

IN THE APPELLATE TRIBUNAL INLAND REVENUE OF PAKISTAN
(DIVISION BENCH - I, ISLAMABAD)

ITA No.539/PB/2024
(Tax Year 2021)

M/s Gul Shahzada Enterprises Pvt. Ltd.
Main Road Dargai,
Opp. Gull Cooking Oil & Vegetable F-Ghee Mill,
Malakand.
NTN 2552614

Appellant

Vs.

The Commissioner Inland Revenue
Corporate Zone,
Regional Tax Office, Peshawar.

Respondent

Appellant By	:	Mr. Siyar Ahmad, Advocate/AR
Respondent By	:	Nemo
Date of Hearing	:	24.10.2024
Date of Order	:	11.11.2024

ORDER

M.ABDULLAH KHAN KAKAR (MEMBER):- This appeal is filed as first appeal before this forum by the taxpayer/appellant in terms of section 126A(1)(b) of the Income Tax Ordinance 2001 (the Ordinance) against an order passed by the Additional Commissioner IR (ADCIR) u/s 122(5A) of the Ordinance. The grounds of appeal are as per memo of appeal.

2. Brief facts of case are that the taxpayer filed income tax return declaring turnover of Rs.3,772,852,296/- as exempt from tax. The assessment deemed to be finalized was considered erroneous insofar as prejudicial to the interests of revenue in terms of section 122(5A) of the Ordinance for reasons that the taxpayer had not paid minimum tax u/s 113 of the Ordinance. In view of ADCIR, the taxpayer was obligated to pay minimum tax irrespective of the fact that its income was exempt from tax. Accordingly, a notice u/s 122(5A) of the Ordinance was issued to the taxpayer confronting with the said shortcoming. In reply the taxpayer contended that being a resident of ex-FATA, its income was exempt from tax under clause (145A) of part I



of 2nd Schedule to the Ordinance. The reply was rejected as minimum tax u/s 113 of the Ordinance was payable irrespective of exemption unless also provided for vide clause (11A) of Part IV of second schedule to the Ordinance. The proceedings were concluded by taxing turnover of the taxpayer u/s 113 of the Ordinance and a tax liability of Rs.56,592,784/- was created.

3. On due date the AR was present whereas no one attended proceedings to represent the department. The AR argued the case in light of grounds of appeal and also furnished written arguments. He provided a brief description of taxation in the erstwhile areas of FATA/PATA to establish that since income of the taxpayer was exempt from tax under cause (145) of Part I of the Ordinance no tax was leviable on the turnover. The appeal is decided as under.

4. A brief back ground on application of tax laws to the erstwhile areas of FATA/PATA is necessitated to decide the issue in hand. The twenty fifth constitutional amendment merged FATA/PATA areas with the province of Khyber Pakhtunkhwa (KP) as a result of which the tax laws stood extended to those areas. However, on demand of the business community of those areas, a phased approach to extend the tax laws was planned. Thus, for this purpose several provisions were inserted in the Second schedule to the Ordinance through SRO 1213(I)/ 2018 dated 05.10.2018 (hereinafter referred to as SRO 1213). These provisions were time specific and later amended to extend the time period of exemption. These provisions are briefly commented as it would be helpful in subsequent discussion.

- Clauses (146) and (145A) of Part I of 2nd schedule to the Ordinance restored the status of erstwhile areas of FATA/PATA prior to the twenty fifth constitutional amendment which envisaged no taxation under the Ordinance in erstwhile FATA/PATA. These clauses were introduced respectively through SRO 1213 and Finance Act 2019 and provided general exemption for the period 01.07.2018 to 30.06.2025 (the period of limitation was extended through different amendments)



- Clauses (110) and (109A) of Part IV of 2nd schedule to the Ordinance, introduced respectively through SRO 1213 and Finance Act 2019 pertained to application of WHT provisions of the Ordinance. In terms of these clauses the WHT provisions would not be applicable in the erstwhile areas of FATA/PATA as exempted prior to the twenty fifth constitutional amendment for the period 01.07.2018 to 30.06.2025 (the period of limitation was extended through different amendments).

The above provisions unequivocally express the intention of legislature to put in abeyance application of the Ordinance in erstwhile FATA /PATA. It would be inconceivable that the legislature would on the one hand restore the status of erstwhile areas of FATA/PATA as existing prior to twenty fifth constitutional amendment – which does not envisage application of tax laws, and yet nullify its own decision by taxing turnover u/s 113, as will be discussed later. At this stage reference to a judgment of honorable Peshawar High would be relevant. The



honorable Court in a judgment cited as **2019 PTD 1652** (2019 SLD 1849 / (2019) 120 TAX 340) in a case titled *M/s Abid Foundry Vs. Federal Government* discussed in detail application of tax laws in light of SROs 1212 and 1213 of 2018 and held;

QUOTE:

“17. The upshot of the above discussion is that, the petitioners are not liable to pay any tax which was not applicable prior to the Constitution (Twenty-fifth Amendment) Act, 2018.”

(Emphasis Supplied)

UNQUOTE.

The judgment supra did not specifically discuss clause (146) ibid but the ratio of the said judgment would be applicable for clauses (146) and (145A) as well. Thus, when it is stated that provisions of the Income Tax Ordinance 2001 are not applicable in erstwhile FATA/PATA it would mean all of the Ordinance and not specific provisions.

5. Having summarized above the purpose and intent of the legislature on tax treatment of erstwhile areas of FATA/PATA, we shall now discuss taxation of income u/s 113 of the Ordinance. Section 113 ibid provide for levy of minimum tax on turnover irrespective of the fact, inter alia, any loss or exemption from tax. For the purposes of section 113 ibid, the turnover is deemed income, as only income is taxable under the Ordinance. Reference is made to sub section (2) of section 113 of the income which reads as under;

(2) Where this section applies:

(a) the aggregate of the person's turnover as defined in sub-section (3) for the tax year shall be treated as the income of the person for the year chargeable to tax;...

The expression 'income' is defined vide sub section (29) of section 2 of the Ordinance as under;

(29) "income" includes any amount chargeable to tax under this Ordinance, any amount subject to collection 2[or deduction] of tax under section 148, 150, 152(1), 153, 154, 156, 156A, 233, sub-section (5) of section 234 and any amount treated as income under any provision of this Ordinance and any loss of income;

(Emphasis Supplied)



Thus, the turnover **treated** as income in terms of sub section (2) of section 113 of the Ordinance falls in the definition of income under sub section (29) of section 2 ibid.

Therefore, the turnover shall be covered in clauses (146) and (145A) ibid and would be exempt.

6. Although turnover deemed as income, is liable to tax irrespective of any exemption, clause (IIA) of Part IV of 2nd schedule to the Ordinance provides exclusions from levy of minimum tax in cases specified therein. The areas comprising FATA/PATA figure in sub clause (xx) of clause (IIA) ibid which reads as under;

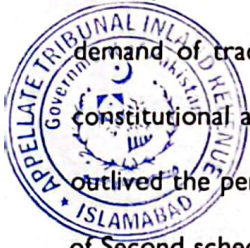
"(xx) taxpayers located in the most affected and moderately affected areas of Khyber Pakhtunkhwa, FATA and PATA for tax year 2010, 2011 and 2012 excluding manufacturers and suppliers of cement, sugar, beverages and cigarettes."

The said sub clause is applicable only for tax years 2010, 2011 and 2012 for specific category of businesses.

7. It is evident from the text of clauses (146) / (145A) and (11A) *ibid* that these are in such conflict that one renders the other two as redundant. It is a trite law that redundancy cannot be ascribed to the legislature. Therefore, such anomalies in law are addressed by way of harmonious interpretation of law. This requires a proper understanding of the intent and purpose of the legislature in wake of the tax scenario evolved after the twenty fifth constitutional amendment.

8. It would be appropriate to analyze SRO 1213 from a different perspective. The said SRO explained the purpose of legislature that a phased approach was required for full implementation of tax laws in the erstwhile FATA/PATA areas therefore on demand of trading community of these areas, the status prior to the twenty fifth constitutional amendment needed to be restored. Therefore, after clause (146) *ibid* outlived the period prescribed therein, a new clause (145A) was introduced in Part I of Second schedule to the Ordinance (reproduced above) whereby the application of provisions of the Ordinance was held in abeyance till 30.06.2025. Similar treatment was accorded to clauses (109A) and (110) of Part IV of 2nd schedule to the Ordinance. The intention of the legislature is unambiguous i.e. the provisions of the Ordinance would not be extended to erstwhile FATA/PATA areas instantly and the status of these areas for the purposes of taxation would deem to be as existing prior to the twenty fifth constitutional amendment.

9. There is no denying to the fact that prior to the twenty fifth constitutional amendment, provisions of income tax ordinance were not applicable in erstwhile areas of FATA/PATA. Thus, intention of legislature would be defeated if income, whether actual or deemed, is taxed under any provision of the Ordinance.



10. In the instant case, the taxpayer is functioning at Special Economic Zone, Mohmand situated in erstwhile FATA areas which is not disputed by the department. There is also no ambiguity nor any dispute that prior to the twenty fifth constitutional amendment the income of the taxpayer was not taxable under the Ordinance, therefore there would be no basis for taxing the income of the taxpayer u/s 113 of the Ordinance. The department can apply provisions of the Ordinance by first establishing that the benefits available prior to twenty fifth constitutional amendment were not available in a specific case. If the turnover of businesses in erstwhile FATA/PATA was not liable to tax, it would remain untaxable under the law by applying doctrine of harmonious construction of law.

11. In view of above discussion, we are of the view that turnover of the taxpayer



is not liable to minimum tax as situation of taxation as existing prior to the twenty fifth constitutional amendment has to be maintained. Accordingly, we annul the

12. The appeal filed by the taxpayer succeed.

13. This order comprises of six (06) pages and each page is signed.

(IMRAN LATIF MINHAS)
MEMBER

(M. ABDULLAH KHAN KAKAR)
MEMBER

Appeal No. ITA No-539/19/24
Date of Order 11-11-24

TRUE COPY OF ORDER FORWARDED TO

1. APPELLANT

2. RESPONDENT

Mr. Muhammad Asghar/PS

Civil Shahzada Enterprises Mela Kand-
CIR RTO Peshawar