

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

CP D 5552 of 2020 : Yunus Textile Mills Ltd. vs. Pakistan & Others
CP D 5381 of 2020 : Liberty Mills Ltd. vs. Federation of Pakistan & Others
CP D 5497 of 2020 : Liberty Mills Ltd. vs. Pakistan & Others
CP D 5528 of 2020 : Feroze 1888 Mills Ltd. vs. Pakistan & Others
CP D 5623 of 2020 : Liberty Mills Ltd. vs. Pakistan & Others
CP D 5657 of 2020 : Liberty Mills vs. Pakistan & Others
CP D 5758 of 2020 : Adamjee Enterprises vs. Pakistan & Others
CP D 5869 of 2020 : Mustaqim Industries vs. Pakistan & Others
CP D 5994 of 2020 : S. Fazal Illahi & Sons vs. Pakistan & Others
CP D 6019 of 2020 : International Textile Limited vs. Pakistan & Others
CP D 6204 of 2020 : Bari Textile Mills (Pvt.) Limited vs. Pakistan & Others
CP D 6307 of 2020 : Waqar Alam vs. Pakistan & Others
CP D 6407 of 2020 : M.N. Textile (Pvt.) Limited vs. Pakistan & Others
CP D 6408 of 2020 : M.N. Traders (Pvt.) Limited vs. Pakistan & Others
CP D 6570 of 2020 : Liberty Mills Ltd. vs. Federation of Pakistan & Others
CP D 6680 of 2020 : ASCO International(Pvt.) Limited vs. Pakistan & Others
CP D 26 of 2021 : Gul Ahmed Textile Mills Ltd vs. Pakistan & Others
CP D 68 of 2021 : J.B. Ind vs. Federation of Pakistan & Others
CP D 688 of 2021 : Bari Textile Mills vs. Federation of Pakistan & Others
CP D 835 of 2021 : Feroze Textile Mills Ltd. vs. Pakistan & Others
CP D 870 of 2021 : Gul Ahmed Textile Mills Ltd vs. Pakistan & Others
CP D 1381 of 2021 : Liberty Mills Ltd. vs. Pakistan & Others
CP D 1625 of 2021 : Gul Ahmed Textile Mills Ltd vs. Pakistan & Others

For the Petitioners : Mr. Jam Zeeshan, Advocate
Mr. Ovais Ali Shah, Advocate
Mr. Qazi Umair Ali, Advocate
Mr. Ayan Mustafa Memon, Advocate
Mr. Rana Sakhawat Ali, Advocate
Mr. Naeem Suleman, Advocate
Mr. Arshad Hussain, Advocate
Mr. Faiz Durrani, Advocate
Mrs. Saima Faiz Durrani, Advocate
Mr. Ali Nawaz Khuhawar, Advocate
Mr. Ameen M. Bandukda, Advocate

For the Respondents : Mr. Muhammad Ahmer, Assistant Attorney General
Mr. Khalid Rajpar, Advocate
Mr. Aamir Raza, Advocate
Mr. Azhar Ali, Advocate
Mr. Muhammad Rashid Arfi, Advocate
Mr. Muhabbat Hussain Awan, Advocate
Ms. Afsheen Aman, Advocate
Mr. Muhammad Khalil Dogar, Advocate
Ms. Durdana Tanveer, Advocate
Mr. Zafar Imam, Advocate
Mr. Tariq Aziz, Principal Appraiser, PMBQ

Date of hearing : 11.03.2021

Date of announcement: 11.03.2021

JUDGMENT

Agha Faisal, J. The crux of this determination is whether the Anti-Dumping Duties Act 2015 (“Act”) could be amended vide the Finance Act 2019 (“FA 2019”), within sanction of Article 73 of the Constitution.

2. Briefly stated, section 15 of FA 2019 amended the Act, in so far as section 51 thereof was concerned. The petitioners assailed the amendment on the anvil of the Constitution and sought for the said amendment to be declared *ultra vires*; hence, of no legal effect.

3. Per petitioners' counsel, amendment to the Act could not be undertaken vide a money bill; *inter alia*, as Article 73 intended money bills to primarily deal with taxation and precluded application thereof to laws designed to impose penalties. It was argued that anti-dumping duty ("ADD") was not a common burden for raising revenue for a general purpose; hence, did not qualify as a tax. It was further submitted that ADD, as envisioned per the Act, had already been adjudged to be penal in nature, therefore, the Act in any event was not amenable for interference vide a money bill.

4. The respondents' counsel insisted that the amendment to the Act was rightly carried out vide FA 2019 since ADD is in itself a tariff; which in turn qualifies as a tax and variation in the tax regime is merited vide a money bill.

5. We have heard the respective learned counsel and perused the record and the law. The issue for determination before us is whether the amendment to the Act vide FA 2019 could be sustained on the anvil of Article 73 of the Constitution.

6. It is considered expedient to initiate this deliberation by adverting to the salient features of the Act; the preamble¹ whereof demonstrates that it does not contemplate a general levy and on the contrary has been promulgated for a specific purpose. Section 3² thereof envisions that mere dumping is not sufficient for levy of ADD, as the presence of an injury to the domestic industry is also required to be conjoined. It is further noted that even if the requirements of section 3 are satisfied, section 46³ contemplates suspension / termination of ADD upon acceptance of a satisfactory price undertaking.

¹ Whereas it is expedient to give effect in Pakistan to the provisions of Article VI of the General Agreement on Tariffs and Trade, 1994, and to the Agreement on Implementation thereof and to amend and consolidate the law relating to imposition of anti-dumping duties to offset such dumping, to provide a framework for investigation and determination of dumping and injury in respect of goods imported into Pakistan and for matters ancillary thereto or connected therewith.

² 3. Levy of anti-dumping duty. (l) The Commission shall, by notification in the official Gazette, impose anti-dumping measures on products imported into Pakistan when it determines, pursuant to an investigation initiated and conducted in accordance with the provisions of this Act that- (a) an investigated product is dumped within the meaning of this Act; and (b) injury is being caused to domestic industry within the meaning of this Act.

³ 46. Acceptance of price undertaking. (l) Where the Commission has made a preliminary affirmative determination of dumping and injury in accordance with the provisions of this Act the Commission may suspend or terminate an investigation without imposition of anti-dumping duties, whether preliminary or definitive, upon receipt of satisfactory price undertaking from an exporter to revise its prices or to cease export to the area in question at dumped prices so that the Commission is satisfied that injurious effect of dumping in question is eliminated...

It is gleaned from the aforementioned that the Act does not contemplate a common burden for raising of revenue for a general purpose and instead has been enacted to mitigate an injury caused by dumping.

7. It is trite law that tax is a compulsory exaction of monies by public authorities for utilization for public purposes. The august Supreme Court has maintained in the *WWF case*⁴ that the distinguishing feature of tax is that it imposes a common burden for raising revenues for a general, as opposed to specific, purpose. Subjecting ADD to the anvil of the definition of tax, illumined by the august Court, we find ourselves unable to sustain the respondents' equation of ADD as a tax.

8. *Mian Saqib Nisar J (as he then was)* elucidated further, in the aforementioned pronouncement, upon the ambit of Article 73 of the Constitution and observed that “*not everything that pertains to finance would necessarily be related to tax. Therefore, merely inserting amendments, albeit relating to finance but which have no nexus to tax, in a Finance Act does not mean that such Act is a Money Bill as defined in Article 73(2) of the Constitution. The tendency to tag all matters pertaining to finance with tax matters (in the true sense of the word) in Finance Acts must be discouraged, for it allows the legislature to pass laws as Money Bills by bypassing the regular legislative procedure under Article 70 of the Constitution by resorting to Article 73 thereof which must only be done in exceptional circumstances as and when permitted by the Constitution. The special legislative procedure is an exception and should be construed strictly and its operation restricted.*”

9. The remit of the Act has been deliberated at length before an earlier Division Bench of this Court in the *Bikiya case*⁵. It was held that ADD, as imposed by the Act, is not a tax as merely dignifying the levy by the appellation *duty* does not mean that ADD is a tax⁶; a tax does not merit being tailored to specific individuals⁷; and that ADD is not a regulatory charge either⁸. *Munib Akhtar J* adjudged ADD to be a penalty; imposed if there is dumping with manifest injury, within meaning of the Act⁹, and illumined that in essence the Act imposes a condition, on import of goods into the country, that goods may not be brought in at a price lower than the normal price, and if

⁴ Per *Mian Saqib Nisar J (as he then was)* in *Workers Welfare Funds & Others vs. East Pakistan Chrome Tannery (Pvt.) Ltd.* reported as *PLD 2017 Supreme Court 28*.

⁵ Per *Munib Akhtar J* in *Muhammad Saleem Bikiya & Others vs. Pakistan & Another* reported as *2018 PTD 2026*.

⁶ Paragraph 13 at page 2037; paragraph 20 at page 2045; paragraph 25 at page 2049; paragraph 28 at page 2051.

⁷ Paragraph 18 at page 2043.

⁸ Paragraph 20 at page 2045; paragraphs 24 & 25 at page 2049; paragraph 28 at page 2051.

⁹ Paragraph 25 at page 2049.

there is any violation of this condition, coupled with manifest injury to the domestic industry, then a penalty, i.e. ADD, would have to be paid¹⁰.

10. It has been established that ADD, within meaning of the Act, is not a tax or a regulatory charge; and on the contrary is a penalty. In such a scenario no rationale has been articulated before us to justify amendments to the Act to be effected vide a money bill, within the mandate of Article 73 of the Constitution, while abjuring the process of amendment via the regular legislative process.

11. Therefore, we are of the considered view that the amendment of the Act vide FA 2019 could not be justified before us; hence, we had allowed these petitions vide our short order dated 11.03.2021, in terms delineated herein below:

“1. It is hereby declared that amendment made through section 15 of the Finance Act, 2019 in the Anti-Dumping Duties Act, 2015, passed through Money Bill (and not through an Act of Parliament) does not fall within the parameters prescribed under Article 73 of the Constitution of Pakistan, 1973, hence, is ultra vires to the Constitution, and is hereby struck down.

2. As a consequence, thereof, the impugned show cause notices / order(s) [if any], issued to or against the Petitioners respectively, are declared to be unlawful and are hereby quashed.

3. The securities/guarantees furnished pursuant to interim orders, passed respectively in these Petitions are hereby discharged. Nazir of this Court/ Customs Collectrates concerned shall release the same to the Petitioners upon proper identification.

4. The goods covered by the aforesaid petitions in respect of which ad-interim orders are yet to be passed shall be released without raising demands for Anti-Dumping Duty which had become payable pursuant to omission of exemption clause (e) of section 51 of the Anti-Dumping Duties Act, 2015.”

12. These are the reasons for our aforementioned short order.

JUDGE

JUDGE

¹⁰ Paragraph 28 at page 2051.