IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, **J**.
Agha Faisal, **J**.

CP D 8233 of 2019

Sapphire Textile Mills Limited

vs.

Federation of Pakistan & Others

(And connected matters, particularized in the Schedule[1] hereto.)

Messrs. Raashid Khalid Anwar, Hussain Ali Almani, Ovais Ali Shah, Abid H Shaban, Anwar Kashif Mumtaz, Naveed A. Andrabi, Ammar A. Saeed, Khawaja Aizaz Ahsan, Imran Iqbal Khan, Naeem Suleman, Arshad Hussain Shehzad, Qazi Umair Ali, Fahim Bhayo, Tasawwur Ali Hashmi, Fahad Ali Hashmi, Usman Alam, Ameen M. Bandukda, Sami-ur-Rehman, Syed Muhammad Ali Mehdi, Basil Nabi Malik, Tauqeer Randhava, Asghar Bangash, Ali Akbar Poonawala, Kashan Ahmed, Maimona Nasim, Syed Danish Ghazi, Maaz Waheed, Muhammad Inzimam Sharif, Muhammad Din Qazi, Abdul Rahim Lakhani, Abdul Jabbar Mallah, Atta Muhammad Qureshi, Ameer Haider Khan, Maryam Riaz, Imtiaz Ali Sahito, Naveeda Bisharat, Imtiaz Ali, Sufiyan Zaman, Muneeb U Qidwai, Jawaid Farooqi, Umer Ilays Khan, Faiz Durrani, Samia Faiz Durrani, Ghulam Muhammad, Gharib Shah, Bilal Ahmed Khan, Rizwan Ahmed, Emad ul Hasan, Syed Aamir Ali Shah, Farhan Ali Shah, Faizan Faizi & Ali Nawaz Khuhawar, Advocates for petitioners.

Messrs. Shah Nawaz Memon, Ameer Bakhsh Metlo, Shahid Ali Qureshi, Rana Sakhawat Ali, M. Taseer Khan, Iqbal, Fayaz Ali Metlo, Imran Ali Mithani, Alizeh Shahani, Qaim Ali Memon, Munawwar Ali Memon, Khalid Mehmood Siddiqui, Zohaib Ahmed, Fozia M. Murad, Muhammad Bilal Bhatti, Ayaz Sarwar Jamali, Riaz Sarwar Jamali, Motia Sikandar on behalf of Muhammad Zubair Hashmi, Bushra Zia, Asma Zehra, Irfan Mir Halepota, Farha Naz Qazi, Tauqeer Ahmed Seehar, Iqbal Hussain, Fouzia M. Murad, Sami Malik, Arshad Ali Tunio, Imzan Ahmed Maitlo, Muhammad Idrees Rahmoon, Zulfiqar Ali Jalbani, Ali Tahir, Hafeezulah, Syed Mohsin Imam, Abdul Sattar Pathan, S. Ahsan Ali Shah, Abdul Sami, Faheem Raza, Asif Ali Siyal, Mujeeb Zeeshan Kumbhar, Sajjad Ali Solangi, Advocates; G.M. Bhutto (Assistant Attorney General), Qazi Ayazuddin (Assistant Attorney General) Ms. Manzooran Gopang, (Law Officer, Law Department) for the respondents.

Dates of hearing	:	25.01.2023	26.01.2023	07.02.2023
Date of announcement	:	07.02.2023		

[1] The Schedule hereto shall be read as an integral constituent hereof.

JUDGMENT

Agha Faisal, **J**. The Petitioners have challenged the constitutionality of section 65 B of the Income Tax Ordinance 2001 ("Ordinance"), as amended vide the Finance Act 2019, *inter alia*, upon grounds that past and closed transactions cannot be reopened; vested rights created through a specific provision cannot be rescinded by amendment of the same provision; while construing a provision intending a retrospective effect, and dealing with vested rights, the words used therein cannot be stretched to include matters that do not fall within the plain language thereof; and that the statutory provision in its present form was confiscatory in nature.

The present petitions were advocated to the extent of the *vires*[2] and allowed to the remit of our short order, announced in Court at the conclusion of the final hearing, on 07.02.2023. These are the reasons for our short order.

Factual context

2. Briefly stated, section 65B was inserted into the Ordinance vide Finance Act 2010 and it conferred a tax credit of ten percent upon qualifying companies for investment, provided that the requisite investment and installation of the pertinent plant and machinery took place within a specified time. A glance at the evolution of the provision demonstrates that upon introduction it conferred the tax credit if the pertinent plant and machinery was purchased and installed at any time between 1st July 2010 and 30th June 2015. The Finance Acts of 2015, 2016 and 2018 extended the expiration date in the provision to 30th June 2016, 30th June 2019 and 30th June 2021 respectively. It is consciously reiterated that vide the Finance Act 2018, the Parliament expressly extended the benefit of section 65B of the Ordinance to qualifying investments, if the pertinent plant and machinery was purchased and installed until 30th June 2021. The Finance Act 2019 reversed the expiration date to 30th June 2019 and furthermore halved the credit for tax year 2019 to five percent.

3. It is considered fitting to reproduce section 65B of the Ordinance, as it stood prior and subsequent to the amendment vide Finance Act 2019, in order to illustrate the *lis* under deliberation before us:

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[2] It merits mention that no other issue was placed / agitated before this Court, irrespective of the pleadings in the respective petitions.

Post Finance Act 2018	Post Finance Act 2019
65B. Tax credit for investment (1) Where a taxpayer being a company invests any amount in the purchase of plant and machinery, for the purposes of extension, expansion, balancing, modernization and replacement of the plant and machinery, already installed therein, in an industrial undertaking set up in Pakistan and owned by it, credit equal to ten per cent of the amount so invested shall be allowed against the tax payable, including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance, by it in the manner hereinafter provided	65B. Tax credit for investment (1) Where a taxpayer being a company invests any amount in the purchase of plant and machinery, for the purposes of extension, expansion, balancing, modernization and replacement of the plant and machinery, already installed therein, in an industrial undertaking set up in Pakistan and owned by it, credit equal to ten per cent of the amount so invested shall be allowed against the tax payable, including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance, by it in the manner hereinafter provided *Provided that for the tax year 2019 the rate of credit shall be equal to five percent of the amount so invested*: *Provided further that the provisions of sub-section (5) relating to carry forward of the credit to be deducted from tax payable, to the following tax years, as specified in the said sub-section, shall continue to apply after tax year 2019; and*
(2) *The provisions of sub-section (1) shall apply if the plant and machinery is purchased and installed at any time between the first day of July, 2010, and the 30th day of June, 2021*.	(2) *The provisions of sub-section (1) shall apply if the plant and machinery is purchased and installed at any time between the first day of July, 2010, and the 30th day of June, 2019*.
(3) The amount of credit admissible under this section shall be deducted from the tax payable by the taxpayer in respect of the tax year in which the plant or machinery in the purchase of which the amount referred to in sub-section (1) is invested and installed.	(3) The amount of credit admissible under this section shall be deducted from the tax payable by the taxpayer in respect of the tax year in which the plant or machinery in the purchase of which the amount referred to in sub-section (1) is invested and installed.
(4) The provisions of this section shall mutatis mutandis apply to a company setup in Pakistan before the first day of July, 2011, which makes investment, through hundred per cent new equity, during first day of July, 2011 and 30th day of June, 2016, for the purposes of balancing, modernization and replacement of the plant and machinery already installed in an industrial undertaking owned by the company. However, credit equal to twenty per cent of the amount so invested shall be allowed against the tax payable, including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance. The credit shall be allowed in the year in which the plant and machinery in the purchase of which the investment as aforesaid is made, is installed therein.	(4) The provisions of this section shall mutatis mutandis apply to a company setup in Pakistan before the first day of July, 2011, which makes investment, through hundred per cent new equity, during first day of July, 2011 and 30th day of June, 2016, for the purposes of balancing, modernization and replacement of the plant and machinery already installed in an industrial undertaking owned by the company. However, credit equal to twenty per cent of the amount so invested shall be allowed against the tax payable, including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance. The credit shall be allowed in the year in which the plant and machinery in the purchase of which the investment as aforesaid is made, is installed therein.

"Explanation. For the purpose of this section the term "new equity" shall, have the same meaning as defined in sub-section (7) of section 65E. (5) Where no tax is payable by the taxpayer in respect of the tax year in which such plant or machinery is installed, or where the tax payable is less than the amount of credit as aforesaid, the amount of the credit or so much of it as is in excess thereof, as the case may be, shall be carried forward and deducted from the tax payable by the taxpayer in respect of the following tax year and so on, but no such amount shall be carried forward for more than two tax years in the case of investment referred to in sub-section (1) and for more than five tax years in respect of investment referred to in sub-section (4), however, the deduction made under this section shall not exceed in aggregate the limit specified in sub-section (1) or sub-section (4), as the case may be. (6) Where any credit is allowed under this section and subsequently it is discovered by the Commissioner Inland Revenue that any one or more of the conditions specified in this section was, or were, not fulfilled, as the case may be, the credit originally allowed shall be deemed to have been wrongly allowed and the Commissioner, notwithstanding anything contained in this Ordinance, shall recompute the tax payable by the taxpayer for the relevant year and the provisions of this Ordinance shall, so far as may be, apply accordingly.	"Explanation. For the purpose of this section the term "new equity" shall, have the same meaning as defined in sub-section (7) of section 65E. (5) Where no tax is payable by the taxpayer in respect of the tax year in which such plant or machinery is installed, or where the tax payable is less than the amount of credit as aforesaid, the amount of the credit or so much of it as is in excess thereof, as the case may be, shall be carried forward and deducted from the tax payable by the taxpayer in respect of the following tax year and so on, but no such amount shall be carried forward for more than two tax years in the case of investment referred to in sub-section (1) and for more than five tax years in respect of investment referred to in sub-section (4), however, the deduction made under this section shall not exceed in aggregate the limit specified in sub-section (1) or sub-section (4), as the case may be. (6) Where any credit is allowed under this section and subsequently it is discovered by the Commissioner Inland Revenue that any one or more of the conditions specified in this section was, or were, not fulfilled, as the case may be, the credit originally allowed shall be deemed to have been wrongly allowed and the Commissioner, notwithstanding anything contained in this Ordinance, shall recompute the tax payable by the taxpayer for the relevant year and the provisions of this Ordinance shall, so far as may be, apply accordingly.

(*Material variation has been italicized and underlined*.)

Respective arguments

4. It was the petitioners' case[3] that section 65B of the Ordinance, as it stood prior to the Finance Act 2019, had been acted upon by the petitioners and that they had accrued protected vested rights, which were unlawfully prejudiced vide the amendment introduced subsequently. Mr. Hussain Ali Almani characterized the petitioners in two distinct categories; firstly those having purchased and installed the plant and machinery by 30th June 2019, yet were considered disentitled to the entire tax credit by virtue of the proviso[4], whereby their entitlement was retrospectively halved; secondly those having made the requisite purchase prior to 30th June 2019, however, completed the installation by 30th June 2021, who were deprived of the credit entirely; and submitted that

[3] Articulated by Mr. Raashid Khalid Anwar, Mr. Hussain Ali Almani & Mr. Ovais Ali Shah in seriatim; adopted by the remaining learned counsel for the petitioners.

[4] Being the 1st proviso to section 65B(1) of the Ordinance - *Provided that for the tax year 2019 the rate of credit shall be equal to five percent of the amount so invested* ("Proviso").

in either instance the dispossession of the petitioners did not enjoy the sanction of the law. Mr. Ovais Ali Shah ventured further and endeavored to demonstrate that a tax credit, once accrued, becomes the property of a person and rights in respect whereof were guaranteed by the Constitution itself[5]. Mr. Raashid Anwar built his case around the Division Bench judgment of this Court in *Gulshan Spinning*[6] and demonstrated that in *pari materia* circumstances this Court had been pleased to strike down a similar attempt at vitiation of vested rights, pertaining to tax credits, in the past.

5. It was the respondents' case[7] that the amendment in section 65B of the Ordinance merely brought an expiration date in the future to the present, therefore, there was no question of any vested rights and / or retrospective effect. It was insisted that *installation* was one of the two integral pillars of the provision, hence, any plant and machinery *not installed* by the reversed expiration date would not qualify for a tax credit, notwithstanding the purchase having taken place within the abridged timeframe.

Dr. Shahnawaz Memon articulated that *Gulshan Spinning* was distinguishable herein and even otherwise in the petitions under reference there was a divergence of facts and circumstances, as to the respective dates of purchase and installation, therefore, the determination of such factual matters was best left to the department itself. He was of the view that if a person had *purchased* and *installed* within the abridged timeframe then he should be entitled to the benefit claimed, however, the factual determination in such regard be left to the department.

Mr. Shahid Ali Qureshi submitted that section 65B of the Ordinance dealt primarily with imported plant and machinery, hence, the benefit was actually extended to the foreign countries wherein such equipment was being manufactured. It was argued that since no benefit was accruing to the domestic economy, therefore, the provision was misconceived in any event. It was further complimented that section 65B(3) suffered from a *drafting error* and this Court ought to read out "*and*" from the provision and read in "*is*" therein[8]. It is imperative to denote at this juncture that none of the other learned counsel

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[5] Article 23 - Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest; Article 24 - No person shall be deprived of his property save in accordance with law…

[6] Per *Muhammad Mujeebullah Siddiqui J* in *Gulshan Spinning Mills Limited vs. Pakistan* reported as *2005 PTD 259*.

[7] Articulated by Dr. Shahnawaz Memon, Mr. Amir Bux Maitlo and Mr. Shahid Ali Qureshi. The arguments advanced by Dr. Shahnawaz Memon were adopted by the remaining learned counsel for the respondents and the learned Assistant Attorney General, appearing on notice per Order XXVII-A CPC.

[8] As in the case of section 107 of the Income Tax Ordinance 1979.

representing the respondents concurred with these arguments and sought for their divergence to be recorded.

6. In rebuttal, Mr. Hussain Ali Almani pinpointed that the petitioners' argument with regards to the unjustifiability of the Proviso[9] had been conceded by the respondents, as none of their learned counsel had articulated any opposition in such regard. While controverting the respondents' interpretation of the amended provision under challenge, the petitioners' learned counsel submitted that they were in concurrence with the respondents that the factual determination, with regard to the qualifying nature of the *purchase* / *installation*, ought to be done by the department itself. However, this Court may be pleased to interpret the provision under challenge in the light of the prevailing law, *inter alia* with respect to vested rights, since the department's interpretation was ostensibly in derogation of settled law.

Scope of determination

7. Heard and perused. At the very onset, it is considered imperative to observe that the respondents' learned counsel made no submissions supporting the Proviso and eschewed any effort to controvert the petitioners' arguments assailing the retrospective halving of the quantum of tax credit for the tax year 2019. On the contrary, it was argued that there was never any cavil to the qualifying persons, being those that had purchased and installed the requisite plant and machinery within the abridged timeframe, being entitled to the tax credit provided vide section 65B of the Ordinance.

8. Secondly, the respective learned counsel from both sides of the spectrum appeared to be in unison for the adjudication, as to whether a person had *purchased* and *installed* within the timeframe, to be done by the department itself in appropriate proceedings.

9. The law obliges courts ought to abstain from deciding larger questions, if a case could be decided on narrower grounds and that it is ideal for courts to confine determinations to issues pivotal for the determination of a case[10]. Since there is consensus that the factual determination, of whether a person had *purchased* and *installed* within the abridged timeframe, would be undertaken by the department itself, therefore, the only question for us to address is the

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[9] Being the 1st proviso to section 65B(1) of the Ordinance - *Provided that for the tax year 2019 the rate of credit shall be equal to five percent of the amount so invested.*

[10] Per *Saqib Nisar J as he then was)* in *LDA & Others vs. Imrana Tiwana & Others* reported as *2015 SCMR 1739*.

interpretation of section 65B of the Ordinance, post amendment vide the Finance Act 2019, in the light of the law illumined by the august Supreme Court.

Tax credit

10. A tax credit *simplicitor* is a reduction in the amount of tax to be paid. The concept came under detailed deliberation before the august Court in *H M Extraction*[11] wherein it was illumined as follows:

> "8. We begin by noting that consideration of the nature of a tax credit on the one hand and an exemption on the other needs to be carried out conceptually and on the plane of principle. Now, in Whitney v. IR Commissioners (1926) 10 TC 88, in a well-known passage that has stood the test of time, Lord Dunedin spelt out the three stages of a tax (at the broadest plane) in the following terms:
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> > "Now, there are three stages in the imposition of a tax: there is the declaration of liability that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."
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> For purposes of the question now before us, the three stages may be restated as follows: leviable (declaration of liability), payable (assessment) and recoverable. It is well established that an exemption inserts itself between the first two stages, i.e., between what is leviable and what is payable. In our view, a tax credit inserts itself between the second and the third stages, i.e., between what is payable and what is recoverable. It is perhaps for this reason that the learned Lahore High Court observed that an exemption and a tax credit are two sides of the same coin, the "coin" being the stage of assessment or what is payable. With respect, we are unable to agree. In our view, there is a conceptual difference between the two, and (as we will see) it is all the more pronounced in the case of income tax. If there is an exemption in the field then the second stage may not be reached at all (i.e., the tax may not be payable) if the exemption is whole. Of course, it may be reached partially if that be the nature of the exemption. On the other hand, in the case of a tax credit the second stage must necessarily always be reached, and that too in full. It is only then that the credit manifests itself by interposing between what is payable (i.e., the assessment) and what is recoverable. This interposition may be complete (if the tax credit is 100%) or partial. Thus, the second stage of "assessment" (i.e., "payable") cannot be the "coin" of which an exemption on the one hand and a tax credit on the other are the two "sides". Put differently, in a fiscal statute there must always be the first stage: that can be affected by neither an exemption nor a tax credit. An exemption operates on, and in relation to, the second stage: that stage may not be reached at all, or only partially. A tax credit does not bear on the second stage. Once that stage is reached, and crossed, then the tax credit is manifested, thereby blocking (as the case may be, either in whole or in part) the third stage. Or, to put the matter in Lord Dunedin's terminology an exemption may eliminate the need for an assessment altogether (if it is whole) or reduce it by the relevant amount if it is partial. A tax credit on the other hand has no bearing on the assessment. It comes into operation after assessment and when the question of recovery arises. In our view, this is a basic conceptual difference. It also has a certain consequence in income tax law, to which we now turn.
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> 9. The learned Lahore High Court observed in para 10 of the Nishat Dairy case that a "tax exemption reduces the amount of annual income that can be taxed". This is certainly correct and that is, generally, the effect of an exemption. But, if we may respectfully note, on the conceptual plane it is only a partial description of how an exemption may operate in income tax law. The reason is that income tax law has had two concepts since the beginning (i.e., the Income Tax Act, 1922): "total income" and "taxable income" (the exact terminology varying across the decades and over different statutes). Total income, as the term implies, is the totality of the income of the taxpayer. The taxable income is that which can be brought to tax.

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[11] Per *Munib Akhtar J* in *H M Extraction vs. FBR* reported as *2019 SCMR 1081*.

The two can be the same, but if there is an exemption the latter will be less than the former. However, the amount of tax payable is determined not only by reference to the amount of income that can be taxed, but also by the applicable rate of taxation. And under the principles of income tax law, the determination of the rate may be with reference to either the total income or the taxable income. As is at once obvious, this can have a material effect on the amount of tax payable. The position has been explained in Kanga and Palkhiwala's The Law and Practice of Income Tax since the early editions of the work, which were in relation to the Income Tax Act, 1922. The latest edition (10th, 2014), which is in relation to the (Indian) Income Tax Act, 1961, puts the matter as follows (pp. 163-4; emphasis supplied):

> "Exemption granted under the Act is of two kinds. Certain incomes are exempt from charge and are also excluded from the assessee's total income. Certain other incomes are exempted from income-tax but they are to be included in the assessee's total income. Thus income which may itself be exempt from tax may yet form part of the assessee's 'total income'.
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> The effect of including exempted income in the assessee's total income is mainly twofold. First, the rate of tax payable by the assessee is determined with reference to the total income and therefore exempted income which is included in the total income would affect the rate of tax applicable to the chargeable portion of the total income. Secondly, in several cases calculations have to be made with reference to the total income; and income which is exempted from tax but included in the total income is to be taken into consideration for this purpose.
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> Where the Act grants exemption from tax in respect of a certain sum, that sum does not form part of the total income unless there is some other provision in the Act making it includible in the total income. In CIT v. Raiji [17 ITR 180], Chagla CJ said, with reference to the 1922 Act:
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> 'The scheme is that wherever one finds an exemption or exclusion from payment of tax, the exemption or exclusion also operates for the purpose of computing the total income. Not only is the sum not liable to tax, but it is also not to form part of the total income for the purpose of determining the rate. When the legislature intends that certain sums, although not liable to tax, should be included in the total income, it expressly so provides…'"

10. It will be seen from the foregoing that while an exemption always reduces the amount of income that can be taxed, it may or may not affect also the rate applicable, depending on whether that is determinable on the basis of taxable income or total income. Of course, in the 2001 Ordinance the rate is determined by the taxable income. But it must be kept in mind that we are here considering the matter on the conceptual plane, and must therefore be guided by the principles of income tax law as they have crystallized over the decades. A tax credit on the other hand has no such effect, even in principle. It has no bearing on, or relevance for, the rate of taxation. This, in our view, is another basic difference which serves to confirm that an exemption and a tax credit are not, essentially, one and the same thing. They are conceptually distinct.

11. Notwithstanding the above, it must be recognized that in practical terms there is no difference in the effect of a complete exemption from tax on the one hand and a 100% tax credit on the other. The final outcome is that zero tax is payable or recoverable. The situation at hand is of course of a 100% tax credit. It seems (if we may say so with respect) that in the Nishat Dairy case the learned High Court concerned itself, not unreasonably and perhaps sub silentio, only with a situation of a complete exemption from tax. However, on the plane of principle such a situation ought to be regarded only as a special case. The equation between the effect of a tax credit and an exemption that would practically exist in such a situation cannot, with respect, affect the conceptual analysis, which must necessarily be carried out in more general terms, so as to take into account the other possibilities as well."

11. Section 65B of the Ordinance extended the benefit of a ten percent tax credit to qualifying companies, provided that the relevant purchase and installation was undertaken prior to 2021. This timeline was specifically

incorporated into the provision vide the Finance Act 2018. To consider whether the subsequent curtailment of the expiration date (and insertion of the Proviso[12]) vide the Finance Act 2019 affected any vested right, it may be appropriate to seek guidance from the august Court upon the concept of vested rights, especially in the context of fiscal legislation.

Vested right

12. There is a preponderance of authority[13] demystifying the concepts of rights, vested rights and past & closed transactions, however, a collative and conclusive edict in such regard is the Division Bench judgment of this Court in *Shahnawaz[14]*:

> "11. The general principles applicable in relation to vested rights, and the extent to which they can be retrospectively affected, are well-settled and have been stated and reaffirmed many times. Thus, in Chief Land Commissioner, Sindh and others v. Ghulam Hyder Shah and others 1988 SCMR 715, it has been observed as follows:
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> "In this behalf the High Court proceeded a on a correct principle of interpretation that 'no rule of construction is more firmly established than this, that retrospective operation is not to be given to a statute so as to impair an existing right or obligation'. The main and primary rule is that every statute is deemed to be prospective, unless by express provision or necessary intendment it is to have retrospective effect. Also the rule that no statute shall be construed so as to have retrospective operation affecting vested rights to a greater extent than its language renders necessary is firmly established." (para 11)
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> "There is another aspect of this matter which also fortifies the conclusion stated above. This Court in Province of East Pakistan v. Sharafatullah and others PLD 1970 SC 514, affirmed the established rule that a statute cannot be read in such a way as to change accrued rights the title to which consists in transactions past and closed or in facts which are events that have already occurred." (para 13)
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> It will be seen that the Supreme Court spoke of both "vested rights" and "past and closed transactions". A detailed analysis of the distinction between the two need not detain us, and it suffices to note that while every past and closed transaction is normally based on, or comprises, a vested right, every vested right is not necessarily a past and closed transaction. Indeed, if rights were required to be placed in ascending order, the 'scale' could be said to comprise of a 'bare' right, a vested right and a past and closed transaction. Ordinarily, a right can be regarded as progressing from a 'bare' right to become a vested right and then perhaps even a past and closed transaction. Of course, some rights only become vested rights, and do not go beyond to become past and closed transactions. Others may vest immediately, as soon as they arise or accrue, and then may (or may not) become past and closed transactions.

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[12] Being the 1st proviso to section 65B(1) of the Ordinance - *Provided that for the tax year 2019 the rate of credit shall be equal to five percent of the amount so invested.*

[13] *Nagina Silk Mills vs. ITO* reported as *PLD 1963 SC 322*; *East Pakistan vs. Sharafatullah* reported as *1970 PLD SC 514*; *CIT vs. EFU Insurance* reported as *1982 PLD SC 247*; *G H Shah vs. Chief Land Commissioner* reported as *1983 CLC 1585*; *Al Samrez Enterprises vs. Pakistan* reported as *1986 SCMR 1917*; *WAPDA vs. Capt. Nazir* reported as *1986 SCMR 96*; *Chief Land Commissioner vs. G H Shah* reported as *1988 SCMR 715*; *Molasses Trading & Export vs. Pakistan* reported as *1993 SCMR 1905*; *Muhammad Hussain vs. Muhammad* reported as *2000 SCMR 367*; *Shahnawaz vs. Pakistan* reported as *2011 PTD 1558*; *Zila Council Jhelum vs. PTC* reported as *PLD 2016 SC 398*; *Al Tech Engineers vs. Pakistan* reported as *2017 SCMR 673*; *Super Engineering vs. CIR* reported as *2019 SCMR 1111*; *H M Extraction vs. FBR* reported as *2019 SCMR 1081*.

[14] Per *Munib Akhtar J* in *Shahnawaz vs. Pakistan* reported as *2011 PTD 1558* ("*Shahnawaz*").

> Some rights (though this would be a somewhat rare and unusual situation) may even become past and closed transactions once they accrue, i.e., progress to that category straight from being 'bare' rights.
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> 12. As even this brief account shows, some care must be taken to properly analyze the nature of the right under consideration. This is all the more so because (especially in the realm of fiscal statutes) past and closed transactions appear to stand on a footing higher than vested rights. This is clearly established by the decision in Molasses Trading and Export (Pvt) Ltd. v. Federation of Pakistan and others 1993 SCMR 1905, a case relied on by learned counsel for the petitioners. The case was concerned with the grant of an exemption under the Customs Act, 1969. An exemption (which is granted by a notification issued under section 19 of the Act) can be regarded as a 'bare' right, one that can be availed of by the concerned importer. In the well-known case of Al-Samrez Enterprise v. Federation of Pakistan 1986 SCMR 1917, it was held that if the importer altered his position in reliance on the notification (e.g., by entering into a contract or opening a letter of credit), he acquired a vested right in the exemption, to which he remained entitled even if the exemption itself stood withdrawn by the time the goods arrived in Pakistan. The 'bare' right, in other words, had been transformed into a vested right. In order to undo the effect of this decision, section 31 A was added to the Customs Act (by the Finance Act, 1988), and it was deemed always to have been part of the said Act.
> Thus, its position was, as presently relevant, similar to that of section 214C of the 2001 Ordinance. The question before the Supreme Court in Molasses Trading was whether section 31A had retrospectively destroyed the vested rights recognized in Al Samrez (the goods in question having been imported before 1-7-1988). The Supreme Court unanimously held that the answer to this question was in the affirmative. However, by a majority, it was also held that those cases in which the bills of entry had been filed by or before 30-6-1988 (i.e., before the Finance Act, 1988 came into force) had become past and closed transactions, and section 31A did not apply to them, notwithstanding the absolute terms in which it had, ostensibly, been given retrospective effect. The reason why the rights in those cases had gone from being vested rights to become past and closed transactions was that, in respect of customs duties, the levy of the tax stood crystallized on the date on which the bill of entry was filed. It is well-settled (see, e.g., the Ghulam Hyder Shah's case (supra)) that retrospective statutes affecting vested rights and/or past and closed transactions are to be given the narrowest effect and interpretation that is reasonably possible. Section 31-A, being concerned with undoing the effect of the Al Samrez case, was directed towards vested rights, and could not therefore affect past and closed transactions. Molasses Trading thus nicely illustrates both how rights can move along the 'scale' referred to above, and the distinction that exists between vested rights and past and closed transactions. In relying on this case, the petitioners clearly claim that their rights in the present case should be regarded as past and closed transactions, and hence remain unaffected by section 214C. Section 177 (under which the rights are claimed) must therefore be carefully analyzed in order to ascertain whether there are at all any rights thereunder and if so, whether they can be regarded as vested rights and/or as past and closed transactions."

13. If a right can be demonstrated to have accrued or crystallized, within the remit of *Shahnawaz*, the next issue would be to determine the protection afforded thereto under the law and beacon to follow in such regard is the recently Supreme Court approved judgment in *Anwar Yahya*[15]. It was held, in material circumstances, that the tax payer had acquired a vested right and the subsequent attempt by the legislature to vitiate that protected right was struck down. It is considered expedient to reproduce the pertinent discussion herein:

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[15] Per *Munib Akhtar J* in *Anwar Yahya vs. Pakistan* reported as *2017 PTD 1069* ("*Anwar Yahya*"); upheld by the Supreme Court in *CIR vs. Pakistan* (*Civil Appeal 930 & 931 of 2017*) judgment dated 21.09.2022 (authored by *Qazi Faez Isa J*).

> "8. ... In our view, on a proper interpretation of section 37A the question of any rights, vested or otherwise, turns not on the state of the Table as on the date of acquisition of the shares but rather on the substantive provisions of the section itself. Here, the most crucial provision is the proviso that was omitted by the Finance Act, 2014. It will be recalled that this was in the following terms: "Provided that this section shall not apply if the securities are held for a period of more than a year". Thus, the proviso disapplied the section in its entirety in respect of shares held for more than one year. As learned counsel for the petitioners rightly submitted, section 37A is a charging provision in a fiscal statute. The proviso had therefore to be read and applied literally. In other words, it meant precisely what it said: if a given lot of shares were held for more than a year, the section simply did not apply. The question of whether there was anything to tax (i.e., whether there were any capital gains) became moot and, in effect, disappeared. It must be kept in mind that this situation is materially different from reading and applying the relevant rate from the Table. To apply the Table necessarily means (and meant) that there is something to tax and the rate of "zero" percent means only that the capital gains are being so taxed. The practical effect would of course be the same, but this should not obscure the fact that, on the legal plane, the proviso operated differently. It operated on its own footing, completely detached from and independently of the Table and, inasmuch as it disapplied the section itself, irrespective of whether there were any capital gains or not. Furthermore, the proviso had effect on a basis that could be ascertained objectively.
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> 9. For the reasons just stated, in our view it was the proviso that could, and did, create vested rights. As soon as any given lot of shares had been held for more than a year, the proviso created a right in the taxpayer that vested, the right being that section 37A did not apply in respect of those shares. And since this was a vested right, the usual rules of interpretation applicable to such rights would apply. (Those rules, being well known and established, require no elaboration and in particular the case law cited by learned counsel for the petitioners need not be considered in any detail.) In particular, the omission of the proviso could not affect the rights that had become vested in a taxpayer in respect of a lot of shares that had been held for more than one year. The omission of the proviso by the Finance Act, 2014 did not therefore affect rights that had vested by the time of the omission. It is to be noted that the omission did not even purport to be retrospective. Since the omission took effect from 01.07.2014, this meant that it was a vested right that section 37A would not apply in respect of any shares held for more than a year by a taxpayer, as on or before 30.06.2014. Any capital gains made on such shares, even if the disposal took place on or after 01.07.2014, could not therefore be brought to tax. Applying the foregoing analysis to the illustrative case (see para 4 above), as on 30.06.2014 the petitioner No. 3 had held the 430,000 shares in PTCL for more than a year (since the same were acquired on 28.06.2013). By reason of the proviso the petitioner had acquired a vested right in section 37A not applying to the said shares on 29.06.2014. The subsequent omission of the proviso was therefore irrelevant and any capital gains made by the petitioner on the disposal of the said shares could not be taxed in terms of section 37A regardless of the date on which they were disposed off."

14. It is the petitioners' case that the Parliament, vide section 65B of the Ordinance post amendment vide Finance Act 2018, consciously conferred a protected right upon tax payers to avail a ten percent tax credit if they had purchased and installed the pertinent plant and machinery before 30th June 2021. Mr. Raashid Anwar had set forth a convincing argument that the curtailing of the benefit extended in section 65B of the Ordinance, consequent upon the amendment made via Finance Act 2019, amounted to impermissible vitiation of vested rights / past and closed transactions and illustrated his submissions by placing reliance upon a Division bench judgment of this Court in the matter of *Gulshan Spinning*[16]. We are informed that *Gulshan Spinning* has been sustained by the Supreme Court.

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[16] Per *Muhammad Mujeebullah Siddiqui J* in *Gulshan Spinning Mills Limited vs. Pakistan* reported as *2005 PTD 259*.

Gulshan Spinning

15. The pertinent facts were that by virtue of an insertion to the Income Tax Ordinance 1979, vide the Finance Act 1988, companies had become entitled to a tax credit at the rate of fifteen percent in respect of the pertinent investment having taken place between July 1976 and 30th June 1991. The investment was also required to be manifest in two stages; *purchase* and *installation*. Section 107 of the Income Tax Ordinance 1979 was amended vide the Finance Act 1988 and the expiration date was brought forward from 1991 to 1988. The amendment was challenged and an earlier Division Bench of this Court allowed the petitions. It is the petitioners' case that the present petitions are clinched in view of the binding ratio of *Gulshan Spinning*, whereas, it is the respondents' assertion that *Gulshan Spinning* is distinguishable in the present facts and circumstances. A deliberation in such regard is best initiated by a comparative reproduction of the relevant statutory provisions:

Section 107; Income Tax Ordinance 1979	Section 65B; Income Tax Ordinance 2001
107. *Tax credit for replacement, balancing and modernisation of machinery or plant*.- (1) Where an assessee being a Pakistani company invests any amount in the purchase of plant and machinery for installation at any time *between the first day of July, 1976 and the thirtieth day of June, 1988 or between the first day of July, 1990 and the thirtieth day of June, 1991*, in an industrial undertaking set up in Pakistan and owned by it, for the purposes of replacement, balancing or modernisation of the machinery and plant already installed therein, credit at the rate of fifteen per cent of the amount so invested shall be allowed against the tax payable by it in the manner hereinafter provided. *Explanation*.- As used in this sub-section,- (a) "amount", in case of plant and machinery acquired on lease, means the amount expended by the lessor in the purchase of the said plant and machinery; and (b) "purchase of plant and machinery" includes acquisition of plant and machinery on lease from a scheduled bank, a financial institution or a leasing company on such terms and conditions as may be approved by the Central Board of Revenue. (2) *The amount of credit admissible under this section shall be deducted from the tax payable by the assessee in respect of the income year in which the machinery or plant in the purchase of which the amount referred to in sub-section (1) is invested is installed*…	65B. *Tax credit for investment* (1) Where a taxpayer being a company *invests any amount in the purchase of plant and machinery, for the purposes of extension, expansion, balancing, modernization and replacement of the plant and machinery, already installed therein*, in an industrial undertaking set up in Pakistan and owned by it, credit equal to ten per cent of the amount so invested shall be allowed against the tax payable, including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance, by it in the manner hereinafter provided Provided that for the tax year 2019 the rate of credit shall be equal to five percent of the amount so invested: Provided further that the provisions of sub-section (5) relating to carry forward of the credit to be deducted from tax payable, to the following tax years, as specified in the said sub-section, shall continue to apply after tax year 2019; and (2) The provisions of sub-section (1) shall *apply if the plant and machinery is purchased and installed at any time between the first day of July, 2010, and the 30th day of June, 2019*. (3) *The amount of credit admissible under this section shall be deducted from the tax payable by the taxpayer in respect of the tax year in which the plant or machinery in the purchase of which the amount referred to in sub-section (1) is invested and installed*…

(*Pertinent consistency has been italicized and underlined*.)

16. It is apparent from a comparative perusal that both provisions of law extend a benefit, in the form of a tax credit, to qualifying persons; provided that the purchase *and* installation of the pertinent plant and machinery was concluded within the specified timeframe. It is respectfully noted that the respondents' counsel remained unable to dispel the observation that the two provisions appear to be *pari materia inter se*.

17. It is considered appropriate to reproduce the illumining constituent of *Gulshan Spinning* herein below:

> "2. Common grievance in all the above petitions is that by virtue of amendment inserted by the Finance Act, 1988 the petitioners became entitled to tax credit at the rate of 15% of the amount invested in between first day of July, 1976 and the thirtieth day of June, 1991, for the purposes of replacement, balancing or modernisation of the machinery and plant already installed against the tax payable by them in the manner provided in section 107 of the Income Tax Ordinance, 1979 (now repealed). Prior to the amendment inserted by Finance Act, the tax credit was available for the investment made between the first day of July, 1976 and thirtieth day of June, 1988…
>
> 3. In pursuance of and acting upon the entitlement available under the provisions as amended by Finance Act, 1988, the petitioners made investments between the first day of July, 1988 and thirtieth day of June, 1989. Subsection (1) of section 107 was further amended by Finance Act, 1989 whereby the year, "1991" was substituted as, "1988", thus reverting to the position as prevailing prior to 1-7-1988…
>
> 8… The learned advocates for the petitioners have mainly argued that -the amendment inserted in section 107(1) of the Income Tax Ordinance, by Finance Act, 1989, substituting the year "1991", by the year "1988", is though retrospective in effect shall not be applicable to the petitioners as they had already made investments prior to the amendment inserted by the Finance Act, 1989…
>
> 13. On the other hand, the learned Advocates for respondents have submitted that there is no cavil to the proposition that the legislature is fully competent to enact any law with retrospective effect and in doing so is further competent to even take away the vested rights, as well as the right accrued under the past and closed transactions. They further maintained that for the purpose, of assessment of the total income and tax payable thereon, the law as prevailing in the assessment year is to be applied and not the law as prevailing in the income year…
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> 14… As already observed above, the legislature while enacting any law or making any amendment with retrospective effect is competent to take away even the vested right already accrued, but for this purpose express words are required in the enactment/amendment. If there are no express words in this behalf, as in this case the presumption would be that the legislature although made enactment/amendment with retrospective but had no intention to take away the accrued vested rights and to reopen the past and closed transactions. By now it is a settled principle of the interpretation statutes that in the absence of express words used by the legislature the retrospectivity to any law is not to be given so as to reopen the past and closed transactions and deprive any person of any accrued vested right in pursuance of such past and closed transactions…
>
> 16… a question arises at what point of time, the tax credit matures into an accrued right making it to be a past and closed transaction…
>
> 17. The right to claim any allowance, deduction or exemption is crystallized and matured with finalisation of assessment proceedings culminating into an assessment order. A perusal of subsection (1) of section 107 of the Income Tax Ordinance shows that the right to tax credit accrues on investments made by an assessee being a Pakistani Company, in the purchase of plant and machinery, for the purpose of replacement, balancing or modernization at the rate of 15 % of the amount so invested and under subsection (2) the said amount shall be deducted from the tax payable by the assessee in respect of the income year in which the machinery or plant in the purchase of which the amount referred to in subsection (1) is invested, is installed. Thus, it is obvious without any ambiguity that the right to claim tax credit comes into

> existence with the making of investment in the purchase of plant and machinery and the actual deduction from the tax payable is a matter of implementation only. With the investment made for the purchase of plant and machinery, the amount of tax credit is automatically determined which is 15 % of the investment and the right to claim the tax credit is immediately matured to the extent that even any further calculation is not required…
>
> 18. Consequent to the above discussion, it is held that the right of: the petitioners to claim the tax credit on the investments made by them in between 1-7-1988 and 30-6-1989 was matured at the time of investment and became a past and closed transaction. The result is that notwithstanding the retrospective amendment made by the legislature in section 107(1) by Finance Act, 1989, it shall not effect the right of the petitioners to claim the tax credit which had already accrued on account of past and closed transactions at the time of amendment which was made on 1-7-1989.
>
> 19. For the foregoing reasons, all the Petitions are allowed in the terms that the petitioners are entitled to claim the tax credit on the investments made by them during the period between 1-7-1988 and 30-6-1989. The competent authorities concerned are therefore, directed to issue the Installation Certificate to the petitioners for claiming the tax credit and the Assessing Officers are directed to allow the tax credit to the petitioners on their BMR investment, notwithstanding the amendment inserted in subsection (1) of section 107 by Finance Act, 1989.
>
> 20. However, we would like to clarify that the direction for allowing the tax credit is subject to the verification of facts by authorities competent in this behalf, as we have given our findings on the provision of law only without considering the facts in each case which shall be examined by the officers competent in this behalf."

18. The only argument advanced by the respondents, in the effort to distinguish *Gulshan Spinning*, was that unlike section 65B of the Ordinance, section 107 of the Income Tax Ordinance 1979 did *not* place a twofold requirement of *purchase* and *installation*. However, a bare perusal of the section 107(2) of the Income Tax Ordinance 1979 demonstrates that the argument is perhaps misconceived as the benefit was only available if the *purchase and installation* was undertaken within the requisite timeframe. This observation is bolstered by Mr. Shahid Ali Qureshi's opening argument that section 65B(3) of the Ordinance was befallen by a drafting error and that the said provision ought to be read in the same verbiage as section 107(2) of the Income Tax Ordinance 1979, hence, admitting the two fold qualification common to both provisions.

Mr. Hussain Ali Almani had made a convincing submission that if anything the conjunctive *requirement to purchase and install* was more prominent in section 107(2) of the Income Tax Ordinance 1979 as the said requirement was contained in subsection (1) thereof, wherein the benefit was being conferred. As opposed to section 65B(2) of the Ordinance, wherein the benefit conferred by virtue of subsection (1) was being qualified.

19. *Gulshan Spinning* observed, in manifestly *pari materia* circumstances, that in the absence of express words no retrospective effect may be given to any law as to reopen the past and closed transactions and deprive any person of any accrued vested right in pursuance of such past and closed transaction and the right to claim tax credit comes into existence with the making of

investment in the purchase of plant and machinery and the actual deduction from the tax payable is a matter of implementation only.

Effect of Shahnawaz[17], Anwar Yahya[18] and Gulshan Spinning[19]

20. *Shahnawaz* catalogued the nature and description of vested rights and *Anwar Yahya* spelt out the protection that the contemporary law afforded thereto. While the ratio of the two edicts is sufficient to settle the present case, it is apparent that the matter is clearly clinched by *Gulshan Spinning*. It may be stating the obvious that the enunciation of law in *Shahnawaz*, *Anwar Yahya* and *Gulshan Spinning* is binding upon us per the *Multiline[20]* principles.

Reconciliation of section 65B of the Ordinance

21. It stands before us that the Parliament conferred a conscious benefit upon qualifying persons purchasing and installing pertinent plant and machinery before 30th June 2021, vide amendment to section 65B of the Ordinance through the Finance Act 2018. The respondents' counsel had unequivocally stated that persons, otherwise qualified per section 65B, having purchased and installed the pertinent plant and machinery prior to 30th June 2019, being the expiration date abridged vide Finance Act 2019, were entitled to the benefit. However, the addition of the Proviso[21] halved their entitlement to the tax credit.

The other category of qualified persons is that which purchased the plant and equipment before 30th June 2019, however, notwithstanding the curtailment of the expiration date had in fact concluded installation before 30th June 2021. In this latter case, the entire benefit of the tax credit has been denied thereto.

22. In view of the binding authority cited supra, it is apparent that the amendment to section 65B of the Ordinance via the Finance Act 2019 amounted to impermissible vitiation of vested rights, however, it is incumbent upon this Court to make every effort to save the legislation under consideration[22]. The path to be taken in such regard was identified by *Denning J* when he observed

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[17] Per *Munib Akhtar J* in *Shahnawaz vs. Pakistan* reported as *2011 PTD 1558* ("*Shahnawaz*").
[18] Per *Munib Akhtar J* in *Anwar Yahya vs. Pakistan* reported as *2017 PTD 1069* ("*Anwar Yahya*"); upheld by the Supreme Court in *CIR vs. Pakistan* (*Civil Appeal 930 & 931 of 2017*) judgment dated 21.09.2022 (authored by *Qazi Faez Isa J*).
[19] Per *Muhammad Mujeebullah Siddiqui J* in *Gulshan Spinning Mills Limited vs. Pakistan* reported as *2005 PTD 259*.
[20] *Multiline Associates vs. Ardeshir Cowasjee* reported as *1995 SCMR 362.*
[21] Being the 1st proviso to section 65B(1) of the Ordinance - *Provided that for the tax year 2019 the rate of credit shall be equal to five percent of the amount so invested.*
[22] Per *Mian Saqib Nisar J.* in *Lahore Development Authority vs. Imrana Tiwana* reported as *2015 SCMR 1739*.

that a judge should ask himself the question as to how the makers of the Act would have straightened it out and in doing so the judge must not alter the material of which the Act is woven, but he can and should iron out the creases[23].

23. It is settled law that an amendment becomes a part of the original statute and must be read together. While an amendment, being considered as the last expression of the will of the legislature, generally prevails, however, such effect is prospective and would not be given any retroactive construction, overriding effect on prior rights, unless the verbiage of the provision makes such construction necessary[24]. In case of any inconsistency, harmonization may be employed so as to impede an irreconcilable conflict.

Reading of section 65B of the Ordinance

Category 1 – Purchased and installed by 30th June 2019

24. The pre amendment verbiage of section 65B permitted purchase of plant and machinery up until 2021 and that expiration date was curtailed vide Finance Act 2019 to reflect 2019. In *Gulshan Spinning* it was unequivocally held that the right to claim the tax credit came into existence with the purchase of plant and machinery. Therefore, notwithstanding the curtailment of the expiration date, protected vested rights had been created in favor of persons having *purchased* the pertinent plant and machinery prior to 30th June 2019.

25. In the first category before us, qualified persons had purchased and installed the plant and machinery before the subsequently curtailed expiration date, however, were being denied the full quantum of the tax credit on account of the Proviso[25], whereby their entitlement for tax year 2019 had been halved. Not a single learned counsel appearing for the respondents articulated any argument in support of the Proviso and on the contrary it was stated that persons having concluded the requisite purchase and installation, per the abridged expiration date, ought to enjoy the benefit conferred. However, notwithstanding the submissions of the respondents' counsel, it is apparent that the Proviso subsists in the statute and has to be dealt with by us.

26. *Gulshan Spinning* held that the tax credit crystallized upon making of the relevant investment and the credit was to be availed in the tax year wherein the installation was concluded. So in the first category, wherein the purchase and

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[23] *Seaford Court Estates Limited vs. Asher [1949] 2 All ER 155, 164 (CA)*.
[24] *The Construction of Statutes* by *Earl T Crawford*; page 622.
[25] Being the 1st proviso to section 65B(1) of the Ordinance - *Provided that for the tax year 2019 the rate of credit shall be equal to five percent of the amount so invested.*

installation had concluded by 30th June 2019, no case could be set forth before us to confer any sanctity upon a subsequently inserted Proviso, seeking to halve the benefit already become due. Therefore, the Proviso is determined to by an unjustifiable attempt to vitiate protected vested rights, hence, struck down.

Category 2 – Purchased by 30th June 2019; installed by 30th June 2021

27. The second category consists of qualified persons having purchased the plant and equipment prior to the subsequent expiration date, being 30th June 2019, however, the installation thereof was concluded by the earlier expiration date, being 30th June 2021. At the risk of repetition, it merits reiteration that *Gulshan Spinning* had held that the tax credit crystallized upon making of the relevant investment and installation was material only in respect of the tax year when the credit was to be claimed. The expiration date was brought forward to 30th June 2019 by virtue of Finance Act 2019 and there is no case before us to consider any benefit for a qualified person *not* having purchased the pertinent plant and machinery prior to the abridged expiration date. However, if a qualified person had in fact *purchased* the pertinent plant and machinery prior to the abridged expiration date then the same merits consideration.

28. The pre amendment version of section 65B of the Ordinance provided a benefit in respect of *purchase* and *installation* before 30th June 2021. Even if we are to construe the benefit as it stood prior to amendment vide Finance Act 2019, *installation* had to take place before 30th June 2021. If a qualified person had acted upon the benefit conferred and made the purchase prior to the abridged expiration date then it remained to be determined as to what effect the abridged expiration date would have in respect of *installation*, as the same is relevant to determine the tax year in which the tax credit may be claimed, if at all. Installation post 30th June 2021 never qualified an investment within the ambit of the benefit conferred, even in the pre amendment version of 65B of the Ordinance and even otherwise no case was ever set forth before us to consider any protection in such circumstances. In summation, it is observed that even in the event that the *purchase* had been undertaken before the abridged expiration date and *installation* had taken place prior to 30th June 2021, the benefit of the tax credit, per section 65B of the Ordinance, would be available to the qualified person.

Tax year in which the tax credit may be claimed

29. Section 65B(3) of the Ordinance provides that tax credit shall be deductible in respect of the tax year in which the plant or machinery in the

purchase of which the relevant amount is invested *and* installed. This perhaps leads to an interpretation that the *purchase* and *installation* had to coincide in the same tax year in order for the benefit of section 65B of the Ordinance to be conferred.

30. As noted earlier, a departmental counsel had argued that the drafting of this provision was inconsistent with the will of the legislature and that tax credit should be read as being deductible in respect of the tax year, in which the machinery or plant in the purchase of which the relevant amount invested, is installed.

31. We had put a specific query to all the departmental counsel in such regard in respect of the tax year in which the relevant tax credit had been allowed to be claimed, prior to the present dispute having arisen. The counsel were unanimous in their response that the tax credit was allowed to be claimed in the year that the relevant *installation* took place, irrespective of whether the purchase took place within the same year or earlier.

32. Our findings in respect of the creation of vested rights and the protection to be afforded thereto under law are delineated supra, however, in order for the same to be given effect section 65B(3) of the Ordinance is to be read to reflect that the tax credit shall be deducted in the tax year in which the pertinent plant and machinery is installed, subject to the determination that the purchase took place prior to 30th June 2019 and installation was concluded prior to 30th June 2021.

Adjudication of claims by the department

33. The respective parties were always in unison that the factual aspect of ascertainment of qualification for the relevant tax credit would always remain in the domain of the department. The edict in *Gulshan* Spinning had also maintained that the direction for allowing tax credit remained subject to verification of facts by the competent authority and that the findings of the Court were confined to interpretation of the law without considering the facts in each case, which shall be examined by the department in respective proceedings. This ascertainment *inter alia* includes the determination of whether purchase, signifying an irrevocable act of acquisition / parting with consideration, took place prior to 30th June 2019 and whether installation was concluded prior to 30th June 2021. The respective ascertainment is to be undertaken by the department in proceedings, pending or to be initiated, there before. The decision

of the department shall be subject to challenge, as may be available under the law, and the present proceedings shall not disentitle either party in such regard.

Conclusion

34. It is considered expedient to denote that our entire deliberation was with respect to qualified persons having purchased and installed the plant and machinery by 30th June 2019 and those having made the requisite purchase prior to 30th June 2019 yet completed the installation by 30th June 2021, therefore, the findings herein are restricted to the said circumstances. There was never any question before us to consider the case of any person that may have *purchased* post 30th June 2019 and / or installed beyond 30th June 2021.

35. The two categories identified were found to have protected vested rights and it was our much deliberated view that such rights could not be vitiated in the manner intended by the amendment to section 65B of the Ordinance by the Finance Act 2019.

36. Therefore, these petitions were allowed, in Court at the conclusion of the final hearing, to the remit of our short order dated 07.02.2023, operative constituent whereof is reproduced herein below:

> "For reasons to be recorded later and subject to what is set out therein by way of amplification or otherwise, these petitions are allowed in terms of and to the extent restricted herein below:
>
> 1. Section 65B(2) of the Income Tax Ordinance 2001 is read to reflect that the provisions of sub-section (1) shall apply if the plant and machinery was purchased before the 30th day of June 2019 and installed before the 30th day of June 2021.
>
> 2. Subject to the foregoing, section 65B(3) of the Income Tax Ordinance 2001 is read to reflect that the amount of credit admissible under this section shall be deducted from the tax payable by the taxpayer in respect of the tax year in which the plant and machinery, under reference, is installed.
>
> 3. The determination of whether the purchase and installation, of the pertinent plant and machinery, was concluded within the period specified supra shall be undertaken by the department in respective proceedings pending or initiated there before.

Notwithstanding the foregoing, the 1st proviso to section 65B(1) of the Income Tax Ordinance 2001, inserted vide Finance Act 2019, is hereby struck down."

These are the reasons for our short order. The office is instructed to place a copy hereof in each of the connected petitions.

JUDGE
(27.02.2023)

JUDGE
(27.02.2023)

Schedule

CP D 8164 of 2019 - Sami Pharma Pvt. Ltd & Others v Fed. of Pakistan and Others	CP D 8234 of 2019 - Gul Ahmed Textile Mills Ltd v Fed. of Pakistan & Others
CP D 8235 of 2019 - Diamond Fabrics Ltd v. Fed. of Pakistan & Others	CP D 8236 of 2019 - Indus Dyeing & Manufacturing Co. Ltd v. Fed. of Pakistan & Others
CP D 8237 of 2019 - Indus Layallpur Ltd v. Fed. of Pakistan & Others	CP D 8238 of 2019 - Blessed Textile Ltd v. Fed. of Pakistan and Others
CP D 8239 of 2019 - Sapphire Finishing Mills Ltd v. Fed. of Pakistan & Others	CP D 8240 of 2019 - Faisal Spinning Mills Ltd v. Fed. of Pakistan & Others
CP D 8241 of 2019 - Bhanero Textile Mills Ltd v. Fed. of Pakistan & Others	CP D 8242 of 2019 - Sumrays Textile Mills Ltd v. Fed. of Pakistan & Others
CP 8243 of 2019 - Sapphire Fibre Ltd v. Fed. of Pakistan & Others	CP D 8244 of 2019 - Amer Cotton Mills Pvt Ltd **VS** Fed. of Pakistan & Others
CP D 8245 of 2019 - Reliance Cotton Spinning Mills Ltd v. Fed. of Pakistan & Others	CP D 8246 of 2019 - Ismail Ind Ltd v. Fed. of Pakistan & Others
CP D 8247 of 2019 - Siddiqsons Ltd v. F.B.R & Others	CP D 8271 of 2019 - Pakistan Cables Ltd v. Fed. of Pakistan & Others
CP D 8272 of 2019 - Amreli Steel Ltd v. Fed. of Pakistan & Others	CP D 8273 of 2019 - Coronet Foods Pvt Ltd v. Fed. of Pakistan & Others
CP D 8274 of 2019 - English Biscuit Manufacturing (Pvt) Ltd v. Fed. of Pakistan & Others	CP D 8275 of 2019 - Ghandhara Nissan Ltd **VS** Fed. of Pakistan and Others
CP D 8276 of 2019 - Thatta Cement Co. Ltd v. Fed. of Pakistan & Others	CP D 8277 of 2019 - Matco Foods Ltd v. Fed. of Pakistan & Others
CP D 8278 of 2019 - Ghandhara Industries (Pvt) Ltd v. Fed. of Pakistan and Others	CP D 8279 of 2019 - Habib Oil Mills Pvt Ltd v. Fed. of Pakistan and Others
CP D 8280 of 2019 - National Refinery Ltd v. Fed. of Pakistan & Others	CP D 8281 of 2019 - The General Tyre & Rubber Co. **VS** Fed. of Pakistan & Others
CP D 8282 of 2019 - Indus Pharma Pvt Ltd v. Fed. of Pakistan & Others	CP D 8283 of 2019 - Nazeer Concrete Pvt Ltd v. Fed. of Pakistan & Others
CP D 8284 of 2019 - Dynatis Pakistan Pvt Ltd v. Fed. of Pakistan & Others	CP D 8342 of 2019 - Liberty Mills Ltd v. Fed. of Pakistan & Others
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CP D 8368 of 2019 - Din Textile Mills Ltd v. Fed. of Pakistan & Others	CP D 8369 of 2019 - Nadeem Textile Mills v. Fed. of Pakistan & Others
CP D 8370 of 2019 - Premium Textile Mills Ltd v. Fed. of Pakistan & Others	CP D 8371 of 2019 - Diamond International Corp Ltd v. Fed. of Pakistan & Others
CP D 8372 of 2019 - N.P Cotton Mills Ltd v. Fed. of Pakistan & Others	CP D 8373 of 2019 - Equity Textiles Ltd v. Fed. of Pakistan & Others
CP D 8374 of 2019 - Kassim Textile Pvt Ltd v. Fed. of Pakistan & Others	CP D 8375 of 2019 - Kassim Pvt Ltd v. Fed. of Pakistan & Others
CP D 8376 of 2019 - Zaman Textile Mills Pvt Ltd v. Fed. of Pakistan & Others	CP D 8377 of 2019 - Saya Weaving Mills Pvt Ltd v. Fed. of Pakistan & Others
CP D 8382 of 2019 - Continental Biscuit Ltd v. Fed. of Pakistan & Others	CP D 8385 of 2019 - Mekotex (Pvt) Ltd v. Fed. of Pakistan and Others
CP D 8389 of 2019 - Shahmurad Sugar Mills Ltd & Others v. Fed. of Pakistan & Others	CP D 8390 of 2019 - Excide Pakistan Ltd v. Fed. of Pakistan & Others
CP.D 8394 of 2019 - Indus Motor Co. v. Pakistan & Others	CP D 8395 of 2019 - Karam Textile Mills Pvt Ltd v. Fed. of Pakistan & Others
CP D 8396 of 2019 - Amna Ind Pvt Ltd v. Fed. of Pakistan & Others	CP D 8397 of 2019 - Pakistan Synthetic Ltd v. Fed. of Pakistan & Others
CP D 8403 of 2019 - Sindh Abadgar Sugar Mills v. Fed. of Pakistan & Others	CP D 8416 of 2019 - Union Fabrics Pvt Ltd v. Fed. of Pakistan & Others
CP D 8417 of 2019 - Al-Razzaq Fibres Pvt Ltd & Others v. Fed. of Pakistan & Others	CP D 8427 of 2019 - International Textile Mills v. Fed. of Pakistan &Others
CP D 8428 of 2019 - Kruddson Pvt Ltd v. Fed. of Pakistan & Others	CP D 8429 of 2019 - Indus Pencil Ind Pvt Ltd v. Fed. of Pakistan and Others
CP 8430 of 2019 - Umar Spinnig Mills Pvt Ltd v. Fed. of Pakistan & Others	CP D 8431 of 2019 - Lucky Textile Mills Ltd v. Fed. of Pakistan & Others

CP D 8432 of 2019 - Naveena Exports Ltd v. Fed. of Pakistan & Others	CP D 8433 of 2019 - Yunus Textile Mills Ltd v. Fed. of Pakistan & Others
CP D 8434 of 2019 - Khas Textiles Mills Ltd v. Fed. of Pakistan & Others	CP D 8442 of 2019 - Feroze 1888 Mills Ltd v. Fed. of Pakistan and Others
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CP D 8447 of 2019 - Orient Textiles Mills Pvt Ltd v. Fed. of Pakistan & Others	CP D 8448 of 2019 - Pakistan Diary Products Pvt Ltd v. Fed. of Pakistan & Others
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CP D 8453 of 2019 - Tapal Tea Pvt Ltd v. Fed. of Pakistan & Others	CP D 8470 of 2019 - Shield Corp Ltd v. Fed. of Pakistan & Others
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CP D 8529 of 2019 - Shabbir Tiles & Ceramics Ltd v. Fed. of Pakistan & Others	CP D 8530 of 2019 - Agriauto Stamping Co. Pvt Ld v. Fed. of Pakistan & Others
CP D 8531 of 2019 - Lucky Knits Pvt Ltd v. Fed. of Pakistan & Others	CP D 8532 of 2019 - Lucky Energy Pvt Ltd v. Fed. of Pakistan & Others
CP D 8534 of 2019 - Al-Karam Towel Ind v. Fed. of Pakistan & Others	CP D 8539 of 2019 - Krystalite Products Pvt Ltd v. Fed. of Pakistan & Others
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CP D 355 of 2020 - Baluchistan Wheels Ltd v. Fed. of Pakistan & Others	CP D 356 of 2020 - Sitara Spinning Mills Ltd v. Fed. of Pakistan & Others
CP D 357 of 2020 - Siddiqsons Industries (Pvt) Ltd v. Fed. of Pakistan & Others	CP D 358 of 2020 - Al Azmat (Pvt) Ltd VS Fed. of Pakistan and Others
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CP D 6498 of 2020 - Gharibsons Pvt Ltd v. Fed. of Pakistan & Others	CP D 6582 of 2020 - Gatron (Ind) Ltd v. Fed. of Pakistan & Others

CP D 6583 of 2020 - Novatex Ltd v. Fed. of Pakistan & Others	CP D 659 of 2020 - Searle Co. Ltd v. Fed. of Pakistan & Others
CP D 660 of 2020 - Nextar Pharma Pvt Ltd v. Fed. of Pakistan & Others	CP D 661 of 2020 - OBS Pakistan Pvt Ltd v. Fed. of Pakistan & Others
CP D 665 of 2020 - Al-Muqeet Textile v. Fed. of Pakistan & Others	CP D 6682 of 2020 - Pakistan Petroleum Ltd v. Pakistan & Others
CP D 6727 of 2020 - Younus Textile Mills VS Fed. of Pakistan & Ors	CP D 6728 of 2020 - Lucky Textile Mills Ltd v. Fed. of Pakistan & Others
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CP D 444 of 2021 - Sitara Fabric Ltd v. Fed. of Pakistan & Others	CP D 5 of 2021 - Nexter Phama Pvt Ltd v. Fed. of Pakistan & Others
CP D 6 of 2021 - OBS Pakistan Pvt Ltd VS Fed. of Pakistan and Others	CP D 7 of 2021 - Searle Co. Ltd v. Fed. of Pakistan & Others
CP D 8 of 2021 - Liberty Mills Ltd v. Fed. of Pakistan & Others	CP D 9 of 2021 - Pakistan Cables Ltd v. Fed. of Pakistan & Others
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