al-Noor Sugar Mills Limited. It is not disputed before us that the other signature on the Power of Attorney on behalf of the Al-Noor Sugar Mills Limited is that of Mr. Muhammad Iqbal Umar Kotharia Wala. Thus, Power of Attorney of Mr. K.A. Wahab, AOR is signed on behalf of the Company apparently by Mr. Muhammad Iqbal Umar Kotharia Wala as appellant No.1 and Mr. Suleman Ayub as appellant No.2. A copy of the Resolution of the Board of Directors of Al-Noor Sugar Mills Limited

dated 01.01.1999 has also been filed which shows that Mr. Muhammad Iqbal Umar Kotharia Wala was duly authorized to file appeal for the company before this Court. Further we also find that there is a copy of the Resolution of the Board of Directors of Mirpurkhas Sugar Mills Limited dated 10.07.1992 on the record which shows that Mr. M. Akram, Managing Director of the Company has been authorized to file appeal before this Court. The Power of Attorney dated 06.03.2007 of Mr. K.A. Wahab, AOR in Civil Appeal No.1476 of 2007 is apparently signed by Mr. M. Akram and it is not the case of the respondents that Power of Attorney dated 06.03.2007 of Mr. K.A. Wahab, AOR is not signed by Mr. M. Akram.

12. The next objection raised by Mr. M. Bilal, learned Senior ASC is that the Board Resolutions were not filed at the time of filing of these appeals and subsequent filing of Board Resolutions will not cure the defect that the appeals were filed by unauthorized persons. In this regard, he has relied upon the case of Telecard Limited v. Pakistan Telecommunication Authority [2014 CLD 415]. The order in this reported case is a short one which can conveniently be reproduced as follows:-

"The appeal filed by the appellant under the provisions of the Pakistan Telecommunication (Re-Organization) Act, 1996 has been dismissed by the learned High Court on the ground that the same has not been filed by an authorized person; admittedly the appellant is a limited company and the appeal has not been filed by someone having due authority under the articles of association of the company authorization by the board resolution. It is a settled law that a *l/s* cannot be initiated on behalf of the company which is a juristic person, without having due authority either in terms of the articles of association or by the board resolution. This is conspicuously missing in the present case. The appellant has not even appended herewith

any document to establish that the CEO of the company, who allegedly signed the memo of appeal, had the authority.

2. In light of the above, we do not find any merit in this appeal calling for interference by this Court in the instant jurisdiction. Dismissed accordingly."

It may be noted that this order of this Court has proceeded on the premises that there was no Board Resolution as it was found to be conspicuously missing but the present case is not where the Board Resolutions are not available rather the same have been filed by the appellants and authenticity and legality of the Board Resolutions have not been challenged by the respondents. In the Australasia Bank Limited (*supra*) the authority of a person filing the suit was challenged on the premises that he had no authority to file it or to sign or verify the pleadings or that he was a principal officer of the Bank. The matter came up before this Court and the question of authority of a person signing the plaint was dealt with as follows:-

"It was apparent from the pleadings that the suit was being instituted by a constituted attorney of a public limited company. He could only do so if he was duly authorised in that behalf and occupied one or other of the offices mentioned in Rule 1 of Order XXIX of the Civil Procedure Code. A copy of the power of attorney had been produced which showed that Muhammad Khan had been empowered in that behalf but the question still remained to be ascertained as to whether those who gave him that power were competent to do so, as the authority was on behalf of a public limited company. For this purpose a reference to the Articles of Association of the company was certainly necessary to see whether the Directors were competent to delegate such power. It was not necessary to see whether the Directors had in fact approved of the giving of such power of attorney to the person who presented the plaint. This was, however, proved by the production of the resolution of the Board of Directors as a matter of abundant caution. The additional evidence was to that extent, therefore, in our opinion, rightly admitted. This was all that was required. It was not

necessary to call the Managing Director as the Court calling for the additional evidence itself realized subsequently. Even, the production of the resolution could have been dispensed with, as it was not strictly necessary."

The judgment referred by this Court on the point quoted above, does observe that production of Board Resolution could have been dispensed with but noted that Power of Attorney signed and executed on behalf of the Company has to be executed in accordance with the Article of Association of the Company. In the present case, there is no dispute before us that the Board Resolutions filed before this Court were not in accordance with the Article of Association of the two appellants namely Al-Noor Sugar Mills Limited and Mirpurkhas Sugar Mills Limited. The Board Resolution in C.A.No.1475 of 2007 of Al-Noor Sugar Mills Limited is dated 01.01.1999 while in C.A.No.1476 of 2007 of Mirpurkhas Sugar Mills Limited it is dated 10.07.1992. Both these Board Resolutions are prior to the filing of CPLAs and CAs by the appellants. When the very Board Resolutions are not in dispute the question as to when they are filed before the Court becomes of little relevance, as we noted from the impugned judgment of the High Court that no question with regard to competency of a person filing the constitution petition was raised or decided and once the respondent CBR raised this objection only then the occasion arose for the appellants to place before the Court the Board Resolutions and such has been done. In our view, nothing more was required to be done by the appellants for supporting that these two appeals were maintainable. We, therefore, find that these appeals were filed by duly authorized officials of the two appellants who had with them the Resolutions of the Board of Directors of the Companies.

13. Now we shall deal with the merits of the case and take up for consideration the first submission of Mr. Khalid Anwar, learned Senior ASC for the appellants that no retrospectivity can be given to SRO dated 23.12.1991 for the financial year 1991-92 and the appellants will be entitled to be given exemption according to SRO dated 07.06.1990. This Court has dealt with such issue time and again and relevant for consideration herein would be the case of M/s Army Welfare Sugar Mills Limited (supra) relating to exemption on production of sugar by sugar factories. Relying on the cases of Burmah Oil Company Limited v. The Trustees for the Port of Chittagong [PLD 1961 SC 452], Commissioner of Sales Tax, Karachi West v. Messrs Kruddsons Limited [PLD 1974 SC 180], Crown Bus Service Limited v. Central Board of Revenue & others [PLD 1976 Lah. 1487] and Salim Akbar v. The Government of Sindh through the Secretary Education, Karachi & another [PLD 1984 Karachi 359], this Court went on to hold "*that it is well settled proposition of the law that a notification which purports to impair an existing or vested right or imposes a new liability or obligation, cannot operate retrospectively in the absence of legal sanction but the converse i.e. a notification which confers benefit cannot operate retrospectively, does not seem to be correct proposition of law.*" In the case of M/s Village Development Organization (supra), the facts of the case in short were that Village Development Organization was an NGO registered with the Government of NWFP (now KPK). It moved an application to the Secretary, Ministry of Food, Agriculture and Livestock, Government of Pakistan for permission to export/transport 20,000 M-Tons of fertilizer (Urea) to Afghanistan, which was allowed vide order dated 02.03.2002 with the condition that transport of Urea would be through exit points

of Torkham and Miranshah. Pursuant to this permission, the respondent entered into an agreement with two Firms in Kahandar, Afghanistan, for supply of fertilizer and also received advance payment. Respondent No.1 also purchased from open market fertilizer for making supply. After completion of all formalities, the respondent applied for grant of transit permit/clearance certificate for export which was denied. The respondent filed writ petition in the Peshawar High Court, Peshawar, which was allowed and the Government of Pakistan challenged the said judgment. On these facts, this Court in para number 6 of the judgment observed as follows:-

"As per record, facility/permit to export allowed to the respondent by MINFAL has not yet been withdrawn but is subsisting as such a vested right has accrued in its favour. It is well-settled principle of law that the executive orders or notifications, which confer right and are beneficial, would be given retrospective effect and those which adversely affect or invade upon vested right cannot be applied with retrospective effect. In the instant case also permission to export was accorded by Government of Pakistan, Ministry of Food, Agriculture and Livestock on 02.03.2002 with NOC. The copy of the said letter was sent to Ministry of Commerce. It was for the first time that petitioner informed the respondent vide letter, dated 09.01.2004 that ECC has taken decision to export 50,000 M/Tons of urea through manufacturers only. Since the said order had adversely affected the vested right of the respondent as such, it would not be appropriate to apply it with retrospective effect. For better appreciation, reference can be made to the case of Anound Power Generation Limited and others v. Federation of Pakistan and others PLD 2001 SC 340, wherein this Court while dealing with the similar aspect of the matter held that if the notification has been used for the benefit of the subject then it can be made operative retrospectively but if its operation is to the disadvantage of a party who is the subject of the notification then it would operate prospectively."

14. In the case of Fecto Sugar Mills Limited through Director v. Government of Pakistan through Secretary, Ministry of Finance and Economic Affairs, Islamabad & 3 others [2002 CLD 1183], the learned Division Bench of the High Court was seized with the matter regarding exemption on manufactured sugar in which the facts were that vide SRO No.376(I)/94 dated 10.05.1994 Federal Government granted exemption on sugar manufactured in a factory in excess of average production of that factory in the preceding three years. While this SRO was in the field, it was followed by another SRO No.545(I)/94 dated 09.06.1994 granting exemption in the same manner against heading 1701.000 in the first schedule to the Act. The appellants geared up the resources by putting extra efforts for producing sugar during crushing season 1994-95 in excess of the previous three years average production. However, vide SRO No.476/95 dated 14.06.1995, the SRO dated 09.06.1994 was amended in the following manner:-

"Cane sugar 1701.1100 if manufactured in a financial year in excess of the average annual production of cane sugar in that factory in the preceding three financial years provided that the factory operated for a period not less than 150 days for crushing, in each of the preceding financial years, for production of cane sugar."

One Rupee
and fifty-
eight paisa
per Kg.

The petitioners, however, sought exemption on clearance of manufactured sugar for the financial year 1994-95 on the basis of SRO dated 10.05.1994 read with SRO dated 09.06.1994. The Division Bench has dealt with the matter as follows:-

"In the present case the petitioners acting on the said SRO No.545(I)/94 proceeded with the manufacturing process resulting in production of excess stocks of sugar in juxtaposition to the average production in the previous three financial years. The cases have been processed by the departmental Authorities and the excess sugar had been ordered to be cleared on the

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concessionary rates. The department has proceeded to withdraw the orders on the ground that the mills had not operated for a period of less than 150 days in each of the three preceding years. The factual controversy, as to whether or not the mills operated for not less than 150 days, aside what has to be seen as to whether the exemption could have been made subject to the said condition by issuing a notification. The answer to the said question in the light of the law laid down in the said case of Army Welfare Trust is, in our opinion to be in the negative for the simple reason that adding a condition to the grant of exemption at a point of time when the mills have already produced the excess stocks acting on the basis of average production for the three previous years set down in SRO No.545(I)/94 may well be impossible for the mills to meet with at the point of time when the latter notification was issued. Thus, for all purposes it will be withdrawal of exemption when the representation had already been made to the mills that stocks in excess of the said three years average production would be cleared at the concessionary rates and acted upon."

15. There is no cavil to the submission of Mr. Shakeel Ahmed, learned ASC for respondents No.3-4 that where Section 12-A of the Act grants power to the Federal Government to grant exemption it also includes power to withdraw such exemption also and there is also no cavil to the proposition that the exemption notification can be regulated by the Federal Government through subsequent notifications. For supporting latter submission, he has relied upon the case of M/s Mardan Industries Limited (*supra*) where the facts of the case were that the Government of Pakistan has granted permission to the respondent for establishment of a new industrial undertaking at Sakhakot, Malakand Agency, Dargai. The Central Government vide notification granted exemption from levy of excise duty for a period of four years on all excisable goods produced or manufactured in the Tribal Areas. The respondent established its Factory in Tribal Area and went into production. It sent a consignment of 'K-2' Cigarettes to M/s

Premier Tobacco Company, Karachi and it was cleared without payment of excise duty. When the respondent despatched the second consignment of 'K-2' Cigarettes to the said Company on 07.05.1964, it was apprehended and demand of excise duty was made. The respondent challenged such demand of excise duty by filing writ petition in the High Court of West Pakistan, Peshawar Bench. On 19.05.1964 the Central Government issued another notification amending earlier notification providing "*that the exemption granted shall not apply to any excisable goods manufactured in the Tribal area which bear brand, or trade name, or trade marks under which similar goods manufactured in any area of Pakistan other than the said tribal areas are also marketed if such goods are removed from the tribal areas to any other area in Pakistan*". The writ petition was allowed by the High Court on the principle that on the earlier notification the respondent has acquired vested right to exemption. The Government of Pakistan came to this Court where it observed as follows:-

"13. No doubt the power to take advantage of a Notification can be termed as right. But the only right which it appears to us, can be said to have been conferred by the said Notification, was that the new industrial undertaking should enjoy exemption from excise duty in respect of goods manufactured in tribal areas. That does not mean that a right had also been conferred on them to despatch free of excise duty out of the tribal areas, goods with such brands and trade marks, under which similar goods were marketed, in other parts of Pakistan. In other words, it cannot be said that the respondents were also given the right to take advantage of the brand of a cigarette that were already in the market in other parts of Pakistan. The High Court failed to notice the effect of the impugned proviso. By the said proviso the right to manufacture cigarettes was not taken away. It even did not disturb the right to manufacture such brands of cigarettes which were already in the market in other parts of Pakistan. It merely stopped them from despatching out of the tribal area without paying excise duty such cigarettes "which

bear brand, or trade name, or trade marks under which similar goods manufactured in any area of Pakistan other than the said tribal areas." Thus the proviso does not destroy their right to manufacture cigarettes out side the tribal areas. Hence no question of taking away any vested right acquired by the respondent No.1 under notification of 1961 arises in this case. At the most it could be said that the said proviso could not have retrospective operation. In other words it should not apply to the past and closed transactions. As already stated the Government is not claiming excise duty in respect of the cigarettes which had been despatched out side the tribal areas prior to the issue of the impugned proviso. It will be therefore, fallacious to say that the proviso interfered with their vested rights.

14. Lastly it may be mentioned that the concession granted to the respondent belonged to the class of '*privilegia favour abilia*' and as such the same could be regulated by a subsequent notification. In other words by the notification granting exemption the Government had not stripped itself of its essential powers to regulate the said exemption. Furthermore, in view of section 21 of the General Clauses Act the power of the Government to issue such a notification cannot also be challenged.

15. For the reasons stated above we hold that the impugned proviso is not *ultra vires* and that the respondent No.1 Messrs Mardan Industries Limited, are not entitled to despatch 'K-2' Cigarettes out side the tribal areas without payment of excise duty."

The principle elucidated by this judgment of this Court is that though exemption granted by the notification remains in filed but how such exemption is to be regulated same is retained by the Government and that such regulation of exemption can only operate prospectively and not retrospectively. The case before us, even if we consider it to be that of a regulation of exemption then too the notification dated 23.12.1991 will have prospective application and not retrospective, more so when this notification itself does not specify any date from which it will have application though such power of applying it from

certain date is available to the Government in terms of Section 12-A of the Act. We may further note that in SRO No.823(I)/91 dated 20.08.1991 by which explanation was added with the words "*that it shall be deemed always to have been so added*" and it only provided for full crushing season for the Province of Punjab to be that of not less than 160-days. No such deeming provision has been made in the notification dated 23.12.1991. The ultimate effect of it would be that this notification dated 23.12.1991 will have prospective application. Having come to such conclusion, now we come to consider as to what effect this notification dated 23.12.1991 has to the appellants viz-a-viz exemption notification dated 07.06.1990 which provided that the sugar manufactured in a factory in a financial year which exceeds production for the preceding year in that factory provided that the factory had worked for full crushing season in the preceding year. The aspect of exemption is not in dispute. Further working of a factory for full crushing season is also not in dispute. The only thing that is impairing the right of the appellants from availing the benefit of this exemption notification dated 23.12.1991 by which explanation of full crushing season for the Province of Sindh has been provided as 180-days. It is admitted position that financial year 1991-92 commenced from 1st July, 1991 and it is also an admitted position that crushing season had commenced from 1st October, 1991. Obviously, it cannot be expected that the appellants will not make arrangements for starting of the financial year 1991-92 and commencement of production without gearing up and its resources for production of excess sugar from preceding year. Thus, the SRO notification dated 23.12.1991 being prospective in operation will not breach the appellants' vested right of availing of incentive of exemption under

SRO notification dated 07.06.1990 for that the appellants have already gone into production of excess sugar in the financial year 1991-92. Having come to conclusion that the very SRO notification dated 23.12.1991 had no application to the financial year 1991-92 which itself clinches the matter, we do not think it is necessary for us to consider other grounds urged by the learned Senior ASC for the appellants.

16. We are cognizant of the law that as a general rule tax exemptions are given rigid interpretation against the assertion of tax payers and in favour of the taxing power but at the same time it is also established and well recognized rule that the burden of taxation should be distributed equally and fairly among the tax payers. We note that in terms of notification dated 23.12.1991 the preceding year has already concluded on 30.06.1991 and all figures of operation of sugar factory including the days they had operated became known to the excise authorities for that it is an undisputed fact that every sugar factory has an excise officer posted in it who notes down all facts and figures of the operation of sugar factory. Thus, when year of operation of the sugar factory has already concluded and its facts and figures have become known to the taxing authority, could a condition on closed operation justifiably be imposed, this very aspect of the matter has been dealt with in the case of M/s Mardan Industries Limited (*supra*) where it was observed that the notification could not apply to the past and closed transactions. This being the position, we hold that the impugned judgment dated 16.11.2006 of the High Court is not sustainable which is set-aside. Consequently, both the appeals are allowed with direction that the appellants shall be entitled to the grant of exemption in terms of SRO dated 07.06.1990 for the financial year

1991-92 and if any tax in this regard has been collected by the excise authorities, the same shall be refunded or adjusted as the case may be subject to determination by the competent forum that burden of such excise duty has not been passed on to the general public. No orders as to costs.

Bench-III
ISLAMABAD
NOT APPROVED FOR REPORTING


Announced in open Court on 26.02.2018

Judge