

## **IN THE HIGH COURT OF SINDH AT KARACHI**

### **C.P No.D-3617 2013**

M/s. Chevron Pakistan Ltd..... v..... Pakistan & another

### **C.P No.D-3555 of 2013**

Reckitt Benckiser Pakistan Ltd..... v..... Pakistan & another

### **C.P No.D-3598 of 2013**

M/s. Mondelez Pakistan Ltd..... v..... Pakistan & another

### **C.P No.D-3618 of 2013**

M/s. Shell Pakistan Ltd..... v..... Pakistan & another

### **C.P No.D-3621 of 2013**

M/s. Pakistan State Oil Company Ltd.....v..... Pakistan & another

### **C.P No.D-3666 of 2013**

Pak Suzuki Motor Company Ltd..... v..... Pakistan & another

### **C.P No.D-3682 of 2013**

M/s. Oil Industries Pakistan (Pvt) Ltd..... v..... Pakistan & another

### **C.P No.D-4872 of 2013**

M/s. International Steel Ltd..... v..... Pakistan & another

Present: *Mr. Justice Muhammad Junaid Ghaffar*  
*Mr. Justice Agha Faisal*

Petitioners in C.P Nos.D-3617,  
3666, 3598, 3618, 3621, 4872 of 2013

Through Mr. Ahmed  
Hussain Advocates.

Petitioner in C.P No.D-3555/2013

Through Mr. Qazi Umair Ali, Advocate.

Petitioner in C.P No.D-3682/2013

Through Mr. S. Irshad-ur-Rehman,  
Advocate.

Respondents No.1:

Through Mr. Kafeel Ahmed Abbasi,  
Advocate.

Respondent (FBR):

Through Mr. Muhammad Asif,  
Advocate.

Respondent in C.P No.D-3682/13

Through Mr. Imran Ali Mithani,  
Advocate.

**Date of hearing:**

**10.11.2020.**

**Date of Judgment:**

**10.11.2020.**

## **J U D G M E N T**

**Muhammad Junaid Ghaffar J.-** All these petitions have sought similar / identical relief. The prayer in CP No.3617/2013 (leading petition) is as under: -

- a) Declare that the Petitioner is not liable to pay extra 1% sales tax and the extra 1% sales tax which have already been paid by the Petitioner is refundable on demand by the Respondents on its transactions from 13.6.2013 to 30.6.2013, while further declaring that the other actions to collect extra 1% sales tax on transaction between 13.6.2013 to 30.6.2013 to be malafide, illegal, unconstitutional, completely without jurisdiction, void ab initio and of no legal effect;
- b) Declare section 5(15) of the Finance Act, 2013 to be unconstitutional and void;
- c) Direct the Respondents to administer refund alongwith additional refund for the amount of 1% sales tax;
- d) Award costs and special costs;
- e) Award any other relief deemed fit.

2. Learned Counsel for the Petitioner in C.P No. D-3555 of 2013 submits that through Finance Bill 2013, the rate of sales tax was increased from 16% to 17%; however, such increase of sales tax by 1% and its enforcement immediately before passing of the Finance Act was taken note of by the Hon'ble Supreme Court in the case of Engineer Iqbal Zafar Jhagra Senator Rukhsana Zuberi v. Federation of Pakistan and others (C.P No.33 & 34 of 2005 and Civil Misc. Application No. 3821 of 2013) and vide a short order dated 21.06.2013, it was held that Government is not authorized to increase sales tax from 16% to 17% by way of Finance Bill along with a Declaration under section 3 of the Provisional Collection of Taxes Act, 1931 ("**1931 Act**"). According to him the petitioners during such period never charged sales tax at rate of 17% between 13.06.2013 to 30.06.2013. He has also placed on record S.R.O. 946(I)/2013 dated 25.10.2013 and submits that the Federal Government by realizing its mistake has even reduced the rate to 16%; but only for the period between 21.06.2013 to 29.06.2013, which according to him in fact ought to have been applicable from 13.06.2013 till 30.06.2013. Other learned Counsel for the Petitioners have adopted his arguments.

3. On the other hand, learned Counsel for FBR has opposed the petition and submits that through the Finance Act, 2013, the increase in the rate from 16% to 17% has been made effective retrospectively from 13.06.2013 vide Finance Act, 2013, and therefore any reliance on the judgment of the Hon'ble Supreme Court in the case of *Iqbal Zafar Jhagra (supra)* is of no relevance; hence the petitions are liable to be dismissed.

4. We have heard the learned Counsel and perused the record. It appears that for the years 2013-2014, Finance Bill was introduced and in Section 3 of the Sales Tax Act, 1990, for the word “**sixteen**” wherever occurring, the word “**seventeen**” was substituted and alongwith introduction of this Finance Bill, a Declaration under the 1931 Act was also issued by giving effect to this amendment and other proposed amendment from 13.06.2013 i.e. the date of presentation of the Finance Bill. Such Declaration under the 1931 Act and the immediate levy and enhancement of sales tax was impugned before the Hon’ble Supreme Court in the above case of **Engineer Iqbal Zafar Jhagra**, (detailed judgment later reported as **Engineer Iqbal Zafar Jhagra Senator Rukhsana Zuberi v. Federation of Pakistan-2013 SCMR 1337**) which was then decided by way of a short order dated 21.06.2013 and the said order is as under:-

**“Iftikhar Muhammad Chaudhry, CJ,**\_\_ For the reasons to be recorded later, it is declared and held as under:-

- (i) The Government is not authorized to impose or increase Sales Tax from 16% to 17% on the value of taxable supplies, i.e. by inserting in the Finance Bill (Money Bill) 2013-2014 a declaration under section 3 of the Provisional Collection of Taxes Act, 1931 [hereinafter referred to as 'the Act, 1931'] as such declaration neither has the status of legislation nor sub-legislation, therefore, it has no force of law.

AND

Immediate recovery of Sales Tax from 16% to 17% on the value of taxable supplies w.e.f. 13-6-2013 is unconstitutional being contrary to Articles 3, 9, 24 and 77 of the Constitution;

- (ii) Under proviso to rule 20(2)(c) of the Sales Tax Special Procedures Rules, 2007, 9% in addition to the Sales Tax prescribed under section 3 of the Sales Tax Act, 1990 imposed or recovered from the consumers on CNG is unconstitutional and contrary to Articles 3, 9, 24 and 77 of the Constitution as well as section 3 of the Sales Tax Act;
- (iii) Section 4 of the Act, 1931 as a whole is declared unconstitutional being contrary to Article 70 of the Constitution, which lays down the procedure for legislation;
- (iv) Section 5 of the Act, 1931 does not lay down parameters for the purpose of refund of the recovered taxes to the consumers, as such, in absence of any workable mechanism, it is not enforceable in its present form;
- (v) As a consequence of above declaration, the Federal Government has no lawful authority to levy, impose and recover Sales Tax @ 17% from 13-6-2013 on the value of taxable supplies made in course or furtherance of any taxable activity until passing of the Finance Bill (Money Bill) 2013-14, which has already been tabled before the Majlis-e-Shoora;

- (vi) The excess amount equal to 1% (17%-16%) of the Sales Tax recovered on the petroleum products/CNG or any other taxable supplies w.e.f. 13-6-2013 onwards, thus is refundable to consumers and concerned authorities accordingly are directed to deposit it with the Registrar of this Court subject to passing of the Finance Bill (Money Bill) 2013-14 by or under the authority of the Majlis-e-Shoora;

If the Sales Tax is imposed by the Majlis-e-Shoora to be recovered with retrospective effect, same shall be paid to the Government, otherwise appropriate orders will be passed for its disbursement;

- (vii) The Government is also directed to deposit 9% out of 26% of the Sale Tax on CNG as per notification dated 13-6-2013 in the same manner as it has been noted above;
- (viii) A statement shall also be filed by the Government showing the amount of Sales Tax recovered @ 9% under proviso to rule 20(2)(c) of the aforesaid Rules 2007 on value of the CNG from the consumers in addition to declared Sales Tax of 16% imposed under section 3 of the Act, 1990 as this amount is also to be refunded to the consumers, for which appropriate order shall be passed subsequently;
- (ix) As prices of essential commodities mentioned in the Sixth Schedule to the Act, 1990 have exorbitantly increased according to the media reports, therefore, Federal Government and the Provincial Governments are directed to take action under sections 6 and 7 of the Price Control and Profiteering and Hoarding Act, 1977 to keep the prices consistent as per the Sixth Schedule under section 13(1) of the Act, 1990 (Essential Commodities);
- (x) Pending passing of the Finance Bill (Money Bill), 2013-14, Sales Tax shall be recovered from consumers on the taxable supplies including petroleum products and CNG at the rate prescribed under section 3 of the Sales Tax Act; and
- (xi) The OGRA shall issue revised notification fixing prices of CNG as per above observations forthwith recovering Sales Tax @16% Sales Tax on taxable supplies till passing of Finance Bill (Money Bill), 2013-2014 by the Majlis-e-Shoora.

The titled Civil Miscellaneous Application is disposed of in the above terms.”

5. Perusal of the aforesaid short order clearly reflects that the Hon'ble Supreme Court was pleased to hold that Government is not authorized either to impose or increase Sales Tax from 16% to 17% on the value of taxable supplies through Finance Bill and by inserting a Declaration under Section 3 of the 1931 Act, as such Declaration neither has the status of legislation nor sub-legislation, therefore, it has no force of law and immediate recovery of sales tax at rate of 17% on the value of taxable supplies w.e.f. 13.06.2013 is unconstitutional being contrary to the Articles 3, 9, 24 and 77 of the Constitution of Islamic Republic of Pakistan. It was further held that as a consequence of above declaration, the Federal Government has no lawful authority to levy, impose and recover Sales Tax @ 17%

from 13-6-2013 on the value of taxable supplies made in course or furtherance of any taxable activity until passing of the Finance Bill (Money Bill) 2013-14, which has already been tabled before the Majlis-e-Shoora. It is not in dispute that pursuant to the aforesaid judgment of the Hon'ble Supreme Court, the petitioners including others kept on charging sales tax in their invoices at the rate of 16% and not 17% and therefore they were apparently acting pursuant to the judgment of the Hon'ble Supreme Court. It appears that the Federal Government to overcome and to undo the effect of the aforesaid judgment while passing Finance Act, 2013 in the 6<sup>th</sup> Schedule enacted clause-15, which read as under:-

**“(15) the provision of sub-clause (2), (3), (7), (13) and (14) relating to collection, levy and payment of sales tax shall have effect and shall be deemed to have taken effect on and from the 13<sup>th</sup> day of June, 2013”**

6. Perusal of the aforesaid provisions reflect that an attempt was made by giving effect to the enhanced rate of sales tax of 17% from 13.06.2013; however, we are of the considered view that such an attempt of giving retrospective effect is neither properly drafted nor can be so held as to undo the law declared by the Hon'ble Supreme Court in the case of **Engineer Iqbal Zafar Jhagra (supra)**. It is settled law that though a Legislature can undo a judgment or give retrospective effect; however, such powers of the Legislature are not unfettered; and can only be exercised in a limited way. Once the Hon'ble Supreme Court had given a Declaration by holding that the rate of sales tax cannot be enhanced from the date of introduction of the Finance Bill and on such Declaration, the Petitioners have acted upon, therefore, if any amendment is brought about through Finance Act supposedly to undo the effect of the Hon'ble Supreme Court's judgment, then it ought to have been specifically so legislated. It is not the case here. Therefore, we are of the view that even by legislation through the Finance Act 2013, in respect of a transaction already concluded pursuant to the judgment and declaration by the Hon'ble Supreme Court, no such retrospective effect can be given to increase the rate of sales tax from 16% to 17%, as the aforesaid provision of the Finance Act, does not caters to it and cannot be sustained and made effective retrospectively.

7. Having said that, nonetheless, subsequently the Federal Government realized that they have acted against the very spirit of

the judgment in question and it would not be possible to ask the registered persons to pay sales tax at rate of 17%, which they have never collected; hence, issued S.R.O 946(I)/2013 dated 25.10.2013, which reads as under:-

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

Islamabad, the 25<sup>th</sup> October, 2013

**NOTIFICATION**  
(SALES TAX)

“S.R.O.946(I)/2013.—In exercise of the powers conferred by clause (b) of sub-section (2) of section 3 of the Sales tax Act, 1990, the Federal Government is pleased to direct that sales tax shall be charged and collected on import and local supply of goods at the rate of sixteen per cent, for the period from 21<sup>st</sup> June, 2013 to 29<sup>th</sup> June, 2013, which otherwise were chargeable to sales tax at the rate of seventeen per cent.

Provided that the aforesaid reduction of rate of sales tax from seventeen per cent to sixteen per cent for the said period shall not be applicable in cases where the incidence of tax has been passed on in terms of section 3B of the said Act.

[C.No.1/55-STB/2013]

Sd/=   
(Shahid Hussain Asad)  
Additional Secretary

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8. Perusal of the aforesaid Notification reflects that the Federal Government is pleased to direct that sales tax shall be charged and collected on import and local supply of goods **at the rate of sixteen per cent**, for the period from 21<sup>st</sup> June, 2013 to 29<sup>th</sup> June, 2013, which otherwise were chargeable to sales tax **at the rate of seventeen per cent** provided that the aforesaid reduction of rate of sales tax from **seventeen per cent to sixteen per cent** for the said period shall not be applicable in cases where the incidence of tax has been passed on in terms of section 3B of the said Act. This Notification clearly reflects that having realized their mistake, the Federal Government has cured this defect through Notification in question. Only dispute now remains is with respect to the period mentioned in the Notification. The period taken by the Federal Government is 21.06.2013 i.e. the date of announcement of judgment by the Hon'ble Supreme Court,

whereas, in our considered view it ought to have been from 13.06.2013 i.e. the date on which the rate was increased through Finance Bill alongwith a Declaration under 1931 Act.

9. In arriving at the above conclusion we are fortified with the judgment<sup>1</sup> of a Division Bench of this Court in respect of regulatory duty, whereby, an attempt of the Federation of Pakistan to undo or nullify the effect of an earlier judgment<sup>2</sup> of another Division Bench declaring the provisions of s.18(3) of the Customs Act as amended vide Finance Act. 2017 and issuance of SRO 1035(I)/2017 as ultra vires, has been disapproved by holding that in the absence of any constitutional amendment, the effect of the earlier judgment cannot be validated through subsequent amendment in law, while giving it retrospective effect in respect of past and closed transaction, therefore, no Regulatory Duty can be charged, collected or recovered for the period starting from the date of commencement of Finance Act, 2017 till the date of commencement of Finance Act, 2018. In ultimate analysis therefore the primary test of validating piece of legislation is whether the new provision removes the defect which the Court had found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made<sup>3</sup>.

10. In view of hereinabove facts and circumstances of this case and the law discussed hereinabove, these petitions merit consideration and are allowed to the extent that SRO 946(I)/2013 dated 25.10.2013, in respect of the present petitioners, shall be read as applicable for the period from 13.6.2013 to 30.6.2013 instead of 21.6.2013 to 29.6.2013.

11. All listed petitions are allowed to the extent as above.

Judge

Judge

Ayaz P.S.

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<sup>1</sup> Dated 6.8.2020 in CP No.4658-2018 [Dewan Motors Ltd., v Federation of Pakistan & Others]

<sup>2</sup> 2018 PTD 861 [Premier Systems v. Federation of Pakistan & others]

<sup>3</sup> Molasses Trading & Export (Pvt) Limited v. Federation of Pakistan [1993 SCMR 1905]