IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi
Mr. Justice Muhammad Ali Mazhar

Civil Appeal No. 24 of 2015
(Against the order dated 25.08.2014 passed by the High Court of Sindh, Karachi in Special Customs. R.A. No. 328 of 2011)

M/s Pakistan Telecommunication Company Ltd.

... Appellant

Versus

Collector of Customs, Karachi

... Respondent

For the Appellants:	Mr. Faisal Siddiqi, ASC Mr. Khizar Ali Khan, Manager Legal, PTCL
For the Respondent:	Raja Muhammad Iqbal, ASC Mr. Jalal Zaidi, D.C. Customs, Islamabad
Date of Hearing:	16.09.2022

JUDGMENT

Yahya Afridi, J.- M/s Pakistan Telecommunication Company Limited **('appellant')**, through a civil petition, challenged the order of the High Court of Sindh, dated 25.08.2014, passed in Special Customs Reference Application No. 328 of 2011, whereon this Court *vide* its order dated 06.01.2015 granted leave to appeal in the following terms:

> Learned ASC submits that the finding of both the Learned Tribunal as well as High Court of Sindh to the effect that the Petitioner could not fulfill the provisions of SRO No. 457(I)/2004, are conjectural. In this regard he has taken us through the judgment of the learned Tribunal wherein it has been stated *inter alia* that though the machinery was not sold to anyone and it was installed at the PTCL premises, yet the Petitioner has failed to prove that the amount of customs duty has not been included in the cost of the service provided to the consumers as no audit report and statement of accounts has been produced. Learned ASC says that this observation by the learned Tribunal which has been upheld by the learned High Court is mistaken, as once it is admitted that the imported machinery was installed at the PTCL premises, the presumption would be that it was not sold/hired out to any other person and hence there would be no question of passing on the incidence of duty and tax to the consumer.

> 2. We have heard learned ASC. In the facts and circumstances of the case, we are of the opinion that leave should be granted in the matter as an importance issue of the interpretation of SRO No. 457(I)/2004 is involved alongwith provisions of Section 19-A and 33 of the Customs Act, 1969. Order accordingly.

Essential Facts

2. The essential facts leading to the present appeal are that the appellant imported consignments of Procurement Installation Testing and Commissioning of Wireless Loop Systems on Turn Key Basis **('imported equipment')**, and for their clearance filed Goods Declarations **('GDs')** on 08.03.2005 and 14.04.2005, claiming the benefit of the concessionary rate of customs duty under SRO.457(I)/2004 dated 12.06.2004 **('SRO 457')**. The imported equipment, however, were cleared by the customs officials on payment of the customs duty by the appellant on the standard rate, instead of the concessionary rate. The appellant, therefore, filed refund claims on 16.05.2005, seeking a refund of the over-paid customs duty.

3. The Additional Collector of Customs declined the refund claims of the appellant *vide* a common Order-In-Original dated 17.12.2009, essentially on two grounds: Firstly, that the conditions for availing concessionary rate of customs duty provided under SRO 457 were not fulfilled by the appellant at the time of clearance of the imported equipment, and the imported equipment were got cleared by the appellant on payment of the standard customs duty without any protest; secondly, that the appellant was unable to rebut the presumption of passing on the incidence of the paid customs duty to its consumers, and thereby failed to fulfill the requirement of refund envisaged under section 33 read with section 19A of the Customs Act, 1969 **('Customs Act')**. Reliance was placed on the judgment rendered by this Court in the case

of **M/s Fecto Belarus Tractor v. Government of Pakistan**[1]. This view was followed through by all rungs of the statutory adjudicatory forums provided under the Customs Act and maintained by the High Court in the impugned order. Hence, the civil petition was filed by the appellant, and this Court granted the leave to appeal.

Submissions of the counsel for the parties

4. Learned counsel for the appellant contended that section 19A and section 33(4) of the Customs Act were not applicable to the imported equipment, as the same were not in force at the time of import of the imported equipment as well as at the time of making refund claims; that the appellant did not pass on the incidence of the excess customs duty as the imported equipment were installed and used by the appellant in its own project of telecommunication services, and were not further sold as "goods" to any third party/buyer; that the appellant did not pass on the incidence of the paid customs duty as part of the charges for the telecommunication services offered to its customers; that twenty eight other refund claims of the over-paid customs duty in respect of the import of similar equipment/machinery during the same period, including that of the appellant, were allowed by the customs authorities; and finally, that the appellant is a State-owned company, whose majority shares are owned by the Government and, thus, the doctrine of unjust enrichment applied in the *Fecto Belarus Tractor case* could not be applied to the present case.

5. On the other hand, the learned counsel for the respondent **('customs department')** contended that the appellant did not fulfil the mandatory requirements as prescribed in SRO 457 and was thus

[1] 2005 PTD 2286

justifiably denied the concession provided thereunder; that the appellant was required to establish through irrefutable documentary evidence that it had not passed on the incidence of the paid customs duty to its consumers, which it failed to do so; that the refund claims of the appellant were based on factual considerations, which when were concurrently rejected by the competent adjudicatory forums under the Customs Act, could not be re-agitated at before this Court; and that the Board of Revenue condoned merely the procedural lapse of not claiming the benefit of SRO 457 in GDs filed at the time of import, in twenty-eight other consignments referred to by the appellant, and directed for allowing the benefit of SRO 457 to those consignments only if the concession was otherwise applicable to them.

6. We have considered the submissions of the learned counsel for the parties and examined the record.

7. The fact that the refund claims were filed by the appellant within the time prescribed in section 33(1) of the Customs Act, is not disputed between the parties. The submissions of the learned counsel for the parties have raised for determination by this Court, mainly the following two questions of law, which we shall discuss in seriatim:

Question of Law No.1

> Whether the appellant was entitled to avail the benefit of the concessionary rate of customs duty under SRO 457 on the imported equipment and fulfilled the conditions precedent to avail the said benefit?

8. Before we dilate upon this question of law, it would be appropriate to first carefully review the relevant contents of SRO No. 457, which read as under:

GOVERNMENT OF PAKISTAN
MINISTRY OF FINANCE, ECONOMIC AFFAIRS, STATISTICS AND REVENUE
(REVENUE DIVISION)
****

Islamabad, the 12th June, 2004

NOTIFICATION
CUSTOMS

S.R.O. 457(I)/2004.- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), and in supersession of its Notification No. S.R.O. 358(I)/2002, dated the 15th June, 2002, the Federal Government is pleased to exempt the raw materials, components and goods specified in column (2) of the Table below, failing under the heading and sub-heading numbers of the First Schedule to the said Act specified in column(3) of the Table, from so much of customs-duty specified in the First Schedule to the said Act, as is in excess of the rates specified in column(4) of the Table below subject to the conditions specified in column(5) thereof:

Sr. No.	Description of raw materials, components and goods	Heading or sub-headings	Rate of duty	Conditions of Import
106	Plant, machinery, equipment and articles imported by the importers for the sectors specified below:- **1. Service Sector,** **i)** Wholesale, distribution and retail trade, transportation, storage and communication, infrastructure projects including development of industrial zones; telecommunication i.e. E-mail / internet/ electronic information services (EID), data communication network services, trunk radio services, cellular mobile telephone services, audio-text services, voice mail services, card pay phone services, close user group for banking operations, international satellite operators for domestic date communications, paging service and any other telecommunication service which is deregulated in future, will become part of this list, technical testing facilities; audio-visual services; sporting and other recreation services; rental services relating to transport equipment and machinery, equipment and tolls for land development and agriculture purposes; environmental services. **ii)** Foreign direct Investment in Service Sector in any activity subject to condition that services which require prior permission or NOC or license from the concerned agencies would continue to get the same treatment until and unless deregulated by such agencies and would be subject to provisions of respective sectoral policies.	Respective headings	5% ad. Val.	If not manufactured locally and as certified through Central Board of Revenue by the Facilitation Committee of Board of Investment (BOI), Islamabad from time to time. The Board of Investment shall take such measures as it deems necessary to ensure that the concerned sectors entitled to avail exemption under his notification, import only those goods as are approved by the Committee in view of actual project requirement. However, in case of imports for the telecommunication sector as specified under the caption "service sector", in column (2), the importers shall also be required to produce NOCs or license, as the case may be, from the concerned agencies for the purpose.

Given that the parties are in consensus that the imported equipment fall within the purview of 'components' stated in serial No. 106 in column No. 2 of the table of SRO 457 (cited above), relating to *'telecommunication i.e. E-mail/internet/electronic information services (EID), data communication network services*' stated under the heading *'Service Sector'*, we need to

see whether the appellant fulfilled the conditions precedent provided therein to avail the benefit of the concessionary rate of the customs duty.

9. The *'Conditions of Import',* provided in column No. 5 of the table, stipulate two essential conditions precedent for availing the concessionary rate of customs duty: Firstly, the imported goods should not be manufactured locally, and this fact is to be certified through the Central Board of Revenue by the Facilitation Committee of the Board of Investment (BOI); and secondly, the importer is to produce NOC or license, as the case may be, from the concerned agencies for the purpose.

10. As far as the Certificate of the Facilitation Committee is concerned, we note that the Board of Revenue *vide* its Certificate dated 25.04.2005 confirmed that *'[t]he Committee decided to extend the benefit of SRO.457(I)/2004 to the Project.'* Moving on to the second condition, it is pertinent to note that the No Objection Certificate (NOC) was granted by the Pakistan Telecommunication Authority to the appellant for the import of the imported equipment *vide* its letter dated 04.03.2005. The said certificate approved that *'[t]he firm needs the equipment for the establishment of its Wireless Local Loop (WLL) Communication infrastructure. Hence, PTA has no objection for the Import of the mentioned equipment under rules, regulations and duties/taxes applicable.'* From the reading of these two certificates, it is clear that, on the factual side, the appellant fulfilled both the conditions precedent for availing the benefit of the concessionary rate of the customs duty under SRO 457.

11. The Additional Collector of Customs rejected the claim of the appellant, not because of the invalidity of the requisite certificates produced by the appellant, but for the reason that the same were not produced at the time of filing of GDs and the refund claims. We are

afraid, this reasoning given by the Additional Collector of Customs appears to be not only absurd but also self-contradictory. In fact, the said certificates were submitted by the appellant in compliance with the direction of the Additional Collector of Customs, dated 31.6.2006. We may have positively considered the reasoning of the Additional Collector of Customs, had the said certificates not been produced by the appellant on his direction or, for that matter, had they not been produced at all during the adjudicatory proceedings. However, the position as found in the present case is otherwise. In fact, the case of the appellant is on a better footing than that of twenty-eight other similar claims, wherein the Board of Revenue condoned even the lapse of not claiming the benefit of SRO 457 in GDs, *vide* its letter dated 05.05.2006, in addition to non-filing of the requisite certificates with GDs.

12. Therefore, it would be safe to hold that the appellant, who was entitled to the benefit of the concessionary rate of the customs duty on the import of the imported equipment, fulfilled the conditions precedent prescribed under SRO 457 for availing the benefit provided therein by producing the requisite certificates. The question of law No.1 is answered, accordingly.

Question of Law No.2

> Whether the presumption under section 19A of the Customs Act, that the incidence of the paid customs duty is to be taken to have been passed on to the buyer unless contrary is proved by the payer of the duty, was applicable on the imported equipment which were used/installed by the appellant in its own project of telecommunication services and were not sold to any third party/buyer?

13. Before we opine on the above question of law, we must observe that section 19A was inserted in the Customs Act by the Finance Act, 2005, and came into force on 1st July, 2005, and thus, was admittedly not in the field when the appellant filed GDs of the imported equipment or for that matter, when it filed the refund claims of the over-paid

customs duty on the imported equipment. In fact, section 19A was inserted in the Customs Act, when the refund claims of the appellant were pending adjudication before the Additional Collector of Customs. Given this position, the question that begs an answer is, whether the then newly added section 19A could be applied to the proceedings of refund claims of the appellant that were then pending before the statutory adjudicatory authority, the Additional Collector of Customs. The answer to this crucial question lies in determining, whether the provision of section 19A is procedural or substantive. It is trite that, a new law, which deals with the procedure and does not affect the rights or liabilities of the parties, generally applies to all proceedings, pending as well as future, while a new law, unless expressly provided, which affects the rights or liabilities of the parties, being substantive in nature, is applied prospectively, and not retrospectively.[2]

14. Given the above fundamental principle of law, we are to consider the true legal import of section 19A of the Customs Act, as it was inserted *vide* the Finance Act, 2005, which reads as under:

> **19A. Presumption that incidence of duty has been passed on to the buyer.** Every person who has paid the customs duty and other levies on any goods under this Act, shall unless the contrary is proved by him, be deemed to have passed on the full incidence of such customs duty and other levies to the buyer as a part of the price of such goods.

A reading of section 19A shows that in essence, it provides for a rebuttable presumption requiring the adjudicatory authority to presume the existence of a fact, that the incidence of the paid customs duty has been passed on to the buyer, as a part of the price of the goods, and places the burden on the payer of the customs duty to rebut this fact by adducing evidence.

---

[2] State v. Muhammad Jamil PLD 1965 SC 681; Muhammad Alam v. State PLD 1967 SC 259; Commissioner of Income Tax v. M/s Asbestos Cement Industries 1993 SCMR 1276; Mumtaz Ahmed v. Federal Service Tribunal 2000 SCMR 832.

15. As far as the legal implication of a rebuttable presumption, in contradistinction to that of an irrebuttable presumption is concerned, a rebuttable presumption falls in the realm of the procedural law of evidence, and thus would have retrospective application; though there is a difference of judicial opinion across the border on the true nature of an irrebuttable presumption, as to whether the same would fall in the legal sphere of substantive law or procedural law, and thus have prospective or retrospective application.[3] This Court has, however, affirmed, in **Abdul Rehman v. Allah Wasai**[4], that a rebuttable presumption of fact is part of the rules of evidence regulating the burden of proof. As section 19A provided for a rebuttable presumption, it falls within the purview of procedural law, and thus, has retrospective application to the refund claims of the appellant, as the proceedings whereof were then pending before the Additional Collector of Customs.

16. The next crucial question that needs to be considered is: If section 19A contains only a procedural law, then what is the source of the substantive law it aims to address. Admittedly, the substantive law on refund of customs duty is contained in section 33 of the Customs Act, which at the time of filing of the refund claims by the appellant did not expressly require a claimant to show that the incidence of the paid customs duty has not been passed on to the buyer as part of the price of the imported goods. In fact, sub-section (4) of section 33 of the Customs Act,[5] expressly mandating that no refund is to be allowed, if the incidence of the customs duty has been passed on to the buyer, was first incorporated in the Customs Act, as a proviso to section 33(1) by the

---

[3] See Izhar Ahmad v. Union of India AIR 1962 SC 1052
[4] 2022 SCMR 399.

[5] It would be pertinent to mention here that this substantive law was first incorporated in the Customs Act as a proviso to section 33(1) by the Finance Act, 2009, and later as subsection (4) of section 33 by the Finance Act, 2017.

Finance Act, 2009, and later, as subsection (4) of section 33 by the Finance Act, 2017, both provisions added after the appellant had filed GDs of the imported equipment and the refund claims. The provisions of section 33(4), being a substantive law, could not be applied retrospectively. That being so, it was the common law declared by this Court in the *Fecto Belarus Tractor case*, in terms of the doctrine of unjust enrichment, that was relevant for deciding the refund claims of the appellant.

17. In the *Fecto Belarus Tractor case*, the importer filed the claim, *inter alia*, for refund of the customs duty paid on the imported tractors, which had been sold out in the open market. The Court though noted that there was no statutory provision in the Customs Act, requiring the importer to prove that the incidence of the customs duty had not been passed on to the purchasers, applied the common law doctrine of unjust enrichment to refuse the refund claim of the importer.[6] The Court held that, on the principle of fair play and equity, the importer-seller having received the indirect tax cannot pocket the same, and explained that the principle of passing on the burden of indirect tax has nexus with the doctrine of unjust enrichment, according to which windfall gains are prohibited to a person in respect of an amount, which is not owned by him nor he has sustained any loss in respect thereof.

18. The law declared in *the Fecto Belarus Tractor case* related to the sale of the actual imported goods (tractors), and not to the sale of goods produced by using any imported capital goods, such as plant, machinery, equipment etc., or for that matter, the services generated by using any such imported capital goods/fixed assets. Therefore, the

6 The Court placed reliance on the case of Mafatlal Industries v. Union of India (1997) 5 SCC 536, among other cases, for declaring this common law.

legislature also referred to it in section 19A, as *'part of the price of such goods*. The expression *'such goods'* refers to *'any goods'* mentioned in the first part of section 19A, whereon the importer has paid the customs duty. No doubt, *'such goods'* can be sold either directly, as they are, or indirectly by including the same, as a raw material or as a component part in the finished product, and in both cases, the incidence of the customs duty can be passed on to the buyer *'as a part of the price of such goods*.[7]

19. In the present case, admittedly the imported equipment has not been sold further by the appellant to any third person/buyer either directly, as they were actually imported, or indirectly, as a raw material or as a component part in the finished product; rather the same have been used and installed by the appellant in its own project of telecommunication services. Therefore, the common law declared in the *Fecto Belarus case,* and referred to in section 19A, cannot be applied to the present case.

20. One may argue that, the incidence of the customs duty paid by the appellant can be passed on by it to its customers, as part of the charges of services being provided by using the imported equipment. It is true that there is such a possibility. But to incorporate it in section 19A, we would have to read the words '*or of services provided by using such goods*", in section 19A after the words '*price of such goods*'. We are afraid, such reading-in would run contrary to the fundamental principle of interpretation of fiscal statutes – '*Nothing is to be read in, nothing is to be implied.*'[8] While construing a tax law, the language used in it is not to be

[7] Union of India v. Solar Pesticide AIR 2000 SC 862.
[8] Brady Syndicate v. Land Revenue Commissioner [(1921) 1QB 64 per Rowlett J., quoted by Hamoodur Rehman J. in Amir Khan v. Collector of Estate Duty PLD 1962 SC 335.

either stretched in favour of the State or narrowed in favour of the taxpayer.[9] We are, thus, not inclined to read any additional words in section 19A, by implication. Further, as observed above, the expression *'such goods'* used in section 19A refers to *'any goods'* mentioned in the first part of section 19A, whereon the importer has paid the customs duty. We have, therefore, not embarked on exploring the extent of the definition of the word 'goods' as provided in section 2(l) of the Customs Act, as to whether or not the same includes 'service', as the adjective 'such' used with the word 'goods' in section 19A has limited the scope of the expression 'goods' to only those goods, whereon the importer has paid the customs duty.

21. We, therefore, answer this question of law in the terms that the presumption under section 19A of the Customs Act, that the incidence of the customs duty paid is presumed to have been passed on to the buyer *as a part of the price of such goods* unless the contrary is proved by the payer of the duty, was not applicable in the present case to the imported equipment, which were admittedly installed and utilized by the appellant in its own project of telecommunication services and were not sold to any third party, either directly or indirectly.

22. As the present case can be decided on the basis of the answers to the above two questions of law, we do not take up and address the remaining contentions of the appellant, particularly with regard to the non-application of the doctrine of unjust enrichment to a company claiming to be owned by the Government, and leave them open to be

[9] Yousaf Rerolling Mills v. Collector of Customs PLD 1989 SC 232.

decided in an appropriate case. It goes without saying that *'if it is not necessary to decide more, it is necessary not to decide more*'.[10]

Conclusion

23. In view of the answers to the above two questions of law, we find that the *fora* below have not attended to the case in hand in its correct factual and legal perspective, and their decisions suffer from legal errors warranting interference and positive correction by this Court. This appeal is, therefore, allowed. The impugned order is set aside and the Special Customs Reference Application of the appellant is accepted. The orders passed by the statutory adjudicatory forums are also set aside and the refund claims of the appellant in respect of the over-paid customs duty are allowed.

Judge

Judge

Judge

Announced in Open Court on 04 November, 2022

Judge

Islamabad
Approved for reporting
Arif

[10] PDK Labs., Inc. v. Drug Enforcement Admin. (2004) 362 F. 3d 786 per John Roberts, J., as aptly quoted by Syed Mansoor Ali Shah J. in Jurists Foundation v. Federal Government PLD 2020 SC 1.