

IN THE HIGH COURT OF SINDH, KARACHI

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

S. No.	Case Number	Parties Name
1.	C.P. No. D-3852 / 2018	Total Parco Pakistan Limited Vs. Pakistan & Another
2.	C.P. No. D-3853 / 218	Total Parco Pakistan Limited Vs. Pakistan & Another
3.	C.P. No. D-3854 / 2018	Total Parco Pakistan Limited Vs. Pakistan & Another
4.	C.P. No. D-3855 / 2018	Total Parco Pakistan Limited Vs. Pakistan & Another
5.	C.P. No. D-3856 / 2018	Total Parco Pakistan Limited Vs. Pakistan & Another
6.	C.P. No. D-5535 / 2018	Kirthar Pakistan B. V. Vs. Pakistan & Others
7.	C.P. No. D-5536 / 2018	Kirthar Pakistan B. V. Vs. Pakistan & Others
8.	C.P. No. D-5537 / 2018	Kirthar Pakistan B. V. Vs. Pakistan & Others
9.	C.P. No. D-5538 / 2018	Kirthar Pakistan B. V. Vs. Pakistan & Others
10.	C.P. No. D-5539 / 2018	Kirthar Pakistan B. V. Vs. Pakistan & Others
11.	C.P. No. D-5564 / 2018	Proctor and Gamble Pakistan Vs. Pakistan & Others
12.	C.P. No. D-1763 / 2020	ENI Pakistan Limited Vs. Pakistan & Others
13.	C.P. No. D-1764 / 2020	ENI Pakistan Limited Vs. Pakistan & Others

Petitioners: Through Mr. Hyder Ali Khan, Advocate.

Respondents: Through M/s. Ameer Bakhsh Metlo, Chand Bibi, Rana Sakhawat Ali and Muhammad Asif, Advocates.

Mr. Kafeel Ahmed Abbasi DAG.

Date of hearing: 12.11.2020, 16.03.2021, 06.04.2021.

Date of Order: 30.04.2021.

JUDGMENT

Muhammad Junaid Ghaffar J.- Through these Petitions, the Petitioners have sought various prayers but while arguing the matter, it has only been confined to seeking a declaration that Section 8(1)(ca) of the Sales Tax Act, 1990 (“Act”) is ultra vires to the Constitution; or in the alternative, it may be read down, as the Court may deem fit.

2. Learned Counsel for the Petitioners¹ has argued that through Section 8(1)(ca)² the input tax claim has been denied on goods or

¹ Mr. Hyder Ali Khan Advocate

service in respect of which sales tax has not been deposited in the Government Treasury by the respective suppliers; that this amounts to a confiscatory action; that the Petitioners while purchasing their goods pay value of the goods so purchased along with sales tax and once it is paid to the supplier, it is the property of the Petitioners which cannot be taken away in this manner; that though Section 8 starts with a non-obstante clause, but in this case insofar as the Petitioners are concerned, they have paid the due sales tax and cannot be subjected to or dependent upon the conduct of the supplier who never remains in their control; that it is for the Respondents to regulate the supplier who is a registered person; that until and unless it has been brought on record that it was within the knowledge of the Petitioners that such tax would go unpaid, and for that an appropriate action has been first initiated under Section 8A of the Act, the petitioners cannot be made liable to the act and conduct of the supplier; that the Lahore High Court has already declared this provision as ultra vires and if this Court so wishes it can even read down this provision to the extent that first a joint liability is to be established under Section 8A and only then such input tax can be disallowed; and by relying upon reported cases³ he has prayed for allowing these petitions to the above extent.

3. On the other hand, Respondents Counsel⁴ have argued that a mere Show Cause Notice has been issued; hence, Petitions are not maintainable; that it is settled that all efforts are to be made to save the law rather than to declare it ultra vires; that input tax is not a fundamental right, but only a statutory right, hence, it is not a case of seeking protection under Article 199 of the Constitution; that even otherwise, such rights are not absolute but qualified; that if the tax

² **“8. Tax credit not allowed.** – (1) Notwithstanding anything contained in this Act, a registered person shall not be entitled to reclaim or deduct input tax paid on –

[(ca) the goods ¹⁰[or services] in respect of which sales tax has not been deposited in the Government treasury by the respective supplier;]

³ D. G. Khan Cement Company Ltd. through Chief Financial Officer V. Federation OF Pakistan through Secretary Ministry of Law and 3 others (P L D 2013 Lahore 693), Pakistan through Chairman FBR and others V. Hazrat Hussain and others (2018 S C M R 939), Messrs Pakistan Beverage Limited, Karachi V. Large Taxpayer Unit (L.T.U.) through chief Commissioner, Land Revenue, Karachi (2010 P T D 2673), Mehran Associates Limited V. Commissioner of Income Tax Karachi (1993 S C M R 274), Nadeem Farooq V. Newze Land Electronics Trading Company LEE Sharja (P L D 2017 SC 95), Ellahi Cotton Mills Limited V. Federation of Pakistan (1997 P T D 1555), Commissioner Inland Revenue V. Tariq Poly Pack Pvt. Ltd. (2015 P T D 2256).

⁴ Mr. Asif Ali and Mr. Ameer Baksh Metlo Advocates.

is not deposited in the Government Treasury, it cannot be adjusted through input tax claim; that Section 8 overrides all such claims of input tax adjustment through a non-obstante clause, whereas, a reasonable restriction can always be placed on any such claim; that if permitted, it would amount to a double impact on the revenue as on the one hand the tax has not been deposited and on the other, further input is being claimed; that it may be a case of unreasonableness or hardship, but is permitted in law. They have relied upon⁵ and have sought dismissal of these petitions on maintainability as well as on merits.

4. Learned DAG has referred to Section 8 and its non-obstante clause; however, concedes that the impugned provision appears to be confiscatory in nature and is asking the Petitioners to pay twice on the same goods; that once a taxpayer establishes that such tax was paid by complying the provision of Section 73 read with Section 7 *ibid*, then he is entitled for input tax; that the supplier in this case ought to be chased by revenue and once the Department is satisfied after invoking Section 8A of the Act; only then the Petitioners can be asked to pay the said tax; that this Court can always read down the impugned provision.

5. We have heard all the learned Counsel as well as learned DAG and have perused the record. As noted hereinabove, the Petitioners had come before this Court by impugning various Show Cause Notices, whereby, they were asked as to why the input tax claimed may not be disallowed in view of Section 8(1)(ca) of the Act; and at the time of filing of these Petitions number of legal objections and jurisdictional points were raised; however, while making submissions it has been confined only to the effect that Section 8(1)(ca) of the Act be declared ultra vires to the Constitution. As to the objection regarding maintainability, we are of the view that after restricting the present petitions only to the extent of a declaration to this effect; they are maintainable as the said relief cannot be sought for or granted under the departmental hierarchy. Even otherwise,

⁵ Liberty Mills Limited and 8 others V. Federation of Pakistan through Secretary, Ministry of Finance and 5 others (2021 P T D 347), The Commissioner of Inland Revenue, Zone-III, RTO-II, Lahore V. Messrs Hamza Nasir Wire and others (2020 P T D 1790), State of M. P. V. Rakesh Kohi and another (2013 S C M R 34), Pakistan Telecommunication Company Ltd. V. Government of Khyber Pakhtunkhwa (KPK) and 4 others (2017 P T D 1359).

input tax in question upon fulfilling the requirements as contemplated in the Act, including section 73 thereof, would become property of the Petitioners, and though the taxing power is unlimited as long as it does not amount to confiscation and that the Legislature does not have the power to tax to the point of confiscation⁶. Taxation is a process which interferes with the personal and property rights of the people, although it is a necessary interference. But because it does take from the people a portion of their property, seems to be a valid reason for construing tax laws in favor of the tax-payer⁷. Accordingly, this objection is hereby overruled.

6. The Petitioners case is premised on the fact that when they purchase goods from suppliers / active taxpayers, they are required to make payment of the goods as well as the amount of the sales tax involved and once that is paid in terms of relevant provisions of the Act including Section 73 *ibid*, they are then issued a sales tax invoice on the basis of which they claim input tax adjustment in their monthly sales tax returns. Once it is done, according to them, the suppliers no more remain in their control, and if ultimately a default occurs in depositing the sales tax, input tax claimed by them is then being denied on the basis Section 8(1)(ca) of the Act which according to them is *ultra vires*, confiscatory, unreasonable and beyond the mandate of the Act read with the Constitution of Islamic Republic of Pakistan. It is their case that section 7⁸ allows this input

⁶ Elahi Cotton Mills Ltd v Federation of Pakistan (PLD 1997 SC 582)

⁷ Mehran Associates Ltd v The Commissioner of Income Tax (1993 SCMR 274)

⁸ **Section 7 Determination of tax liability.**-(1) [Subject to the provisions of [section 8 and] 8B, for] the purpose of determining his tax liability in respect of taxable supplies made during a tax period, a registered person shall [, subject to the provisions of section 73.] be entitled to deduct input tax paid or payable during the tax period for the purpose of taxable supplies made, or to be made, by him from the output tax [excluding the amount of further tax under sub-section (1A) of section 3.] that is due from him in respect of that tax period and to make such other adjustments as are specified in Section 9

[Provided that where a registered person did not deduct input tax within the relevant period, he may claim such tax in the return for any of the six succeeding tax periods.]

(2)A registered person shall not be entitled to deduct input tax from output tax unless,-

(i) in case of a claim for input tax in respect of a taxable supply made, he holds a tax invoice [in his name and bearing his registration number] in respect of such supply for which a return is furnished [.]

Provided that from the date to be notified by the Board in this respect, in addition to above, if the supplier has not declared such supply in his return or he has not paid amount of tax due as indicated in his return;

(ii) in case of goods imported into Pakistan, he holds bill of entry or goods declaration in his name and showing his sales tax registration number, duly cleared by the customs under section 79 [, section 81] or section 104 of the Customs Act, 1969 (IV of 1969);]

(iii) in case of goods purchased in auction, he holds a treasury challan, [in his name and bearing his registration number,] showing payment of sales tax;]

[(iv) ***]

tax adjustment and once it is paid, it becomes their property. On the other hand section 8 generally restricts such claim of input tax and for the present purposes it is disallowed in terms of section 8(1)(ca), whereas, 8A⁹ provides for initiating a joint action against the persons so involved in it. At the same time Section 73¹⁰ of the Act requires a purchaser to follow certain guidelines while claiming any such input tax.

7. Perusal of Section 7 reflects that subject to the provisions of Section 8 and 8B, for the purpose of determining his tax liability in respect of taxable supplies made during a tax period, a registered person shall, subject to the provisions of section 73, be entitled to deduct input tax paid or payable during the tax period for the

[(3) Notwithstanding anything in sub-sections (1) and (2), the Federal Government may, by a special order, subject to such conditions, limitations or restrictions as may be specified therein allow a registered person to deduct input tax paid by him from the output tax determined or to be determined as due from him under this Act.]

[(4) Notwithstanding anything contained in this Act or rules made there under, the Federal Government may, by notification in the official Gazette, subject to such conditions, limitations or restrictions as may be specified therein, allow a registered person or class of persons to deduct such amount of input tax from the output tax as may be specified in the said notification.]

⁹ “[8A. **Joint and several liability of registered persons in supply chain where tax unpaid.**— Where a registered person receiving a taxable supply from another registered person is in the knowledge or has reasonable grounds to suspect that some or all of the tax payable in respect of that supply or any previous or subsequent supply of the goods supplied would go unpaid [, of which the burden to prove shall be on the department] such person as well as the person making the taxable supply shall be jointly and severally liable for payment of such unpaid amount of tax ³[-:]”

[Provided that the Board may by notification in the official gazette, exempt any transaction or transactions from the provisions of this section.]”

¹⁰ [73. **Certain transactions not admissible.**— (1) Notwithstanding anything contained in this Act or any other law for the time being in force, payment of the amount for a transaction exceeding value of fifty thousand rupees, excluding payment against a utility bill, shall be made by a crossed cheque drawn on a bank or by crossed bank draft or crossed pay order or any other crossed banking instrument showing transfer of the amount of the sales tax invoice in favour of the supplier from the business bank account of the buyer ¹ [:-]

[Provided that online transfer of payment from the business account of buyer to the business account of supplier as well as payments through credit card shall be treated as transactions through the banking channel, subject to the condition that such transactions are verifiable from the bank statements of the respective buyer and the supplier.]

(2) The buyer shall not be entitled to claim input tax credit, adjustment or deduction, or refund, repayment or draw-back or zero-rating of tax under this Act if payment for the amount is made otherwise than in the manner prescribed in sub-section (1), provided that payment in case of a transaction on credit is so transferred within one hundred and eighty days of issuance of the tax invoice.

(3) The amount transferred in terms of this section shall be deposited in the business bank account of the supplier, otherwise the supplier shall not be entitled to claim input tax credit, adjustment or deduction, or refund, repayment or draw-back or zero-rating of tax under this Act.

Explanation— For the purpose of this section, the term “business bank account” shall mean a bank account utilized by the registered person for business transactions, declared to the [Commissioner] in whose jurisdiction he is registered [through Form STR-1 or change of particulars in registration database].]

[(4) A registered ³ [person] shall not be entitled to deduct input tax (credit adjustment or deduction of input tax) which is attributable to such taxable supplies exceeding, in aggregate, one hundred million rupees in financial year or ten million rupees in a tax period as are made to certain person who is not a registered person under this Act:

Provided that the aforesaid shall not apply to supplies made to:-

- (a) Federal / provincial / local Government departments, authorities, etc. not engaged in making of taxable supplies;
- (b) Foreign Missions, diplomats and privileged persons; ³[***]
- (c) all other persons not engaged in supply of taxable goods; ⁴[-and]

[(d) persons or classes of person, specified by the Board through notification in the official Gazette subject to such conditions and restrictions as may be specified therein.]”

purpose of taxable supplies made, or to be made, by him from the output tax. Though, in terms of Section 7 such admissibility of input tax adjustment or refund is qualified by and through s.8 and here, more precisely in terms of s.8(1)(ca), the Petitioners' precise case is that they have paid this tax and are in possession of a sales tax invoice, and when s.7 along with s.8 is read harmoniously; there is no occasion to deny input tax adjustment in terms of s.8(1)(ca). On the other hand Respondents case is based on the fact that it is the intent of the legislature which has to be seen, and for the reason that the claim of input tax is subject to section 8, which has an overriding effect, whereas, this issue is already settled by a learned Division Bench Judgment of this Court in the case of **AMZ Spinning**¹¹ and followed by this Bench in the case of **Liberty Mills Ltd.**¹², therefore the Petitioners have no case. With respect, in our considered view, for discussion to follow, this case is not covered by the ratio settled in the aforesaid judgments as it requires a much deeper appreciation of the impugned provision.

8. Here Section 8 and its non-obstante clause have to be read along with s.8A. It is in respect of joint and several liability of registered persons in a supply chain where tax is unpaid and provides that where a registered person receiving a taxable supply (petitioners herein) from another registered person (Supplier) is in the **knowledge or has reasonable grounds to suspect** that some, or all of the tax payable in respect of *that supply or any previous or subsequent supply* of the goods supplied would go unpaid, **of which the burden to prove shall lie on the department** such person as well as the person making the taxable supply shall be jointly and severally liable for payment of such unpaid amount of tax. It is of utmost importance to appreciate that Section 8(1) (ca) and Section 8A, both were introduced in the Act at the same time through Finance Act 2006 and when both these provisions are read in juxtaposition, it appears that they have nexus with each other and neither can be read in isolation; nor it would be appropriate to apply them in isolation to each other. The intent and purpose appears to be the same. Both relate to the same transaction of disallowing an input tax adjustment on goods or services on

¹¹ 2006 PTD 2821 (AMZ Spinning and Weaving Mills (Pvt.) Ltd. vs. Appellate Tribunal, Karachi)

¹² Liberty Mills Limited and 8 others V. Federation of Pakistan (2021 P T D 347)

which tax remains due or unpaid. It is not in dispute that the petitioners have paid such tax to the supplier. In that case first it has to be determined and for which the onus is on the department that the petitioners are at fault or have remain negligent with conscious knowledge. The Petitioners stance appears to be weighty that before disallowing any input tax under Section 8(1)(ca) first an exercise has to be carried out under Section 8A ibid and for that the burden lies on the Department to first establish that where a registered person receiving a taxable supply from another registered person is in knowledge or has reasonable grounds to suspect that such amount of tax which he is paying to the supplier and of which he is claiming input tax adjustment would go unpaid. One needs to see the legislative intent as it is the knowledge or reasonable grounds to suspect that this tax would not be deposited; with a further qualification that for this the burden lies on the Department. Until this has been discharged, invoking s.8(1)(ca) would be premature. So in all fairness first an exercise under Section 8A has to be carried out and after it is concluded by discharging the burden to this effect, only then Section 8(1)(ca) could be invoked and the input tax adjustment can be disallowed. If this is not done in this manner, then the provision of Section 8A would be redundant and redundancy cannot be attributed to the legislature.

9. A learned Division Bench of Lahore High Court in the case of **D. G. Khan Cement (supra)**¹³ has dealt with the same challenge, wherein, the constitutionality of Section 8(1)(ca) of the Act was challenged as being offensive to the fundamental rights of the Petitioners. After going through various case law and interpretation of reasonable restrictions and sub-constitutional provisions, it was held that to impose the liability of one over the other is opposed to basic fundamentals of law and offends due process, logic and rationality; that it axes an innocent person for the wrong of the other; that it does not advance any public interest or passes the test of proportionality; that "collusion" and "tax fraud" cannot be read into section 8(1)(ca) as it is not the intention of the legislature; that pursuant to section 8-A of the Act the department has to establish that the taxpayer had 'knowledge' and then proceed against the

¹³ Speaking through Mansoor Ali Shah, J, as his lordship then was

taxpayer; that section 8A cannot be read into a show cause notice issued in terms of section 8(1)(ca). After having come to this finding the learned Judge then declared this provision as unconstitutional and accordingly struck down the same.

10. It also needs to be appreciated that when the petitioner and or a buyer purchases goods, an invoice is issued for the amount of goods so purchased along with the amount of sales tax, and when the petitioner and or the purchaser makes payment of the same, it is being done to a person who has been duly authorized to receive it by FBR as a registered person. He is not a stranger or an unauthorized person for that purpose. If he had not been an authorized tax registered person, in that case he could not issue any sales tax invoice, resultantly, no one would pay him the amount of sales tax of which no sales tax invoice is being issued. It is a receipt of tax issued by the supplier on behalf of the State, as he has been permitted to do so. It becomes the input tax claim or the property of the purchaser, once he has complied with the relevant conditions and restrictions prescribed under the Act or any Rules thereunder while making payment of the same. In the instant matter there are two requirements which the petitioner has to fulfill i.e. the supplier should be available as an active tax payer on the list so issued by FBR; and secondly, while making payment the condition / restriction, if any, of section 73 of the Act has to be complied with. It is not the case of the Respondents that petitioners before us have not fulfilled these two basic conditions. Therefore, by asking the petitioners to do what they are not required to do, in the present facts and circumstances amounts to doing an impossible task. They have complied with the requirement stipulated for them at the time of purchase of the goods; and subsequently, if the supplier does not deposit the tax collected from them, without recourse to the provision of section 8A *ibid*, they cannot be denied the benefit of input tax in question. In our considered view both these provisions are to be read together and in juxtaposition. Section 8(1)(ca) has to be read down in a manner so as to save the provision and at the same time it remains enforceable; however, in a harmonious manner along with Section 8A *ibid*.

11. There is another aspect of the matter which also requires consideration. In terms of s.7 the input tax is though admissible subject to s.8; but also at the same time provides that input tax can be claimed (subject to whatever limitations may be), on tax **paid** or **payable**. Here, as the case appears, when goods were purchased, the tax was though paid to the supplier, but was not paid to the Government and remained payable by the supplier. The question then arises that once the input tax claim has been made admissible on both i.e. **the tax already paid as well as payable**; then whether by virtue of s. 8(1)(ca), can it be denied or disallowed any further, if it remains unpaid by the supplier. At the crucial time when input was claimed as permissive, it was admissible also on tax payable; then seemingly it cannot be disallowed through s.8(1)(ca). If that was the intention then, Respondents ought to have devised some other mechanism, like the one existent in the withholding regime. The petitioners could have been asked to either withhold such tax from payment to the supplier; or in the alternative, bear the burden of its disallowance in terms of s.8(1)(ca).

12. Ordinarily, Courts in these circumstances, do not hesitate in striking down a provision of law, as being ultra vires. At the same time, however the principle that all efforts need to be made by Courts in its interpretative process to save rather than destroy a Statute cannot be over looked¹⁴. Laws duly passed by the Legislature are presumed to be constitutional as Legislature is deemed to have acted for the benefit of the people in light of their needs and therefore, declaring a law as unconstitutional is one of the last resorts taken by the Courts. Instead Courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable. At times the doctrine of severability is also invoked to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. However, this should only be applied keeping in mind the scheme and purpose of the law and the intention of the Legislature and should be avoided where the two

¹⁴ Rauf Bakhsh Kadri v The State (2003 MLD 777)

portions are inextricably mixed with one another. The Court is also required to see that whether the vagueness and arbitrariness which goes to the root of a provision would not render it unconstitutional. It also needs to see that whether its implementation would be a matter of unfettered discretion or not. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations¹⁵.

13. The theory of reading down is a rule of interpretation which is resorted to by the Courts when they find a provision read literally seems to offend a fundamental right or falls outside the competence of the particular Legislature¹⁶. It falls within the competence of a Court to do this so as to save the very statute. Besides, the addition and subtraction of a word in a statute is not justified, except where for the interpretation thereof the principle of reading in and reading down may be pressed into service in certain cases¹⁷. Rule of reading down a statutory provision means that a statutory provision is generally read and or toned or narrowed down, applying restrictive meaning in its application¹⁸. Sometimes they [courts] have to construe a particular law as meaning nothing and sometimes they have to construe the law as meaning something different from the letter of the law passed by the Parliament. The offending provision or part of it is read down to the extent it is necessary to give it legal effect, or will be severed if it cannot be read down, and the remaining part and provisions of the statute will remain intact¹⁹. The fundamental principle of the "reading down" doctrine can be summarized as follows. Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality²⁰.

¹⁵ Greater Bombay Co-operative Bank Limited vs. United Yarn Tex. Pvt. Ltd. (2007) 6 AWC 5409 SC

¹⁶ Illahi Cotton Mills v. Federation of Pakistan (PLD 1997 SC 582).

¹⁷ (PLD 2011 SC 260) Syed Mukhtar Hussain Shah v Mst. Saba Imtiaz

¹⁸ 2016 SCMR 931 Haroon-Ur-Rashid v Lahore Development Authority

¹⁹ 2016 SCMR 931 Haroon-Ur-Rashid v Lahore Development Authority

²⁰ Subramanian Swamy and Ors. vs. Raju Thr. Member Juvenile Justice Board (AIR 2014 SC 1649)

14. Therefore, we are of the considered view that instead of declaring the impugned provision of s.8(1)(ca) of the Act as being ultra vires or unconstitutional; we would rather save it and read it down, in the manner, that it cannot be invoked or applied independently in isolation and has to be read with Section 8A; and can only be invoked against the petitioners, once an exercise has been carried out and a conclusive finding has been arrived at against them pursuant to section 8A of the Act.

15. Accordingly, all listed Petitions are allowed to the above extent, and all impugned notices / actions of the Respondents stand modified accordingly.

Dated: 30.04.2021

J U D G E

Arshad/

J U D G E