IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Yahya Afridi
Mr. Justice Amin-ud-Din Khan
Mrs. Justice Ayesha A. Malik

Civil Petitions No. 1896, 1897 & 1900 of 2022
(Against the judgment dated 09.02.2022 passed by the Peshawar High Court, Peshawar in Writ Petition No. 5184-P of 2021)

M/s Taj Wood Board Mills (Pvt) Limited. *(in C.P. 1896 of 2022)*
M/s Al-Mashood Oil & Ghee Industries *(in C.P. 1897 of 2022)*
M/s Bara Ghee Mill (Pvt) Ltd. *(in C.P.1900 of 2022)*
...Petitioners

Versus

Government of Pakistan through Federal Secretary Finance and Revenue Division, Islamabad, etc. *(in all cases)*
...Respondents

For the Petitioners:	Mr. Isaac Ali Qazi, ASC
For Respondent No. 4:	Dr. Farhat Zafar, ASC
For Respondent No. 10:	Mr. Ghulam Shoaib Jally, ASC
For the Departments:	Syed Fazle Samad, FBR Najeeb Arjumand, D.C. Customs Fahad, A.C. FBR Sharif Ullah, Asst. Director, R.T.O.
Date of hearing:	02.05.2024

ORDER

Yahya Afridi, J.- M/s Taj Wood Board Mills (Pvt) Ltd, M/s Al-Mashood Oil & Ghee Industries (Pvt) Ltd, and M/s Bara Ghee Mills (Pvt) Ltd **("Petitioners")**, private companies with manufacturing units in the erstwhile Federally Administered Tribal Areas **("FATA")** and Provincially Administered Tribal Areas **("PATA")**, have through the instant petitions challenged the judgment dated 09.02.2022, passed by the Peshawar High Court, Peshawar.

2. The grievance of the present petitioners arises from the change in the constitutional status of the areas that formerly formed part of FATA and PATA. These areas, by virtue of Article 247 of the Constitution, were immune from the operation of fiscal and tax regime applied elsewhere in Pakistan until 2018, when the Constitution (Twenty-Fifth Amendment) Act was enacted. Article 247 of the Constitution was omitted, and FATA and PATA were merged as different districts **("Merged Districts")** in the province of Khyber Pakhtunkhwa. This merger resulted in the extension of fiscal and tax laws to the Merged Districts.

3. Following this development, the trading community of the Merged Districts demanded the continuation of their pre-existing exemption from income tax and sales tax. Recognizing the need for a phased approach in extending fiscal and tax laws to these areas, the Federal Government issued SRO No. 1212(1)/2018 (sales tax) and SRO No. 1213(1)/2018 (income tax) both dated 05.10.2018 **("SROs")**. These SROs granted the exemption from sales tax and income tax to residents/domiciles of the Merged Districts for a specified period of time, mirroring the scenario under Article 247 of the Constitution, as if it had not been omitted by the Twenty-Fifth Constitutional Amendment Act. Furthermore, by inserting Entry 151 in the Sixth Schedule to the Sales Tax Act 1990 *vide* the Finance Act 2019, exemptions for a specific time period and the method of claiming such exemptions at the stage of imports of goods, machinery and industrial inputs for industrial units situated in former FATA and PATA were provided. The Revenue insisted that close supervision, scrutiny, and audit were necessary to prevent pilferage of imported goods from the port of entry until

they reached their final destination in the Merged Districts. It is important to note that it was in this context that Custom General Order No. 1 of 2021 dated 25.02.2021 **("CGO No. 1 of 2021")**, Circular No. 9 of 2021 dated 01.03.2021 **("Circular No. 9 of 2021")** and Custom General Order No. 08 of 2021 dated 31.08.2021 **("CGO No. 8 of 2021")** were issued. These orders/circulars essentially aimed to regulate the procedures for imports and transhipment of goods from the port of entry to their final destination in the Merged Districts.

4. The petitioners along with other business concerns from the Merged Districts moved the constitutional jurisdiction of the Peshawar High Court, assailing certain terms of CGO No. 1 of 2021 and Circular No. 9 of 2021. In addition, they also alleged and challenged the discriminatory treatment meted out to the petitioners under the provisions of CGO No. 8 of 2021. And finally, they sought writs of mandamus to be issued against the Revenue/respondents to treat the petitioners in accord with the mandate of the law. The Peshawar High Court decided all the petitions *vide* a consolidated judgment dated 09.02.2022, in terms that:

> **i. The Federal Board of Revenue has the authority to issue Circulars and Instructions as provided under Section 4 of the Federal Board of Revenue Act, 2007 and thus, issuance of Circular No. 01 dated 25.02.2021 except condition No. v has been lawfully issued.**
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> **ii. Condition No. v of Circular No. 1 dated 25.02.2021 authorizing the Revenue to subject the importers for annual audit is illegal and thus ultra vires to section 177 of the Income Tax Ordinance, 2001 and Section 25 of the Sales Tax Act, 1990 and is, accordingly, struck down.**
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> **iii. Circular No. 09 dated 01.03.2021 was onetime dispensation meant for the release of stuck up**

> **imported goods at Karachi Port destined for consumption at the industrial units at erstwhile FATA/PATA and thus is no more applicable to the import of the petitioners.**

5. The said judgment of the Peshawar High Court was challenged by both parties, the Revenue filed Civil Petitions No. 1544 to 1555 of 2022, while the present petitioners filed the instant petitions. This Court *vide* order dated 30.04.2024 repelled the stance taken by the Revenue in Civil Petitions No. 1544 to 1555 of 2022. The findings relating to CGO No. 1 of 2021 and Circular No. 9 of 2021 were in terms that:

> "**Customs General Order No. 1 of 2021**
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> 3. We have gone through the record and note that as far as condition (v) of Circular No.1 is concerned, the same has been aptly dealt with the impugned judgment, wherein it was correctly noted that as far as the audit part of the procedure laid down by the Revenue Department is concerned, the relevant provisions are already provided by the legislature. Hence a parallel system ought not to have been introduced, when in particular Section 177 of the Income Tax Ordinance, 2001 and Section 25 of the Sales Tax Act, 1990 are in the field, which can aptly deal with any audit, which the Revenue Department intends to carry out. In view of the above, we are not inclined to disturb the findings on condition (v) of Customs General Order No. 1 of 2021, so recorded by the High Court in the said judgment.
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> **Circular No. 9**
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> 4. As far as the findings recorded in relation to Circular No.9 dated 01.03.2021 are concerned, we have gone through the judgment, and, in para-12, the court clearly states that the learned counsel for the Revenue Department had agreed that this dispensation was only one time, and was not applicable to the regular import by the present petitioners. This being the position, it would not be appropriate for the Revenue Department to agitate otherwise before this Court, without first seeking the correction before the High Court."

6. In the instant petitions, after arguing the matter at some length, the learned counsel for the petitioners restricted his challenge only to the extent of prayer (iii) sought in the

constitutional petitions before the Peshawar High Court, which was as follows:

> "(iii) Declare and direct that the provision of paras (a) & (b) of CGO No. 08 of 2021 dated 31.08.2021 may please also be extended to the Petitioner imports and may please treated accordingly."

7. In order to appreciate the directions sought by the petitioners in relation to the application of paragraphs (a) & (b) of CGO No. 8 of 2021 and the opposition thereto by the Revenue, we must consider the said provisions. CGO No. 8 of 2021 provides as under:

GOVERNMENT OF PAKISTAN
(REVENUE DIVISION)
FEDERAL BOARD OF REVENUE

C.NO.2(2)L&P/2016) Islamabad, the 31st August, 2021

CUSTOMS GENERAL ORDER NO. 08 OF 2021

SUBJECT: AMENDMENTS IN CUSTOMS GENERAL ORDER NO. 12 OF 2002 DATED 15.06.2002

The Federal Board of Revenue is pleased to direct that the following further amendments shall be made in Customs General Order No. 12 of 2002 dated the 15th June, 2002, namely:-

In the aforesaid order, in para 117,-

(a) In sub-para(i) after the word "Karachi", the expression "whereas ST type of GD will be filed for goods imported in bulk by manufacturers of edible oil located in erstwhile FATA/PATA" shall be added;

(b) In sub-para (iii), after the word "Peshawar" the expression "except the goods imported in bulk by manufacturers of edible oil, cleared under safe transportation regime as applicable to such manufacturers located outside erstwhile FATA/PATA" shall be added.

(c) After sub-para (v), the following new sub-para shall be added, namely:-

"(vi) The provisions from sub-para (i) to (iv) above shall not be applicable to the goods/raw materials imported by small manufacturers of plastic goods, wood, pharmaceutical, food and aluminium foil established upto March, 2021 in erstwhile FATA/PATA and having imports of Rs. 200 million or less per annum (FY). In case where the annual imports by these small manufacturers increase to more than Rs. 200 million, the imports of such an importer will be subject to provisions sub-para (i) to (iv)".

Sd/----
(Wajid Ali)
Secretary (Law & Procedure)"

Considering the provisions outlined in CGO No. 8 of 2021, it becomes evident that it primarily offers preferential treatment in clearance and transhipment of imported goods to manufacturers of edible oil in the Merged District and, that too, to those who engage in bulk imports, as compared to other business concerns therefrom. The question thus arises as to whether such preferential treatment is justifiable for edible oil manufacturers importing in bulk, particularly when compared to other businesses in the region, or for that matter manufacturers of edible oil not importing in bulk, who are not given such concession.

8. The stance of the Revenue supporting the terms of CGO No. 8 of 2021 was that the manufacturers of edible oil who were importing goods in bulk were a class of importers apart from other business concerns, hence, there was a rational basis for creating such a class. On the other hand, the learned counsel for the petitioners contended that there was no reasonable classification having an intelligible differentia rendering a rational basis for creating such a distinct class *vide* CGO No. 8 of 2021 and, in this regard, referred to a recent judgment by a four-Member Bench of this Court in **M/s AK Tariq Foundry Etc. v. Government of Pakistan through Federal Secretary Finance and Revenue Division, Islamabad, etc. (Civil Petitions No. 159 to 178 of 2023, etc.).**

9. In **M/s. AK Tariq Foundry case (*supra*),** the private petitioners had challenged classifications envisaged in Entry 152 of the Sixth Schedule to the Sales Tax Act 1990. The challenged classification, in the first place excluded from the benefit of exemption, the industries of steel and ghee or cooking oil, and in the second place those industries, which were set up and started industrial

production after the specified cut-off date. After due deliberation, this Court opined that:

> "We see that the exemption under consideration was provided with a purpose, namely, to provide a breather to the former tribal areas before full application of fiscal laws was extended to such areas. This benefit was extended to a specific geographical area, with eligibility based solely on the location of individuals and businesses in that area. A distinction was drawn between the former tribal areas and the rest of the county. This classification was based on the consideration that a phased approach was to be adopted for the extension of fiscal laws to the erstwhile tribal areas. For attaining this objective, it is not clear why the legislature excluded two industries i.e. steel and ghee or cooking oil from the exemption. All persons and industries of the former tribal areas which formed a particular class by reason of being located in the former tribal areas were to reap the benefit of this concession. The issue is not of granting or not granting the exemption. Once the legislature exercises the choice of extending a concessional right to the people and businesses of an area for the reason of being located in that area, excluding some merely because they are engaged in two specific industries would not provide rational basis for their exclusion.....
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> There does not remain any room for creating sub-classification thereby excluding one sub-category without adopting any differentia having a rational relation to the object of exemption. The record does not exhibit any rational distinction on the basis of which two industries of steel and ghee or cooking oil were deprived of the benefit of exemption envisaged under Entry 152 of the Sixth Schedule to the Sales Tax Act. There cannot be any discriminatory treatment of some persons who fall in the same category for it would then be violating the equality clause enshrined in Article 25 of the Constitution. The Exclusion of steel and ghee or cooking oil industries has no nexus with the object that is sought to be achieved i.e. providing a time specific relief to the people and industry of the former tribal areas. It appears to be a case of clear and palpable discrimination without any rational basis. We do not agree with the view of the High Court with regard to the steel and ghee or cooking oil industries and declare that the exclusion of steel and ghee or cooking oil industries in Entry 152 of the Sixth Schedule to the Sales Tax Act is *ultra vires* Articles 25 and 18 of the Constitution and is, therefore, struck down."

10. Comparing the facts of the above case with that of the present case, it becomes clear that the petitioners in both the cases share striking similarities. First, they are business concerns located in the Merged Districts. Second, they both rely upon the same exemption extended to the people and businesses of the region. Finally, they claim to be victims of discrimination simply

because they operate in a specific industry. However, the key distinction between the two cases lies in the nature of the challenged provision. In the earlier case, it was a provision of a legislative enactment, and in the present case, it is a discriminatory provision introduced in a circular, denying the beneficial mode of clearance and transhipment granted to bulk-importing edible oil manufacturers.

11. We see that a four-Member Bench of this Court in **M/s. AK Tariq Foundry case (*supra*)** has already adjudged a statutory provision, creating a sub-class within those carrying on businesses in the Merged Districts, and thereby executing a category of businesses being refused exemption from the fiscal and tax regime as enjoyed by other businesses in the Merged Districts, as discriminatory, offending Article 25 of the Constitution. This pronouncement of this Court leaves little room for this three-Member Bench to hold otherwise.

12. In view of the above, these petitions are converted into appeals and allowed in the above terms.

Judge

Judge

Judge

Announced in Open Court on 17.05.2024 at Islamabad.

Judge

Approved for reporting.
Arif