

**IN THE HIGH COURT OF SINDH, KARACHI**  
**C. P. No. D-5575 of 2023**

Date

Order with signature of Judge

Present: *Mr. Justice Muhammad Junaid Ghaffar*  
*Mr. Justice Zulfiqar Ahmed Khan*

Petitioner: Muhammad Naeem,  
Through M/s. Khawaja Shamsul Islam  
& Imran Taj, Advocates.

Respondents: Federation of Pakistan & Others.  
Through Mr. Qazi Ayazuddin Qureshi,  
Assistant Attorney General & Mr.  
Muhammad Khalil Dogar, Advocate  
for Respondent No. 2.

Ms. Maria Qazi, Joint Secretary (FT-II),  
Ministry of Commerce Government of  
Pakistan.

Date of hearing: 21.12.2023.

Date of Judgment: 31.01.2024.

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

**Muhammad Junaid Ghaffar, J:** Through this Petition, the Petitioner has sought a declaration that the impugned Notifications bearing SRO No.1397(I)/2023 dated 3.10.2023, SRO No.1401(I)/2023 dated 7.10.2023, SRO No.1402(I)/2023 dated 7.10.2023, and SRO No.1380(I)/2023 dated 3.10.2023, whereby, certain restrictions have been imposed on goods meant for Transit to Afghanistan are not applicable on the seven consignments as detailed in Para 2 of the memo of the petition.

2. Learned Counsel for the Petitioner has contended that the seven consignments in question were imported much prior to the date of issuance of the impugned Notifications; that a vested right has already accrued in favour of the Petitioner; that

the goods in question are for transit to Afghanistan and therefore, even otherwise, no such restrictions can be imposed by the Federal Government so as to regulate or ban the transit cargo; that clarification of Ministry of Commerce dated 17.11.2023 also supports the stance of the Petitioner; that Para 4 of the Import Policy Order notified vide SRO 545(I)/2022 dated 22.04.2022 already provides protection to the effect that any amendment made in the Import Policy Order shall not be applicable to such imports where either a bill lading or a letter of credit was issued or established prior to any such amendment; that SRO 151(I)/2004 dated 10.03.2004 which has been amended through impugned SRO 1397 is not at all relevant as presently, the transit trade between Pakistan and Afghanistan is regulated by a new Agreement dated 28.10.2010 whereas, the SRO in question is no more valid as it was issued in respect of the previous Agreement dated 2.3.1965 and therefore, in view of the law laid down by the Courts<sup>1</sup>, the Petitioner is entitled for release of the seven consignments in question.

3. On the other hand, Mr. Khalil Ahmed Dogar representing the concerned Directorate of Afghan Transit Trade has opposed the Petition on the ground that insofar as the Customs Department is concerned, they are bound to comply the directions / orders of the Ministry of Commerce which were issued vide SRO 1397, whereas, except one consignment, the remaining six have arrived after the cut-of-date as notified by the Ministry of Commerce and the only remedy available to the Petitioner is by way of re-export of such goods. He has prayed

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<sup>1</sup> Muhammad Amer Saeed v. Model Customs Collectorate of Customs (2016 PTD 2910), Haji Abdul Raziq Khan v. Federation of Pakistan (2014 SCMR 1821), Pakistan v. Aryan Petro Chemical Industries (Pvt) Ltd. (2003 SCMR 370), Messrs Baig Enterprises and Engineering v. Federation of Pakistan (2015 PTD 181), Mir Jeeand Badini v. Model Collectorate of Customs Appraisalment (2020 PTD 213), Imad Samad v. Federation of Pakistan (2022 PTD 1860), Muhammad Umer v. Federation of Pakistan (2004 PTD 94), Messrs Najib Zarab Limited v. Government of Pakistan (PLD 1993 Karachi 93), Federation of Pakistan v. Jamaluddin (PTCL 1996 CL 534), Premier Systems (Pvt) Ltd. v. Federation of Pakistan (2018 PTD 861), Collector of Customs, v. Messrs New Shinwari Ltd (2023 SCMR 1972), Messrs Mustafa Impex v. The Government of Pakistan (PLD 2016 SC 808), Haji Ihsan ullah v. Federation of Pakistan (2018 PTD 1419), Central Board of Revenue v. Messrs Kaghan Impex (PLD 1989 SC 463) and Reliance Petrochem Industries (Pvt) Ltd. v. Pakistan (order dated 6.11.2018 in Suit No. 1970 of 2018 (Unreported Judgment)).

for dismissal of instant Petition. Learned Assistant Attorney General along with Ms. Maria Qazi, Joint Secretary (FT-II), Ministry of Commerce Government of Pakistan has also opposed instant Petition on the ground that Para 4 of the Import Policy Order is not relevant inasmuch as the imports under Afghan Transit Trade Agreement are more specifically governed by Para 6(3) of the Import Policy Order and therefore, no protection can be claimed under Para 4 thereof. It has been further contended that insofar as letter dated 17.11.2023 issued by the Ministry of Commerce is concerned, it is only relevant for relaxation in the levy of processing fee and the procedural requirements; however, it is not applicable on those goods which have been banned vide SRO 1397. They have also prayed for dismissal of instant Petition.

4. We have heard all the learned Counsel as well as learned Assistant Attorney and Joint Secretary (FT-II), Ministry of Commerce Government of Pakistan and have perused the record. It appears that the Petitioner represents its various clients stationed in Afghanistan who have imported seven consignments containing various goods i.e. Tyres, Miscellaneous Cosmetic items and Textile Fabric as detailed in Para 2 of the memo of petition. At the same time, Respondent No.2 has also given details of the consignments along with their final remarks as to the status of the goods in question. They read as under: -

**Para 2 of Memo of Petition**

S. N o.	Consignee	Bill of Lading No.	Container	GD Nos & Date	Shipped on board	Arrival date
1	KAMIL MAZLUMYAR TRADING CO	ALBO202308110	TSSU5056368	ITTK-AT-16223-30-09-2023.	26-08-2023	03-10-2023
2	KAMIL MAZLUMYAR TRADING CO	SLF230800027	FFAU127209	ITTK-AT-16253-30-09-2023.	01-09-2023	03-10-2023
3	BAHAR NOORI LTD.	HDMUTAOZ234 33700	KOCU419975	ITTK-AT-16376-30-10-2023.	18-09-2023	23-08-2023
4	BAHAR NOORI LTD.	EGLV143363741 888	EISU8369443	ITTK-AT-16489-02-10-2023.	18-09-2023	06-10-2023
5	FAIZULHAQ "ACHAKZAI S/O. NOORULLAH	OOLU411981	CCLU740872	ITTK-AT-16638-03-10-2023.	16-09-2023	03-10-2023

6	BAHAR NOORI LTD.	HDMUTAOZ276 48200	KOCU4375634	ITTK-AT-16705-03- 10-2023.	23-08-2023	04-10-2023
7	KAMIL MAZLUMYAR TRADING CO	MEDUIL373715	MEDU8954688	ITTK-AT-17170-07- 10-2023.	06-08-2023	08-09-2023

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**Details by Respondent No.2**

Sr. No	GD NO.	Description of goods	Vessel Name	Arrival Date	Port of discharge	Remarks
1	ITTK-AT-16223-30-09-2023.	TYRES	TS NINGBO	03.10.2023	SOUTH ASIA PAKISTAN TERMINALS	Banned in terms of SRO 1397(I)/2023 dated 03.10.2023
2	ITTK-AT-16253-30-09-2023.	TYRES	VANCOUVER	03.10.2023	KARACHI INTERNATIONAL CONTAINER TERMINAL	Banned in terms of SRO 1397(I)/2023 dated 03.10.2023
3	ITTK-AT-16376-30-10-2023.	TYRES	HUYNDAI TOKYO	04.10.2023	SOUTH ASIA PAKISTAN TERMINALS	Banned in terms of SRO 1397(I)/2023 dated 03.10.2023
4	ITTK-AT-16489-02-10-2023.	MISC. COSMETICS ITEMS	SEATTLE BRDIGE	06.10.2023	KARACHI INTERNATIONAL CONTAINER TERMINAL	Banned in terms of SRO 1397(I)/2023 dated 03.10.2023
5	ITTK-AT-16638-03-10-2023.	TEXTILE FABRIC	VANCOUVER	03.10.2023	KARACHI INTERNATIONAL CONTAINER TERMINAL	Banned in terms of SRO 1397(I)/2023 dated 03.10.2023
6	ITTK-AT-16705-03-10-2023.	TYRES	HUYNDAI TOKYO	04.10.2023	SOUTH ASIA PAKISTAN TERMINALS	Banned in terms of SRO 1397(I)/2023 dated 03.10.2023
7	ITTK-AT-17170-07-10-2023.	TYRES	MSC SHAY	08.09.2023	SOUTH ASIA PAKISTAN TERMINALS	May be allowed release subject to furnishing bank guarantee in lieu of duty and taxes SRO 1402(I)/2023 dated 07.10.2023

5. From perusal of the aforesaid details, it appears that there are seven different consignments of various Petitioners and prior to the issuance of SRO 1397 by Ministry of Commerce, there was no impediment in the transit of subject goods, whereas, besides this ban, till the filing of this petition, the goods which are not banned under the Afghan Transit Policy, have been subjected to a processing fee at the rate of 10% ad valorem as per Notification issued by FBR bearing SRO No. 1380. At the same time, another SRO No. 1402 was issued whereby, certain amendments were made in the Customs Rules, 2001 governing the procedure of Afghan Transit goods and for the words “*revolving insurance guarantee*”, the words “*bank guarantee*” was substituted. There were some other changes in the procedure regarding handling of Afghan Transit

Trade Cargo as well. The said Notification further provided that it shall not be applicable on Afghan Transit goods declaration filed prior to issuance of the Notification dated 07.10.2023. Thereafter, on 27.11.2023 two further SROs bearing No. 1711(I)/2023 and 1712(I)/2023 both dated 27.11.2023 were issued making certain amendments in SRO No. 1380 and 1402 giving further relaxation, whereby, it has been notified that these notifications shall not be applicable to Afghan Transit Trade Cargo arrived at Pakistani Ports as determined from the berthing date of vessel during the period commencing on the 3<sup>rd</sup> day of October, 2023 and ending on the 16<sup>th</sup> day of November, 2023, and shall apply thereafter. Since the seven consignments as mentioned in the above table(s), are protected as per the amending SRO's dated 27.11.2023, therefore, for the present purposes, the only issue left for this Court to decide is the applicability and implication of SRO 1397 issued by the Ministry of Commerce. It reads as under: -

Government of Pakistan  
Ministry of Commerce

Islamabad 3rd October, 2023

**ORDER**

S.R.O. 1397(1)/2023, - In exercise of the powers conferred by sub-section (1) of section 3 of the Imports and Export (Control) Act, 1950 (XXXIX of 1950), the Federal Government is pleased to direct that in its Notification No. S.R.O. 151(1)/2004, dated 10th day of March, 2004 in the table, in the first column, after the omitted Sr. No. 2 and entry relating thereto in the second column, the following new S. Nos. and corresponding entries relating thereto shall be inserted, namely:-

“2A	Fabrics having HS Codes	5208, 5209, 5407, 5512, 5513, 5514, 5515, 5516, 5603, 5801, 5804, 5901, 5903, 6001, 6004, 6005, 6006
2B	Tyres having HS Code	4011
2C	Black tea having HS Codes	0902.4090, 0902.4020, 0902.3000
2D	Cosmetics and toiletries having HS Code	3301, 3302, 3303, 3304, 3305, 3306, 3307, 3401, 3402, 3403, 3404, 3405, 3406, 3407
2E	Nuts and fruits having HS Code	0801, 0802, 0803, 0804, 0805, 0806, 08080809, 0810, 0811, 0812, 0813
2F	Vacume flask having HS Code	9617
2G	Home appliances CBU's having HS Code	8414.5120, 8414.5130, 8414.5140, 8414.5190, 8415.1019, 8415.1029, 8415.1039, 8415.1099, 8415.8190, 8415.8290, 8415.8390, 8418.1090, 8418.2190, 8418.2990, 8418.3090,

8418.4090, 8418.6939, 8418.6990, 8422.1100, 8450.1190,  
8450.1290, 8450.1919, 8450.1999, 8450.2090, 8508.1190,  
8508.1990, 8509.4010, 8509.4020, 8509.4030, 8509.8000,  
8516.1090, 8516.2100, 8516.2900, 8516.3100, 8516.3200,  
8518.1090, 8518.2100, 8518.2200, 8518.2990, 8518.3000,  
8516.5090, 8516.6010, 8516.6020, 8516.6030, 8516.6090,  
8516.7100, 8516.7200, 8516.7990, 8516.8010, 8516.8090,  
8521.1010, 8521.1020, 8521.1090, 8521.9010, 8521.9090,  
8528.7211, 8528.7219, 8528.7290, 8543.4000

Provided that the new measures under S. No. 2A to 2G shall be subject to the following conditions, namely: -

(i) They shall not apply to the transit cargo already arrived at Pakistani ports. The cargo at high seas shall have the option for re-export upon arrival at Pakistani ports; and

(ii) They shall not be applicable on the transit cargo meant for foreign grant-in-aid to Afghanistan",

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[F. No. 1(2)/2014-Afg.]

Sd/-  
(M. Zubair Khan)  
Deputy Secretary, (Afghanistan & CARS)

6. The above SRO 1397 has been issued by the Ministry of Commerce by exercising powers conferred under sub-section (1) of section 3 of the Imports and Export (Control) Act, 1950 (XXXIX of 1950), ("Import & Export Control Act") by amending its Notification No. S.R.O. 151(1)/2004, dated 10.03.2004 and certain entries with description and HS Code have been incorporated and all these goods are now banned under the Afghan Transit Trade facility. In the same Notification a proviso has been added which states that serial No. 2A to 2G shall be subject to two conditions namely, (i) that they shall not apply to the transit cargo already arrived at Pakistani Ports, whereas, the cargo at high seas shall have the option of re-export upon arrival at Pakistani Ports, and (ii) they shall not be applicable to the transit cargo meant for foreign grant in aid to Afghanistan. Insofar as the present issue is concerned, it is only in respect of the first part of the proviso that whether the exception which has been made applicable on Serial No. 2A to 2G would cover the goods imported by the Petitioners who claim that the same had already arrived at Port. As could be seen from table(s) at Para 2 above, the consignment at Serial No.7 had arrived prior to 3.10.2023 and is not hit by the amending SRO 1397. The

rest of the consignments have arrived on 3.10.2023, 4.10.2023 and 6.10.2023. The Petitioners case is that Para 4 of the Import Policy Order, 2022 notified vide SRO No. 545(I)2022 dated 22.04.2022 protects the goods in question, whereas, the stance of the Ministry of Commerce as agitated by the learned Assistant Attorney General and the Joint Secretary (FT-II), Ministry of Commerce Government of Pakistan is that it is to be governed by the Para 6(3) of the Import Policy Order, 2022 as it is the prerogative of the Federal Government to notify the effective date of SRO 1397. It would be advantageous to refer to Para 4 and Para 6 (3) of the Import Policy Order, 2022 which reads as under:-

**“Notification No. S.R.O.545(I)2022, dated 22<sup>nd</sup> April, 2022.**—In exercise of the powers conferred by sub-section (1) of section 3 of the Imports and Exports (Control) Act, 1950 (XXXIX of 950), the Federal Government is pleased to make the following Order, namely:-

1. **Short title and commencement**—(1) This Order may be called the Import Policy Order, 2022.

(2) It shall be come into force at once.

4. **Import of goods.** —Import of all goods may be allowed from worldwide sources unless otherwise specified to be banned, prohibited or restricted in this Order:

Provided that the amendments brought in this Order from time to time shall not be applicable to such imports where bill of lading or irrevocable letters of credit were issued or established prior to the issuance of amending Order.

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6. **Restrictions:** --(1) -----

(2) -----

(3) Imports under border trade agreements and Afghanistan-Pakistan Transit Trade Agreement shall be made in accordance with procedure notified by the Federal Government from time to time.

7. From perusal of Para 4 of the Import Policy Order, 2022, it reflects that import of all goods is allowed from worldwide sources unless otherwise specified to be banned, prohibited or restricted, whereas, the proviso states that the amendments brought in this Order from time to time shall not be applicable to such imports where bill of lading or irrevocable letters of credit have been issued or established prior to the issuance of the

amending Order. On a simple understanding of Para 4 and as interpreted by various Judgments of the Courts, there remains no doubt that insofar as the ordinary imports into Pakistan are concerned, if by way of an amending Order / Notification certain goods have been put on a banned or restricted list or which require fulfillment of some further formalities before they are imported, the applicable date of such an amending Order or Notification would be prospective and shall not be applicable to goods for which either a bill of lading has been issued or an irrevocable letter or credit has been established. In the instant matter it is not in dispute that Bills of Lading of the remaining 6 consignments were issued prior to 3.10.2023. While confronted, it has been contended on behalf of the Ministry of Commerce, Government of Pakistan that this Para is only in respect of imports into Pakistan and it does not apply to Afghan Transit goods which are governed by SRO No. 151 duly amended by the Federal Government through SRO 1397. It has been further argued by them that the effective date and the conditions for its enforcement have also been notified by the Federal Government by exercising its discretion in terms of Para 6(3) *ibid* which states that Afghanistan-Pakistan Transit Trade Agreement shall be made in accordance with procedure notified by the Federal Government from time to time. However, on a plain reading of the above provisions, the contention of the Respondents including Ministry of Commerce cannot be accepted on this ground alone. It is not in dispute that Para 6(3) is part of the Import Policy Order, 2022, notified in terms of Section 3(1) of the Import & Export Control Act, and it only states that the imports under Afghanistan-Pakistan Transit Trade Agreement shall be made in accordance with the procedure notified by the Federal Government from time to time. However, the main SRO 151 which has been amended by the impugned SRO 1397 has not been issued in terms of Para 6(3) of the Import Policy Order 2022; but it is an independent



SRO issued while exercising powers under Section 3(1) of the Import & Export Control Act read with Article X of the Agreement between the Government of Pakistan and the Government of Afghanistan. Therefore, the protection sought in terms of Para 6(3) of the Import Policy Order, 2022 and the argument that Para 4 thereof would not ipso facto be applicable on the Afghan Transit Trade goods does not appear to be in consonance with the Notification under consideration including the Import Policy as a whole. Since SRO 151 (amended by SRO 1397) has been issued under Section 3(1) of the Import & Export Control Act, therefore, Para 4 thereof of the Import Policy Order, 2022 which has also been issued under the same provision can be made applicable to the goods notified through SRO 151 and Para 6(3) ibid would not be an impediment as such, as it only provides an exception to the general conditions of Import. However, when the question as to the applicability of an amending Order / Notification arises, the benefit of Para 4 will be available in generality. We do not see as to why a benefit to an ordinary Importer is available but not to Afghan Transit Goods despite the fact that both are similarly placed as to performing an impossible task of halting its imports on high seas or for that matter have it re-exported. It further appears that after issuance of the impugned SRO 1397 some representation was made by the Afghanistan Government through its Minister of Commerce and Industries and subsequently, the Ministry of Commerce has issued a Letter dated 17.11.2023 giving further concession and extension in the applicable dates of its Notifications. The same reads as under: -

"F.No. 1(2)/2014-AFG  
Government of Pakistan  
Ministry of Commerce

Islamabad the 17<sup>th</sup> November, 2023

Subject:- **ONE TIME RELEASE OF AFGHANISTAN TRANSIT TRADE CONTAINERS  
STUCK AT KARACHI PORTS**

Please refer to Federal Board of Revenue's SRO 1380(I)/2023 dated 3rd October, 2023 under which processing fee @ 10% ad valorem on smuggling prone items imported into Afghanistan in Transit via Pakistan was imposed and SRO 1402(1)/2023 dated 7th October, 2023 under which the bonded carriers/customs agents filing the GDs for Afghan transit trade cargo are required to submit Bank Guarantee with customs authorities to cover the leviable duty and taxes in the GDs for Customs security.

On the request of the visiting delegation from Afghanistan led by the Minister for Commerce & Industry, during the negotiations held from 15-16th November, 2023 led by Minister for Foreign Affairs and Minister for Commerce and Industries & Production, Pakistan about the stuck up ATT containers, at Karachi, the Government of Pakistan, as a gesture of good will, has agreed to allow the release of the subject containers, under previous policy requirement of Insurance Guarantee. This does not include the containers of items prohibited in Afghanistan Transit Trade under SRO. 1397(1)/2023 dated 3.10.2023.

The Federal Board of Revenue and Directorate General of Transit Trade are directed to allow one-time release of the containers imported by Afghanistan which arrived at Pakistani ports from 03-10-2023 to 16-11-2023, in relaxation of the provisions of SRO 1380(1)/2023 dated 3<sup>rd</sup> October, 2023 and SRO 1402(1)/2023 dated 7<sup>th</sup> October, 2023.

It is further directed that the cross border of the subject containers may be arranged in coordination with the relevant Security Agencies in batches on urgent basis and daily report may be provided by FBR to the Ministry of Commerce for onward submission to the Competent Authorities.

Sd/-  
(Maria Kazi)  
Joint Secretary (FT-II)

8. From perusal of the aforesaid letter, it reflects that Federal Board of Revenue has been directed to grant one-time release of the containers imported under the Afghan Transit Trade which arrived at Pakistani Ports from 03.10.2023 to 16.11.2023, in relaxation of the provisions of SRO 1380 and SRO 1402 and as a consequence thereof, neither the processing fee is to be levied nor the requirement of bank guarantee has to be enforced during such period. Such period has been further extended and clarified vide SRO 1711 and 1712 as noted hereinabove in Para 5. At the same time, it has been further clarified that this concession does not include the containers of items prohibited in Afghani Transit Trade under SRO 1397. Now from perusal of the above clarification, it further appears that as to the levy of processing fee and

submission of bank guarantee, the time frame has been extended and notwithstanding the fact that pursuant to Cabinet's approval, certain Notifications were already issued by FBR, but still their applicable dates have been extended. However, at the same time, without any reason or justification, it has been clarified that this concession and extension in time frame would not be applicable on the goods so notified as banned in terms of SRO 1397. There does not appear to be any justification and rationale in arriving at such a conclusion. If a relaxation has been provided in respect of levy of processing fee and furnishing of bank guarantee for goods already shipped prior to 3.10.2023, then why the same benefit cannot be extended to the category of goods which have been put on banned list through impugned SRO 1397. Moreover, when the Import Policy Order, 2022, already provides such a protection generally to all importers. It needs to be appreciated that it is not within the hands of the Afghan Importers to suddenly stop shipment of goods on high seas or at Port and thereafter, re-export it at the same time. The same is not only difficult but is an impossibility to execute and so also against all norms of free trade including Transit trade. Time and again, Para 4 of the Import Policy Order, 2022, has been interpreted by the Courts and it is the consistent view of the Courts that any such amendment brought in the Import Policy Order, cannot be applied on goods which are already shipped and bill of lading has been issued; or an irrevocable letter of credit has been established.

9. The Lahore High Court in the case of ***Kaghan Impex v. Central Board of Revenue & Others*** (PLD 1982 Lahore 608) had the occasion to examine an amendment made in the Import Policy Order, whereby in terms of SRO dated 13.10.1980 an amendment was made in Para 8(4) of the Import Policy Order, 1980, which resultantly read as "*Import of goods*

*from India (including goods of Indian Origin from any country) will be allowed to public sector agencies”.....*, whereas, previously the words read as *“Import of goods from India (including goods of Indian origin) will be allowed to public sector agencies”... The petitioner imported its consignment from Singapore prior to the amending SRO dated 13.10.1980, however, when it arrived in Pakistan, the same was confiscated on the basis of the amending Notification that goods from India and of Indian Origin from any country are no more importable by the private sector. The learned Lahore High Court was pleased to hold as under:*

The change in the import Policy Order, 1980, through the amending provisions cannot affect past and closed transactions and the petitioners have a vested right to demand that their case be decided according to the law as it existed when the action was begun, unless the amendment shows a clear intention to the contrary. I am, however, of the considered view that the amendment does not operate retrospectively. Reference may also be made to *B. G. N. Bhandari v. Rehabilitation Authority, Lahore (2)* and *Ahmad Ali Khan v. Muhammad Raza Khan and others (3)*, wherein it was held that a subsequent change in the law cannot affect past and closed transactions.

10. In appeal the matter went before the Hon'ble Supreme Court and the case is reported as ***Central Board of Revenue v. Messrs Kaghan Impex and another*** (PLD 1989 SC 463), wherein the Apex Court observed as under;

There is force in these submissions. As already stated the ban contained in the Import Policy Order, 1979, was directed only to goods of Israel, South Africa, Taiwan a province of the People's Republic of China, Rhodesia or goods originating from any of these countries. It was only later on i.e. on 13-10-80 that a similar ban was imposed for the first time in relation to goods originating from India. The Government apparently was becoming wiser by lapse of time and by stages, but the amendment made on 13-10-1980 could not, as rightly pointed out by the High Court, apply to the goods which were imported much earlier.

In the result when the disputed goods were imported by the respondents and arrived in Pakistan notwithstanding the fact that they were goods of Indian origin having been imported not from India but from another country (Dubai) they were not liable to confiscation in terms of Import Policy Order, 1979, then in force.

11. Similarly in the case reported as **Government of Pakistan through Ministry of Finance v Manzoor Brothers** (1995 SCMR 516), the Hon'ble Supreme Court had the occasion to examine the judgment of the learned Lahore High Court in respect of a similar situation, wherein, on the basis of a Ruling dated 15.8.1993 issued by the Chief Controller of Imports and Exports, the clearance of consignments for which the Bills of Entries were filed prior in time i.e. on 20.2.1983 and 31.5.1983, was withheld by the Customs, and the Apex Court approved the observations of learned Lahore High Court in the following manner;

In this case, the respondent firm had presented the Bills of Entry in one case on 20-2-1983 and in the other on 31-5-1983. The Policy ruling was given on 15th August, 1983. This ruling could not affect goods imported before 15-8-1983. We, therefore, agree with the following observation of the High Court:

"The present goods were imported in March 1983 and if at all the ruling of the Controller-of Imports and Exports had to be applied, it should only have been in respect of imports made on or after 15-8-1983 which was the date of the ruling of the Controller. The application of the Controller's decision retrospectively on the case of the petitioner cannot be permitted, because the goods were imported by the petitioner around March 1983."

No good ground for interference with the orders of the High Court has been made out. Accordingly, these appeals must be dismissed. No costs.

12. In the case of **Federation of Pakistan v Muhammad Aslam**<sup>2</sup>, a somewhat similar issue came up before Supreme Court inasmuch as a policy was notified whereby, Pakistanis living abroad could import or bring in Trucks and Buses from their own foreign exchange earnings. Subsequently, old Buses and Trucks were also allowed to be imported and thereafter, a change in definition was made as to what constitutes *new* and *old* vide press Note dated 20.3.1983. The Respondent / Petitioner had already entered into a contract to import Buses as per the un-amended policy of Ministry of Commerce. Being

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<sup>2</sup> 1986 SCMR 916

aggrieved he approach the Lahore High Court and his petition was allowed and before the Supreme Court the stance of the Ministry of Commerce was that it possessed untrammelled powers and could restrict or prohibit or control the imports under Section 3(1) of the Import and Export Control Act, and while recognising such powers, it was held by the Court that there is an exception to exercise of such powers. The Court relying upon the case of **Zamir Ahmed**<sup>3</sup>, held that one such limit as spelt out in the said case is that vested rights cannot be allowed to be overridden, unless it takes place by unequivocal words, by an organ or authority competent to impair or override the vested rights. And while holding so, it was further held that all executive power has to be exercised fairly and justly, for advancing the object of the legislation; in other words, every such exercise of power has to satisfy the test of reason and relevance. In the instant matter the Ministry of Commerce has not come up with any justifiable reason not to grant the benefit of Para 4 of the Import Policy Order, 2022, which otherwise is available to all ordinary imports into the Country, whereas, the argument that it has been done to curb the menace of smuggling of these goods back into Pakistan is hardly a justifiable reason to accept. This very argument was earlier also raised on behalf of the Pakistan Government in **Jamaluddin**<sup>4</sup>, and it was contended that since the transit facility extended to Afghanistan under the Transit Agreement was being misused and the tyres (one of the items in the impugned SRO 1397) imported for Afghanistan were smuggled back to Pakistan on a massive scale; hence, the authorities took the impugned action to protect the economic interests of Pakistan. It was further contended that such an action was permissible under Article X of the Transit Agreement (of 1965) which enables either party to the Agreement to adopt and enforce measures necessary to protect public morals, human, animal or plant life or health and

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<sup>3</sup> Federation of Pakistan v Zamir Ahmad (PLD 1975 SC 667)

<sup>4</sup> Federation of Pakistan v Jamaluddin (1996 SCMR 727)

for the security of its own territory. However, neither in that case nor in the case in hand, it is the case of the Respondents that the impugned action taken by them was necessary to “*protect public morals, human, animal or plant life or health*”. In fact, as per the comments and the arguments raised before us the impugned measure (imposition of ban and disallowing the transit facility) has been defended on the ground that it was necessary to put a halt to the increase in smuggling of the impugned goods. The Supreme Court went on to hold otherwise and ruled that they were not persuaded to accept this contention because the words used in Article X of the Transit Agreement are “for the security of its own territory” which can by no stretch of reasoning or logic be construed as economic security of the country. Territorial security/integrity has a definite connotation which could not be said to have been jeopardized/threatened by the alleged smuggling of tyres into Pakistan. It was further observed that the problem of smuggling could well be solved by adopting and enforcing strict and effective anti-smuggling measures. The Supreme Court then went on to uphold that observations of the learned Judges of the High Court that, “*If the grievance of the respondents was, as it seems to have been, that the tyres and tubes after entering into Afghanistan illegally re-entered into Pakistan and are mixed up with mass of other tyres and tubes, then other remedies might be open to the respondents*”. Finally, it was held that in our considered view, the alleged smuggling of the tyres into Pakistan could not furnish any valid justification to the appellants to unilaterally take away the facility of transit or to impose any restriction on the duty-free import itself which was guaranteed by the Transit Agreement. It was held that:

“Customs Authorities should have proceeded under Article VIII of the Transit Agreement or recourse should have been taken to the machinery provided under Article XII of the Agreement which provides for negotiation and in the event of failure of negotiations, to refer the matter to an arbitrator acceptable to both the parties whose decision would be binding on them. Failing to find any solution through this mechanism, the Government of Pakistan could terminate the Transit Agreement which

is terminable at the instance of either party at any time after giving six months' notice of termination and re-negotiate fresh terms of the Transit Agreement. In fact, during the course of hearing, we were informed that the meetings between the parties were already being held and the parleys were in progress for re-negotiating/re-drafting the Transit Agreement. This appears to be the only lawful and reasonable course in the facts and circumstances of the case. Needless to observe that so long as the Afghan Transit Trade Agreement of the year 1965 is subsisting, the appellants had no option but to allow the goods in transit to be transited to Afghanistan in accordance with the terms of the said Agreement and the procedure laid down in the Protocol and the Annex appended therewith. Section 129 of the Customs Act also requires the Customs Authorities to allow the goods in transit to be transmitted to the country of their destination without payment of any duties which are otherwise chargeable thereon. We have not been shown any provision in the Customs Export Transit Rules to show that the Customs Authorities had any jurisdiction to impose ban on the import of goods intended to be transited to another country across the territory of Pakistan or to refuse to allow the transit of such goods to that country.

13. Admittedly, the Transit Agreement of 1965 has been replaced with the 2010 Agreement; however, SRO 151 still refers to Article X of the Agreement (without specifying the year), whereas, in the new Agreement of 2010 Article X relates to and deals with Licensing of Transport Operators. Though we believe that this appears to be a mistake on the part of Ministry of Commerce, that since 2010 SRO 151 has not been amended accordingly. Not only this, even when the impugned SRO 1397 was issued, they again failed to take care of it and the said mistake still continues. Since, we are of the view that the present issue can be resolved on a simple interpretation of Para 4 and 6(3) of the Import Policy Order, 2022, we have restrained ourselves from giving any final observation as to the very implication of this mistake and the applicability of SRO 151 as amended by SRO 1397, as a whole.

14. Another important legal issue which also stands decided by the Supreme Court in the case of Jamaluddin (Supra) is to the effect that the transit goods to Afghanistan are not “imports” in literal sense and since Afghanistan is a land locked country, the goods so imported by Afghan Nationals from other countries could not said to have been imported into Pakistan



merely because they crossed the Customs barrier as they are goods in transit and are to be regulated and governed by the Transit Agreement alone. Par 9 of the said report is relevant and reads as under:

9. From the afore-noted resume of the factual background and the respective contentions raised by the learned Deputy Attorney-General and the learned counsel appearing for the respondent-importer, the question which arises for consideration is whether the C.B.R. and/or the Collector of Customs could lawfully ban/disallow import of tyres by Afghan nationals under the Afghan Transit Trade Agreement and refuse the facility of transit through the territory of Pakistan in respect of such tyres during the subsistence of the said Agreement: This question when examined on a purely legal and jurisdictional plan, its answer is bound to be in the negative. We quite agree with the view taken by the learned Judges of the High Court that keeping in view the background of the Transit Agreement and the fact that Afghanistan is a land-locked country, the goods imported by Afghan nationals from other countries for use and consumption in Afghanistan could not be said to- have been imported into Pakistan merely because they crossed the Custom barrier and entered into Pakistan, through to be transited to their destination viz Afghanistan. Such goods, in fact, are goods in transit to be dealt with and transhipped to Afghanistan in accordance with the Transit Agreement and the Protocol appended thereto Customs law relating to the importation would not, therefore, be applicable to them....”

15. In the case of **Salahuddin**<sup>5</sup> the issue before the Supreme Court was that whether the respondent / Petitioner had any vested right in the matter of obtaining an Import License in importing the machinery for which a license had already been issued notwithstanding a Prohibitory Notification duly issued under Section 3(1) of the Import and Export Control Act. In that case the Government had notified a Scheme that import of second-hand reconditioned machinery under NRI Scheme (Non-Repatriable Investment Scheme) and any person so entitled for is required to have a No Objection Certificate. The Respondent had obtained the No Objection Certificate; but during such period some further prohibition was notified and the Respondent/Petitioner was told that no Import License could be issued nor the goods can be imported. The learned High Court of Sindh had allowed the Petition of the Respondent and the stance taken by the Government of Pakistan before the

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<sup>5</sup> Pakistan Vs. Salahuddin (PLD 1991 SC 546)

Supreme Court was that the Doctrine of Promissory Estoppel does not extend to legislative and executive actions or sovereign functions of the State and while holding that such stance is correct to a certain extent that it does not indeed extend to legislative and sovereign functions; but at the same time executive actions are not excluded from operation of the said Doctrine. The Supreme Court while accepting that the case is fully covered under the Doctrine of Promissory Estoppel and also relied upon the case of **Ch. Muhammad Aslam (Supra)** as already discussed hereinabove in Para 12 of this opinion. Going further, it was further held by the Supreme Court that Doctrine of Promissory Estoppel is subject to following limitations<sup>6</sup>, none of which is attracted in these appeals before it. Reference may also be made to the famous case of **Al-Samrez**<sup>7</sup>, wherein the concept of accrual of vested rights has been approved and is still followed notwithstanding that certain amendments have been made in Section 31A of the Customs Act, 1969, to undo the effect of the said judgment. The same applies in the given facts of the case in hand.

16. In view of hereinabove facts and circumstances of this case and in view of the judgment of the Supreme Court delivered in **Jamaluddin (Supra)** as to the validity and overriding effect of the Transit Agreement and so also considering Para 4 of the Import Policy Order, 2022, notwithstanding that the Ministry of Commerce may have powers in terms of Section 3(1) of the Import & Export Control Act, (as other issues except the applicability of SRO 1397 is no more in dispute) we cannot uphold the stance of the Respondents that any such ban could also be imposed unilaterally on the goods which have already

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<sup>6</sup> (1) The doctrine of Promissory estoppel cannot be invoked against the legislature or the laws framed by it because the legislature cannot make a representation;(2) Promissory estoppel cannot be invoked for directing the doing of the thing which was against law when the representation was made or the promise held out;(3) No agency or authority can be held bound by a promise or representation not lawfully extended or given;(4) The doctrine of Promissory estoppel will not apply where no steps have been taken consequent to the representation or inducement so as to irrevocably commit the property or the reputation of the party invoking it; and (5) The party which has indulged in fraud or collusion for obtaining some benefits under the representation cannot be rewarded by the enforcement of the promise.

<sup>7</sup> Al-Samrez Enterprise v The Federation of Pakistan (1986 SCMR 1917)

been shipped and for which Bills of Lading have already been issued (*in fact 3 (three) have arrived at Karachi Port on 3.10.2023; 2 (two) on 4.10.2023 and 1 (one) on 6.10.2023*). Such an action would be too harsh as well as against the settled principle of protection to vested rights besides being impractical. It is our considered view that the principal of vested right as enunciated by the courts of law is very much applicable in the instant matter, hence, the impugned SRO 1397 does not appear to be applicable on the goods in dispute which are to be governed by the policy as in vogue prior to the issuance of SRO 1397 dated 03.10.2023. Accordingly, the Petition is **allowed** in the above terms.

Dated: 31.01.2024

**J U D G E**

Arshad/

**J U D G E**