

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Munib Akhtar and Agha Faisal, JJ**

- C.P. D-7357 of 2017 : M/s. Marosh & 24 others vs. Federation of Pakistan & 3 others
- C.P. D-7418 of 2017 : M/s. N.S. Brothers & 26 others vs. Federation of Pakistan & 3 others
- C.P. D-7515 of 2017 : M/s. Nutshell Traders & 12 others vs. Federation of Pakistan & 3 others
- C.P. D-7769 of 2017 : M/s. Tribune & 16 others vs. Federation of Pakistan & 3 others
- C.P. D-7803 of 2017 : M/s. Jawad Traders vs. Federation of Pakistan & another
- C.P. D-7816 of 2017 : M/s. Wali Construction Company vs. Federation of Pakistan & another
- C.P. D-7918 of 2017 : M/s. Baba International & 14 others vs. Federation of Pakistan & 3 others
- C.P. D-7991 of 2017 : M/s. Area Associates & 12 others vs. Federation of Pakistan & 3 others
- C.P. D-8025 of 2017 : M/s. Globe Tiles & Sanitary Ware & 4 others vs. Federation of Pakistan & 3 others
- C.P. D-8135 of 2017 : M/s. The City Tiles & 9 others vs. Federation of Pakistan & 3 others
- C.P. D-8167 of 2017 : M/s. Al Rehman Trading Company & 10 others vs. Federation of Pakistan & 3 others
- C.P. D-8245 of 2017 : M/s. Impressions Tiles & 8 others vs. Federation of Pakistan & 3 others
- C.P. D-8246 of 2017 : M/s. Imperial Glass and Tiles Co. & 2 others vs. Federation of Pakistan & 3 others
- C.P. D-8266 of 2017 : M/s. Nine Enterprises vs. Federation of Pakistan & 3 others
- C.P. D-8373 of 2017 : M/s. Umer Trading Company & 12 others vs. Federation of Pakistan & 3 others

- C.P. D-8432 of 2017 : M/s. Alyaan & Co. vs. Federation of Pakistan & 2 others
- C.P. D-8468 of 2017 : M/s. Jawad Traders vs. Federation of Pakistan & another
- C.P. D-8516 of 2017 : M/s. Home Solutions & 4 others vs. Federation of Pakistan & 3 others
- C.P. D-8546 of 2017 : M/s. Imperial Glass and Tiles Co. & 3 others vs. Federation of Pakistan & 3 others
- C.P. D-8572 of 2017 : M/s. A.S & Sons & 4 others vs. Federation of Pakistan & 3 others
- C.P. D-8617 of 2017 : M/s. Ibrahim Traders & 6 others vs. Federation of Pakistan & 3 others
- C.P. D-8619 of 2017 : M/s. Al-Israr Electronics vs. Federation of Pakistan & 2 others
- C.P. D-8705 of 2017 : M/s. Zoab Ali & Co. & 6 others vs. Federation of Pakistan & 3 others
- C.P. D-8882 of 2017 : M/s. Agility & Co. & 17 others vs. Federation of Pakistan & 3 others
- C.P. D-09 of 2018 : M/s. S.H.S Nutrition & 4 others vs. Federation of Pakistan & 3 others
- C.P. D-123 of 2018 : M/s. United Tiles (Pvt) Ltd. & 10 others vs. Federation of Pakistan & 3 others
- C.P. D-301 of 2018 : M/s. Marhaba Marbles & Granite Tiles & 10 others vs. Federation of Pakistan & 3 others
- C.P. D-438 of 2018 : M/s. Khalid Trading Company vs. Federation of Pakistan & another
- C.P. D-484 of 2018 : M/s. Abu Yousaf Traders & 11 others vs. Federation of Pakistan & 3 others
- C.P. D-566 of 2018 : M/s. Marachi International & another vs. Federation of Pakistan & 2 others
- C.P. D-612 of 2018 : M/s. Zainab Trading Co. & another vs. Federation of Pakistan & 2 others
- C.P. D-646 of 2018 : M/s. Hussain Traders & 9 others vs. Federation of Pakistan & 3 others

- C.P. D-676 of 2018 : M/s. K.K. Enterprises & 2 others vs. Federation of Pakistan & 3 others
- C.P. D-706 of 2018 : M/s. Zahid World Corporation & 7 others vs. Federation of Pakistan & 3 others
- C.P. D-743 of 2018 : M/s. Floorissa Tiles vs. Federation of Pakistan & 2 others
- C.P. D-759 of 2018 : M/s. Khalid Trading Company & another vs. Federation of Pakistan & 2 others
- C.P. D-911 of 2018 : M/s. Versatile Traders & 7 others vs. Federation of Pakistan & 3 others
- C.P. D-1116 of 2018 : M/s. Impression Tiles & another vs. Federation of Pakistan & 3 others
- C.P. D-1140 of 2018 : M/s. Rainbow Tex S.P.R.L & 15 others vs. Federation of Pakistan & 3 others
- C.P. D-1216 of 2018 : M/s. Artica Ceramics & 11 others vs. Federation of Pakistan & 3 others
- C.P. D-1355 of 2018 : M/s. Imperial Trading Corporation vs. Federation of Pakistan & 2 others
- C.P. D-1365 of 2018 : M/s. Nutshell Traders & 9 others vs. Federation of Pakistan & 3 others
- C.P. D-1433 of 2018 : M/s. Marachi International & another vs. Federation of Pakistan & 2 others
- C.P. D-1508 of 2018 : M/s. Hussain Traders & 7 others vs. Federation of Pakistan & 3 others
- C.P. D-1509 of 2018 : M/s. S.F. International vs. Federation of Pakistan & another
- C.P. D-1700 of 2018 : M/s. AMA Corporation & 9 others vs. Federation of Pakistan & 3 others
- C.P. D-1703 of 2018 : M/s. Imperial Trading Corporation & another vs. Federation of Pakistan & 2 others
- C.P. D-2081 of 2018 : M/s. NAN Traders & 9 others vs. Federation of Pakistan & 3 others
- C.P. D-2180 of 2018 : M/s. MS Ceramics vs. Federation of Pakistan & another

- C.P. D-2357 of 2018 : M/s. Imperial Trading Corporation & another vs. Federation of Pakistan & 3 others
- C.P. D-1863 of 2018 : M/s. A.S. & Sons vs. Federation of Pakistan & 2 others
- C.P. D-2114 of 2018 : M/s. Attractive International vs. Federation of Pakistan & 2 others
- C.P. D-2255 of 2018 : M/s. Ahmad Enterprises vs. Federation of Pakistan & 2 others
- C.P. D-2439 of 2018 : Royal Corporation & another vs. Federation of Pakistan & 4 others
- C.P. D-2451 of 2018 : Ms. MI Sanitary Store & 6 others vs. Federation of Pakistan & 3 others
- C.P. D-2617 of 2018 : M/s. Salman Sanitation Service & 11 others vs. Federation of Pakistan & 3 others
- C.P. D-2644 of 2018 : M/s. Imperial Glass and tile Co. & 4 others vs. Federation of Pakistan & 2 others
- C.P. D-2848 of 2018 : M/s. MARS International & 12 others vs. Federation of Pakistan & 3 others
- C.P. D-3007 of 2018 : M/s. Safa Corporation & 8 others vs. Federation of Pakistan & 3 others
- C.P. D-3022 of 2018 : M/s. A.S. and Sons & 2 others vs. Federation of Pakistan & 2 others
- For the Petitioner(s) : Mr. Kashif Nazeer, Advocate
(In C.P. D-7357, 7418, 7769 of 2017)
- Mr. Imran Ali Mithani
(In C.P. D-7918, 7991, 8025, 8135, 8167, 8245, 8373, 8516, 8617, 8705, 8882 of 2017 and 123, 301, 484, 646, 706, 911, 1140, 1216, 1365, 1700, 2451, 2848, 3007 of 2018)
- Mr. Aqeel Ahmed Khan, Advocate
(In C.P. D-8246, 8546 of 2017 and 9, 438, 566, 612, 759, 1355, 1433, 1703, 1863, 2357, 2644, 3022 of 2018)
- Ms. Dil Khurram Shaheen, Advocate.
(In C.P. D-7803, 7816, 8468 of 2017 and 2180 of 2018)

Mr. Imran Iqbal Khan, Advocate.
(In C.P. D-8432, 8619 of 2017 and 743 of 2018)

Mr. Ghulam Haider Shaikh, Advocate
(In C.P. D-7357, 7918, 7991, 8135, 8516, 8617 of 2017 and 2617 of 2018)

Mr. Salman Yousuf, Advocate.
(In C.P. D-1509 of 2017 and 2255 of 2018)

Mr. Muhammad Afzal Awan, Advocate.
(In C.P. D-676, 1116 of 2018)

Mr. Adnan Moton, Advocate.
(In C.P. D-8266 of 2017)

Ms. Rashida Perveen, Advocates.
(In C.P. D-2357 of 2018)

For the Respondents : Mr. Meer Hussain Abbasi, Assistant Attorney General.

Mr. Kafeel Ahmed Abbasi, Advocate.

Dates of hearing : 5th and 10th April 2018.

JUDGMENT

Agha Faisal, J: These connected petitions pertain to a common question of law and shall be decided through the instant judgment.

2. The facts pertaining to C.P. D-7357 of 2017 (“**Lead Petition**”) are representative of the facts pertaining to the rest of the petitions, listed supra, and therefore it may suffice to confine the factual discussion to the controversy cited in the Lead Petition.

3. The specifics in brief are that the petitioners are importers of tiles and sanitary fixtures and fittings (“**Goods**”) from the People’s

Republic of China (“**PRC**”). The Goods are being imported from the PRC under PCT headings covered by S.R.O. 497(I)/2009, dated 13.06.2009 as amended from time to time (“**SRO 497**”). The said statutory regulatory order (“**SRO**”) provides exemption from customs duties in excess of Thirty Seven point Five percent (37.5%). The Respondent No. 1, through SRO 1035(I)/2017 dated 16.10.2017 (“**SRO 1035**”) imposed duties upon various items, including the Goods. The position taken by the revenue authorities is that SRO 1035 supersedes / repeals earlier SROs, including SRO 497, and hence the benefit of SRO 497 is no longer available to the Petitioners. The issue of whether the benefit of SRO 497 remains in the field post issuance of SRO 1035 or otherwise is the main controversy herein and hence the common subject matter of the listed petitions.

4. Mr. Kashif Nazeer, learned counsel for Petitioners in the Lead Petition, has submitted that the Respondents are misinterpreting SRO 1035 and have unlawfully revoked the rightful benefits accruing pursuant to SRO 497. The arguments advanced by the learned counsel in regard hereof are encapsulated herein below:

- i. It was contended that by virtue of the SRO 497, Goods sought to be imported by the Petitioners were exempted from the custom duties in excess of the rate specified in the aforesaid SRO, being 37.5% in the present case. It may be pertinent to reproduce the relevant portion of SRO 497 herein below:

S.R.O. 497

In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), the Federal Government is pleased to exempt on import into Pakistan from Peoples Republic

of China the goods specified in column (3) of the Table below, falling under the Heading and sub-Heading numbers of the First Schedule to the said Act as specified in column (2) of the said table, from the whole of customs duties in excess of the rates specified in column (4) of the Table;....

(Underline added for emphasis)

- ii. It was contended that the aforesaid Notification was amended from time to time vide SRO 595(I)/2009 issued in June 2009, SRO 104(I)/2010, dated 22.02.2010 and SRO 573(I)/2017, dated 01.07.2017.
- iii. It may be relevant to reproduce the contents of the aforementioned SROs herein below:

S.R.O. 595(I)/2009

In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), the Federal Government is pleased to direct that in its Notification SRO No.497(I)/2009 dated the 13th June, 2009, the following amendment shall be made and shall be deemed always to have been made, namely:

In the aforesaid Notification, in the Table, against Serial Nos 1 to 21 and 24 to 30 in column (1), in column (4) for the figure “35” the figure “37.5” shall respectively be substituted.

S.R.O. 104(I)/2009

In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), the Federal Government is pleased to direct that the following further amendment shall be made in its Notification SRO No.497(I)/2009 dated the 13th June, 2009, namely:

In the aforesaid Notification, after S. No.34 in column (1) and the entries relating thereto in columns (2), (3) and (4), the following new S. Nos. and the entries relating thereto shall be added, namely:

35	6910.1020	Bath tubs ceramic	37.5
36	6910.1030	Bidets ceramic	37.5
37	6910.1040	Cisterns ceramic	37.5
38	6910.1050	Sink ceramic	37.5
39	6910.1060	Toilet ceramic	37.5
40	6910.1070	Urinals ceramic	37.5
41	6910.1080	Water closet pans	37.5

S.R.O. 573(I)/2017

In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), the Board, with approval of the Federal Minister-in-charge, is pleased to direct that the following further amendments shall be made from the 1st July, 2017 in its Notification No. SRO 497(I)/2009 dated the 13th June, 2009, namely:

In the aforesaid Notification, -

(a) in the preamble, for the words "First Schedule", the word "Schedules" shall be substituted and shall be deemed always to have been so substituted; and

(b) for the existing Table, the following Table shall be substituted, namely: ...

- iv. It was the contention of the learned counsel that the import of items mentioned in SRO 497, as amended from time to time, enjoyed exemption from duties in excess of 37.5% and further that such exemption subsisted till date.
- v. Learned counsel drew the Court's attention to the SRO 1035 and stated that the same was being misinterpreted by the Respondents and in unfounded reliance thereupon duties in excess of 37.5% were being demanded from the Petitioners in respect of the Goods.
- vi. It was submitted that the Petitioners' grievance is that SRO 1035 does not apply to the Goods, as exemption granted in respect thereof vide SRO 497 remains in the field.
- vii. Learned counsel for the Petitioners placed reliance on the judgments reported as *The Assistant Collector, Customs, Central Excise and Sales Tax, Mardan Division and 2 Others vs. M/s. Gadoon Textile Mills Limited*, 1994 SCMR 712 ("**Gadoon Textile**"), *Collector of Customs and Others vs. Ravi Spinning Limited and Others*, 1999 SCMR 412 ("**Ravi Spinning**") and *Government of Pakistan and Others vs.*

Messrs Saif Textile Mills Limited and Others, 2003 PTD 335 (“**Saif Textile**”) in order to bulwark his submissions made herein.

viii. In view of the foregoing, the learned counsel for the Petitioners pleaded that the Goods be declared as being exempted under SRO 497 and further that any duty in excess of 37.5% be declared to be inapplicable thereto in view of the exemption so enjoyed.

5. Learned counsel for the Petitioners in the other connected petitions, as listed in the title hereof, adopted the arguments of the learned counsel for the Petitioners in the Lead Petition.

6. Mr. Kafeel Ahmed Abbasi set out the Respondents’ case and submitted that SRO 497 was no longer in the field as it stood superseded by SRO 1035. The submissions of the learned counsel for Respondents may be summated as follows:

i. It was submitted by the learned counsel that the listed petitions had been filed with the intention to deprive the Government from its legitimate revenue through misrepresentation and misinterpretation of law.

ii. Learned counsel for Respondents read out paragraph 2(iii) of the counter affidavit of the Respondent No. 4 to the Court in support of his contentions. The passage referred to stipulated as follows:

“The crux of the subject application as well as the petition is that as per SRO 497(I)/2009 dated 13.06.2009, the regulatory duty (R.D) or any other additional customs duty can be imposed on the goods mentioned in the aforesaid SRO. It is respectfully submitted that as held by this Honourable Court in the case of the RD petitions, including the petition D-

344/2015, the Government can levy the RD even if there is any exemption or concession through any SRO under Section 19 of the Act. Without prejudiced to the above, it is respectfully submitted that there were eight notifications which had been issued to levy RD on import of different items including two main notifications i.e. SRO 482(I)/2000 dated 13.06.2009 and SRO 568(I)/2014 dated 26.06.2014. Now all these eight RD notifications of import related have been merged and a sign notification has been issued. This SRO supersedes Notifications Nos. SRO 482(I)/2009 dated 13th June, 2009, SRO 808(I)/2009 dated 19th September 2009, SRO 214(I)/2010 dated 29th March 2010, SRO 568(I)/2014 dated 26th June 2014, SRO 1043(I)/2014 dated 25th November 2014, SRO 254(I)/2015 dated 30th March 2015, SRO 393(I)/2015 dated 30th April 2015 and SRO 1248(I)/2015 dated 17th December 2015. SRO 482(I)/2009 had excluded imports against FTA and PTA, whereas SRO 568(I)/2014 did not provide such exclusion on the ground that scope of FTA / PTA is restricted to CD, which RD is outside the ambit of such trade agreements, which was letter upheld by the superior courts. Accordingly, SRO 1035(I)/2017 does not provide exemption / concession from RD to goods earlier covered under SRO 482(I)/2009 and SRO 497(I)/2009. In view of the above, it is clear that the provisions of SRO 497(I)/2009 cannot over-ride the provision of SRO 1035(I)/2017, thus, the subject application as well as the petition is devoid of merits, hence, liable to be dismissed in limine.

- iii. It was contended that levy of customs duties was undertaken by virtue of section 18(1) of the Customs Act, 1969 ("**Customs Act**") and that it was the said duty which was subject to the exemption granted vide SRO 497.
- iv. It was contended that imposition of regulatory duty and additional custom duties was undertaken by virtue of sections 18(3) and 18(5) of the Customs Act and, hence the said duties were outside the purview of SRO 497 in any event.
- v. Learned counsel further submitted that SRO 497 was finally amended by SRO 505(I)/2017, dated 21st June, 2017, and that pursuant to entry 299 therein the Petitioners were required to pay 25% regulatory duty in addition to the other

duties being paid thereupon. The relevant portion of the stated SRO is reproduced herein below:

S.R.O. 505(I)/2017

In exercise of the powers conferred by sub-section (3) of section 18 of the Customs Act, 1969 (IV of 1969), the Federal Government is pleased to direct that the following further amendments shall be made in its Notification No.SRO 568(I)/2014 dated the 26th June, 2014, namely:

2. *In the aforesaid Notification, -*

(a) for the Table, the following shall be substituted, namely:

“TABLE

S.NO.	PCT Code	Description	Rate of Regulatory Duty (%)
299	6907.1000	Tiles, cubes and similar articles, whether or not rectangular, the largest surface area of which is capable of being enclosed in a square the side of which is less than 7 cm	25

vi. In support of his contentions, the learned counsel placed reliance on the judgment reported as *Messrs Advance Telecom and Others vs. Federation of Pakistan and Others*, 2018 SCMR 1 (“**Advance Telecom**”).

vii. It was the contention of the learned counsel that SRO 497 stood duly repealed / rescinded and that no benefit could be availed there from by the Petitioners or any other person(s) whatsoever.

7. Learned Assistant Advocate General adopted the arguments made by Mr. Kafeel Ahmed Abbasi and also supported the contention that SRO 497 stood repealed / rescinded and was no longer operative in the field.

8. Learned counsel for the Petitioner in the Lead Petition, having considered the arguments of the learned counsel for the Respondents, exercised his right of rebuttal and the submissions made are particularized herein below:

- i. It was contended that the Petitioner does not rely on the Proviso but places reliance upon SRO 497, which was duly issued under s.19.
- ii. It was also contended that SRO 659 pertained to a bilateral arrangement between Pakistan and China and that the same *inter alia* was discussed in *Advance Telecom*. It was contended that the scope of SRO 497 was entirely distinct from that of SRO 659, and hence the ratio of *Advance Telecom* was distinguishable herein.

9. We have heard the parties with the able assistance of the learned counsel and have examined the point involved in these connected petitions: Whether the SRO 497 remains in the field or whether the same stood repealed / rescinded by SRO 1035.

10. It may be proper to approach this issue by referring first to the applicable law in this regard.

11. The levy of duties pursuant to the Customs Act are imposed by virtue of section 18 thereof ("**s.18**"), which reads as follows:

18. Goods dutiable.- (1) Except as hereinafter provided, customs duties shall be levied at such rates as are prescribed in the First Schedule or under any other law for the time being in force on,--

(a) goods imported into Pakistan;

(b) goods brought from any foreign country to any customs station, and without payment of duty there, transshipped or

transported for, or thence carried to, and imported at any other customs-station; and

(c) goods brought in bond from one customs station to another.

(1A) Notwithstanding anything contained in sub-section (1), customs duties shall be levied at such rates on import of goods or class of goods as are prescribed in the Fifth Schedule, subject to such conditions, imitations and restrictions as prescribed therein.

(2) No export duty shall be levied on the goods exported from Pakistan.

(3) The Federal Government may, by notification in the official Gazette, levy, subject to such conditions, limitations or restrictions as it may deem fit to impose, a regulatory duty on all or any of the goods imported or exported, as specified in the First Schedule at a rate not exceeding one hundred per cent of the value of such goods as determined under section 25 or, as the case may be, section 25A.

(4) The regulatory duty levied under sub-section (3) shall –

(a) be in addition to any duty imposed under sub-section (1) or under any other law for the time being in force; and

(b) be leviable on and from the day specified in the notification issued under that sub-section, notwithstanding the fact that the issue of the official Gazette in which such notification appears is published at any time after that day.

(5) The Federal Government may, by notification in the official Gazette, levy an additional customs-duty on such imported goods as are specified in the First Schedule, at a rate not exceeding thirty-five per cent of value of such goods as determined under section 25 or, as the case may be, section 25A :

Provided that the cumulative incidence of customs-duties leviable under sub-sections (1), (3) and (5) shall not exceed the rates agreed to by the Government of Pakistan under multilateral trade agreements.

(6) The additional customs-duty levied under sub-section (5) shall be,--

(a) in addition to any duty imposed under sub-sections (1) and (3) or under any other law for the time being in force; and

(b) leviable on and from the day specified in the notification issued under that sub-section, notwithstanding the fact that the official Gazette in which such notification appears is published at any time after that day.

12. On the other hand, exemptions granted in respect of the aforesaid levies are undertaken by virtue of section 19 of the Customs Act (“s.19”), which is reproduced herein below:

19. General power to exempt from customs-duties.--

(1) The Board, with approval of the Federal Minister-in-charge, and pursuant to the approval of the Economic Coordination Committee of Cabinet, wherever circumstances exist to take immediate action for the purposes of national security, natural disaster, national food security in the emergency situations, protection of national economic interests in situations arising out of abnormal fluctuation in international commodity prices, removal of anomalies in duties, development of backward areas , implementation of bilateral and multilateral agreements and to any International Financial Institution or foreign government owned Financial Institution operating under a memorandum of understanding, an agreement or any other arrangement with the Government of Pakistan, subject to such conditions, limitations or restrictions, if any, as it deems fit to impose, may, by notification in the official Gazette, exempt any goods imported into, or exported from, Pakistan or into or from any specified port of station or area therein, from the whole or any part of the customs-duties chargeable thereon and may remit fine, penalty, charge or any other amount recoverable under this Act.

13. A perusal of s.18 shows that the said provision provides for the imposition of customs duties, regulatory duties and additional customs duties. S.19 confers wide powers to exempt any goods from duties chargeable thereupon, by virtue of s.18, either in whole or in part.

14. It would follow that the exemption provided for under s.19 would apply to all the levies chargeable under s.18 and not merely be restricted to the levy of customs duties.

15. The primary argument of the learned counsel for the respondent was that the exemption issued pertained to customs duty only and was not applicable to regulatory duty or any other levy pursuant to the Customs Act. It was argued that regulatory duty was imposed pursuant to section 18(3) of the Customs Act, vide SRO 1035, and that the exemption relied upon, arising out of SRO 497, pertained to customs duty only, which was levied vide section 18(1) of the Customs Act. It was thus submitted that since the relevant SROs pertained to independent provisions of the Customs Act therefore the exemption issued could not be applied to a levy imposed under s.18(3) of the Customs Act.

16. The first issue to consider is whether the exemption granted under s.19 pertained to customs duty only, leviable under section 18(1) of the Customs Act, or whether such an exemption could be construed to encompass all types of levies delineated in s.18.

17. This issue came under deliberation before the Supreme Court of Pakistan in the case of *Gadoon Textile*, wherein it was maintained as follows:

“In this background of the situation, the only interpretation which can be put on the notification is the total exemption from the whole of customs duties and sales tax and not only those mentioned in s.18(1) of the Customs Act. As held by this Court in the cited judgment referred to above, the regulatory duty is an additional customs charge leviable under the various sections of the Customs Act and it may look unreasonable if customs duty leviable under subsection (1) of s.18 is declared exempted whereas the additional customs charge in the form of regulatory duty is held recoverable. The words used in the notification “whole” and “leviable” suggested that the said industrial estate was exempted from all customs duties leviable in past or in future.”

18. The distinction between customs duty and regulatory duty was deliberated upon in detail by the Supreme Court of Pakistan in the case of *Ravi Spinning*, wherein it was articulated as follows:

“12. In accordance with clause (1) of s.18 *ibid*, customs duties are levied on goods imported in Pakistan, goods brought from a foreign country to a customs station in Pakistan and without payment of customs duty there taken to another customs station and on goods brought in bond from one station to another, according to rates prescribed in the 1st or 2nd Schedule to the Act or as may be prescribed by or under any other law for the time being enforced. The customs duty under s.18(1) *ibid*, is therefore, a statutory duty charged at a fixed or pre-determined rate specified in 1st or 2nd Schedule to the Act or by or under any other law for the time being enforced.

13. Regulatory duty, on the other hand, is neither fixed nor pre-determined. It is imposed in exercise of the delegated authority, by the Government subject to limitations mentioned in clauses (2) to (4) of s.18, *ibid*, in the following manner:-

(i) The Government while levying regulatory duty may impose such conditions as it may deems fit;

(ii) regulatory duty may be imposed by the Government on all or any of the items mentioned in the 1st Schedule to the Act;

(iii) the rate of regulatory duty cannot exceed one hundred per cent. of the value of the goods, determined in accordance with section 25 or 25B of the Act;

(iv) the regulatory duty is in addition to any duty levied under s.18(1) of the Act or levied by or under any other law for the time being enforced;

(v) the regulatory duty imposed under s.18(2) *ibid* is effective from the date specified in the notification notwithstanding the date of publication of such notification in official Gazette; and

(vi) the notification imposing regulatory duty, unless rescinded earlier, remains effective only until expiry of the financial year in which it is issued.

In the like manner and subject to limitations mentioned above, regulatory duty may also be imposed by the Government under s.18(2) on all or any of the goods exported from Pakistan, at the rate not exceeding one hundred per cent. of the value of goods, determined under section 25 or 25B of the Act, if such goods are mentioned in the 2nd Schedule to the Act, and in respect of goods not mentioned in the 2nd Schedule at the rate not exceeding 50% of the value determined under sections 25 and 25B of the Act.

The regulatory duty, therefore, by its very nature is a transitory measure intended to cover and meet a situation or condition not covered by the statutory duty prescribed under s.18(1) of the Act. The scope and vires of the authority of the Government, to levy regulatory under s.18(2) of the Act was examined in detail by this Court in the case of *Abdur Rahim v. Federation of Pakistan* (PLD 1988 SC 670) which related to the import of iron and steel scrap and some other iron and steel items. The relevant discussion dealing with the point in issue, reads as under:-----

"By subsection (2) of s.18, the Legislature has delegated to the Federal Government the discretion to levy 'regulatory duty' on all or any of the items specified in the First Schedule at a rate not exceeding fifty per cent. of the rate, if any, specified therein or at a rate not exceeding hundred per cent. of the value of such articles, as determined under section 25 and may, by a like notification, levy a regulatory duty on all or any of the articles exported from Pakistan in respect of the articles mentioned in the Second Schedule at a rate not exceeding thirty per cent. of the rate specified in the Second Schedule or of the amount which would represent the value of such articles as determined under section 25; and in the case of articles not specified in the Second Schedule, at a rate not exceeding thirty per cent. of the amount which represents the value of such articles as determined under section 25. Here what is to be noticed is the exercise of a discretion within a legislative framework i.e., firstly, that the discretion to levy is subject to such conditions, limitations or restrictions as the Federal Government may deem fit to impose; secondly, the specification of the articles by reference to the Schedule and the maximum of the rate of duty to be imposed; and thirdly, that

the imposition of the levy was for a limited period of a financial year unless the levy was earlier withdrawn.

The levy was described as "regulatory duty" as it was imposed to maintain a proper balance in a fluctuating market as a result of sharp fall in the international prices of iron and steel scrap and certain other iron and steel items with the result that the importers imported these materials at a much lower costs but regardless of it the prices did not fall to any substantial extent in the domestic market, and it were the importers only who were the beneficiaries and were earning windfall profits. Therefore, the discretion to levy 'regulatory duty' was a device to enhance the rate of duty at any time during the course of the year so as to achieve a balance. The Legislature, in the circumstances could not know as to the details of the fluctuating international prices from time to time during the course of the year and for that matter could not also be in a position to enhance the levy to obtain a balance of the prices in the domestic market nor was it in a position to speculate the details of the conditions, limitations or restrictions which were necessary to be imposed for the levy of 'regulatory duty'. It was in these circumstances that it provided the framework for the levy of 'regulatory duty' to be imposed and gave the discretion to the Federal Government to make a levy so as to achieve a balance in the prices in the local market.

In this view of the matter, what has to be seen is the nature of the power delegated which determines whether the delegation is proper or invalid. If the Legislature delegates its power to make the law, that is, its own legislative function then it would be invalid but if what is delegated is the authority to exercise the discretion in respect of matters which had been finally determined by the Legislature itself, the delegated authority does not exercise a legislative function. In this context, the law itself provided the framework and left it to the Federal Government to exercise the discretion in the manner laid down within the framework. It cannot therefore, be regarded as an abdication of its function by the Legislature but by law a valid delegation of a discretion to achieve the purpose of the law."

19. In the aforesaid judgment it was maintained by the Supreme Court, in the conclusion, as to whether exemption notification applied to the existing charge of customs duties or also covered future levy, i.e. regulatory duty, would depend on the language used in the said notification itself.

20. It was further held that regulatory duty imposed by the Government, though a species of customs duty, in addition to the duty prescribed under the First Schedule to the Act, to meet a particular situation, not covered by the statutory duty. If the Government intended to exempt any future levy of the customs duty as well, while granting exemption from the existing prescribed customs duty, it could provide so in the exemption notification as has been done on a number of occasions.

21. The Supreme Court of Pakistan maintained that where the expression “whole of the custom duties” was used in the notification without making any reference to customs duty prescribed in the Schedule to the Customs Act, the same is significant and distinguishes this case from a notification which granted exemption from customs duties prescribed only under a specified schedule to the Customs Act.

22. It may be pertinent to reproduce the relevant operative part of *Ravi Spinning* herein below to demonstrate the principle of law settled therein:

“We now take up the cases covered by S.R.O. No.108(I)/95, dated 12-2-1995. These cases/appeals arise from the judgment of Peshawar High Court, dated 23-2-1997. We have already reproduced earlier in this judgment the text of S.R.O.108(I)/95, dated 12-2-1995. This S.R.O. is valid for a period of 5 years from the date of its issue. The Government

while granting exemption from payment of customs duty to the industrialists under this notification firstly, made no reference to the duty of customs prescribed in the 1st Schedule to the Act as was done in other S.R.Os. Secondly, the expression used in this notification is "from whole of the customs duties" which is identical to the language used in the notification which came up for consideration before this Court in the case of Assistant Collector of Customs v. Gadoon Textile Mills (supra). Therefore, keeping in view the tenor of the language of the notification and the fact that the notification was valid for a period of 5 years from the date of its issue, the conclusion arrived at by the learned Judges of Peshawar High Court that the language used in the exemption notification covered the future levy of additional customs duty as well appears to be correct. We, accordingly, hold that in respect of the goods covered by S.R.O. No.108(I)/95, dated 12-2-1995, the regulatory duty imposed by S.R.O. No.1050(1)/95, dated 29-10-1995. was not recoverable."

23. The subsequent judgment of the Supreme Court of Pakistan in the case of *Saif Textile* further elucidated upon this issue and it was maintained as follows:

"It may be seen that this Court in the case of Abdur Rahim (ibid) has held that the Regulatory Duty falls within the definition of Customs Duty and is covered by Article 43, Schedule IV of the Constitution of Islamic Republic of Pakistan. Therefore, we are of the opinion that the expression "Exemption from whole of the Customs Duty" includes the Customs Duty as defined under s.18(1) and Regulatory Duty covered under subsections (2) and (3) of s.18 of the Act, 1969. It would be worth to mention here that exactly this proposition came for examination before this Court in the case of Assistant Collector, Customs (ibid), wherein while interpreting the word "whole" it was held that "Customs Duty" includes the "Regulatory Duty". This proposition can be examined from another angle namely if Legislature intended to levy Regulatory Duty, then it would have instead of using the expression "exemption from whole of the Customs Duty" may have use expression "exemption from Customs Duty" as defined under s.18(1) read with First Schedule of the Act, 1969. In this context, it may not be out of place to note that in S.R.O. No. 517(I)/89, dated 3rd June, 1989, exemption was granted from the whole of Customs Duties. Therefore, on its withdrawal, a compensation to the extent of 25 % ought to have been given in respect of the whole of Customs Duty including Regulatory Duty and if the argument so raised by the learned counsel for appellant is p accepted that no exemption has been granted on the Regulatory Duty, it would create anomalous position, because on the one hand originally

Government granted exemption from whole of the Customs Duty but the 25 % compensation (relief) had been withheld on the Regulatory Duty, which does not appear to be the intention of decision of ECC. As such, we are of the opinion that using the word "Customs Duty" in a singular form, instead of plural form, would not mean that Regulatory Duty is not included in it. It needs no detailed discussion that at a time the word used in a singular form can also construed in a plural sense to achieve the object of the law. It is to be noted that in the instant case the Federal Government in fact has agreed to grant compensation (relief), meaning thereby to share with the losses which the industrialists have suffered on withdrawal of the notification, dated 3rd June, 1989, therefore, such instrument has to be construed strictly and is to be interpreted in favour of the subject in whose favour a right has accrued. Thus, we are of the Opinion that the expression "exemption from whole of the Customs Duty" also includes the Regulatory Duty."

24. A plain reading of SRO 497 demonstrates that the benefit arising therefrom is exemption "from the whole of customs duties in excess of the rates specified ..." It would follow that the language employed in SRO 497 would rest squarely within the parameters prescribed by the Supreme Court of Pakistan in the judgments cited supra.

25. It may be relevant to observe that the expression applied in SRO 497 reads that the exemption is from the plural, whole of customs duties, and not just from the singular, customs duty.

26. A review of the applicable rate of custom duties from the time of issuance of SRO 497 till date shows that the same has been maintained at 20%. The variations have been in the levy of regulatory duty and additional customs duties from time to time. It would appear that even at the time of issuance of SRO 497, the combined impact of the customs duties levied was in excess of 37.5% and hence, the issuance of the said notification was relevant.

27. It is thus maintained that the expression “exempt on import from whole of the customs duties” also includes exemption from regulatory duty and additional customs duty.

28. The next issue to consider was whether SRO 497 stood duly repealed / rescinded by SRO 1035, as had been argued by the learned counsel for the Respondents.

29. A plain reading of SRO 1035 demonstrates that there is no constituent thereof that seeks to repeal or rescind SRO 497, as amended from time to time.

30. The said SRO clearly states that the same is in supersession of the instruments listed therein. It may be pertinent to reproduce the relevant excerpt of SRO 1035:

“S.R.O.1035 (1)/2017- In exercise of the powers conferred by sub-section (3) of section 18 of the Customs Act, 1969 (IV of 1969), and in supersession of its Notifications Nos. S.R.O. 482(1)/2009 dated the 13th June, 2009, S.R.O. 808(1)/2009 dated the 19th September, 2009, S.R.O. 214(1)/2010 dated the 29th March, 2010, S.R.O. 568(1)/2014 dated the 26th June, 2014, S.R.O. 1043(1)/2014 dated the 25th November, 2014, S.R.O. 254(1)/2015 dated the 30th March, 2015, S.R.O. 393(1)/2015 dated the 30th April, 2015 and S.R.O. 1248(1)/2015 dated the 17th December, 2015, the Board, with approval of the Federal Minister-in-charge is pleased to levy regulatory duty on import of goods specified in column(3) of the Table below, falling under the PCT Code of the First Schedule to the said Act specified in column (2) of the said Table, at the rates specified in column (4) thereof

31. It is apparent from the text that SRO 497 and / or any of the instruments that amended SRO 497 from time to time find no mention in the listed instruments that stood superseded by SRO 1035 hence there is no express repeal of SRO 497.

32. The honorable Lahore High Court in the case of *Ahmed Khan Niazi vs. Town Municipal Administration Lahore & Others*, PLD 2009

Lahore 657 (“**Ahmed Khan Niazi**”), had expounded upon the concept of repeal by an express mandate of law. It was held that where an old enactment was alien to the new enactment and the old enactment was vitally, fundamentally and manifestly inconsistent with the new enactment, then to define the same as implied repeal would be a misnomer. Such a repeal was to fall within the domain of the rule of express repeal on the criteria of inconsistency; where the inconsistency is vivid and imminent the repeal shall be deemed to be express by all means.

33. There appears to be no inconsistency between SRO 1035 and SRO 497. While SRO 1035 seeks to impose levies pursuant to the Customs Act upon items including the Goods, SRO 497 provides an exemption in the event that the Goods are imported from the PRC.

34. Therefore, evaluating the present scenario upon the anvil of *Ahmed Khan*, it may safely be stated that the concept of repeal by express mandate of law is inapplicable hereto.

35. It is also prudent to consider whether upon any construction of SRO 1035 an inference could be drawn to construe an implied repeal of SRO 497.

36. The essential requisites for implied repeal, albeit in the context of a statute, have been enunciated by the Supreme Court of Pakistan in the case of *Tanveer Hussain vs. Divisional Superintendent Pakistan Railways & Other*, PLD 2006 SC 249 (“**Tanveer Hussain**”), in the following manner:

“The necessary conditions of implied repeal of an earlier statute or a provision thereof by a later statute are that; firstly, the two statutes cannot stand or co-exist together; secondly, to stand side by side, they will lead to absurd consequences;

and thirdly, when the entire subject matter of the earlier statute or provision thereof is taken away by the later statute ...”

37. The Peshawar High Court, in the case of *Muhammad Sheraz vs. Chief Secretary Government of Khyber Pukhtunkhwa & Others* PLD 2014 Peshawar 170 (“**Muhammad Sheraz**”), has detailed the principles of implied repeal and extrapolated the same in the form of a test. The relevant excerpt therefrom reads as follows:

“In regard to implied repeal, the general principle of 'Interpretation of Statutes' is that there is a strong presumption against implied repeal. This matter came up for consideration before the High Court of Australia in *Share Gold v. Tanner* (2002 76 ALRJ 808), wherein, a five member bench quoted with approval, its earlier judgment in *Saraswati v. The Queen* (1991 172 CLR 1) that;

"It is a basic of construction that in the absence of express words an earlier statutory provision is not repealed altered or derogated from by a latter provision unless an intention to that effect is necessary to be implied. There must be very strong grounds to support that indication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlapped, one should be read as subject to the other."

Thus, it would be safe to state that as far as implied repeal of an earlier law is concerned, it can only be inferred, when the latter law overrides the earlier law and is totally inconsistent with the earlier law and the two cannot stand and co-exist together.

N. S. Bindra on 'Interpretation of Statutes' (10th Edition) provides that:

"Where there is a "clear and direct" inconsistency between the two Acts and it is "absolutely irreconcilable" bringing the two Acts into "direct collision" then only one of these may be regarded as impliedly repealed by the other"

Hallsbury's Laws of England has rendered certain tests for 'implied repeal', which can be explained as follows:

“If its provisions are so plainly repugnant to the subsequent statute;

II If the two standing together would lead to wholly absurd consequences;

III If the entire subject-matter of the first is taken away by the second”

38. In the present circumstances when the prerequisites of implied repeal garnered from *Tanveer Hussain*, as articulated in the form of a test by *Muhammad Sheraz*, are applied to the facts at hand it appears firstly that the provisions of SRO 497 are not repugnant to those of SRO 1035; secondly, that the two SROs standing together do not lead to any absurd consequences; and finally it is definitely not the case of the entire subject matter of SRO 497 being taken away by SRO 1035.

39. Therefore, it is observed that since the two SROs when read together are not hit by any of the three tests, prescribed in *Muhammad Sheraz*, therefore, no case has been made out to suggest that SRO 497 has been impliedly repealed by SRO 1035.

40. It would be reasonable to deduce that while SRO 1035 provides for the imposition of customs duties upon items listed therein, the said rates would not apply to the goods that enjoy exemption under SRO 497.

41. Learned counsel for the respondent had submitted that his submissions were bolstered by the recently reported judgment of the Supreme Court of Pakistan in the case of *Advance Telecom*.

42. A review of the cited judgment showed that primary issue therein pertains to the proviso of s.18(5) of the Customs Act (“**Proviso**”), which reads as follows:

(5) The Federal Government may, by notification in the official Gazette, levy an additional customs-duty on such imported goods as are specified in the First Schedule, at a rate not exceeding thirty-five per cent of value of such goods as determined under section 25 or, as the case may be, section 25A :

Provided that the cumulative incidence of customs-duties leviable under sub-sections (1), (3) and (5) shall not exceed the rates agreed to by the Government of Pakistan under multilateral trade agreements.

(Underline added for emphasis)

43. The aforesaid judgment maintained that the benefit of the Proviso would be extended to matters covered under multilateral agreements and that bilateral trade agreements could not be read into the said Proviso.

44. The said judgment appears to be distinguishable in respect of the present petitions, as the Petitioners place no reliance upon the aforesaid Proviso and instead claim their right squarely from a specific exemption granted vide SRO 497.

45. It is thus the considered view of this Court that SRO 497 continues to remain in the field notwithstanding the issuance of SRO 1035.

46. For the reasoning contained herein the listed petitions are allowed in terms delineated herein below:

- i. It is declared that SRO 497(I)/2009 dated 13.06.2009 remains in the field and the items listed therein continue to enjoy exemption from customs duties in the terms stated therein.
- ii. It is further declared that in respect of the items covered under SRO 497(I)/2009 dated 13.06.2009, the duties imposed vide SRO 1035(I)/2017 dated 16.10.2017 are not recoverable.

iii. Any amounts recovered from the Petitioners, in excess of the exemption provided for under SRO 497(I)/2009 dated 13.06.2009, shall be duly refunded thereto by or before 31.10.2018. Such refund may be made by way of direct repayment or adjustment (against any tax or duty) and in one lumpsum or in installments, as the FBR may determine (but the same policy must be adopted in all cases). Any security provided by any of the Petitioners, in terms of interim orders made in the Petitions, shall be released/discharged after a period of one month subject to proper verification and confirmation.

47. This judgment is suspended for 30 days in order to enable any aggrieved person/party so desirous to avail the remedy of appeal. During this period the interim order dated 07.11.2017 made in CP D-7357/2017 (and also as made applicable in other petitions) shall continue to remain operative.

JUDGE

JUDGE