

Stereo: HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE.

JUDICIAL DEPARTMENT

W.P. No. 23960 of 2023

Arzoo Textile Mills Ltd. etc. Vs. Federation of Pakistan etc.

Date of Hearing	21.06.2023, 23.06.2023, 26.06.2023 and 27.06.2023.
Petitioners By	Mr. Salman Akram Raja, Mr. Arslan Riaz, Rai Amer Ijaz Kharal, Mr. Rabeel Safdar Tatla, Mr. Muhammad Omar Malik, Mr. Arslan Fazil, Mr. Mustafa Kamal, Malik Bashir Ahmad Khalid, Mr. M.A. Rizwan Kamboh, Mr. Qamar-uz-Zaman Cheema, Mr. Khalil-ur-Rehman, Mr. Hashim Aslam Butt, Mr. Naveed Khalid, Ms. Samia Aslam, Mr. Saima Safdar Chaudhary, Ms. Uzma Firdous, Malik Farrukh Khurshid, Malik Ahsan Mehmood, Hafiz Muhammad Shehzad, Ch. Iqbal Ahmad Khan Dehangal, Mr. Nauman Aziz, Mr. Abdul Rehman Qadar Khan, Barrister Hassan Qadar Khan, Rana Sohail Ashraf, Malik Imran Khan Thaheem, Mr. Muhammad Ihtisham Arshad, Mian Mehmood Rashid, Mr. Irfan Ghaus Ghumman, Mr. Irfan Dogar, Mr. Hassan Raza, Mr. S.M. Ghaffar Khan, Mr. Iftikhar Gull Khan, Mr. Muhammad Amir Masood Niazi, Barrister Muhammad Hassan Anwaar Pannun, Rana Muhammad Imran Qamar, Mr. Muhammad Tariq Bashir, Mr. Muhammad Abu Bakar, Mr. Abdul Hameed Tahir Kasuri, Mr. Ali Akbar Rana, Mr. Tanveer Ahmad Gill, Mr. Abdul Waheed Habib, Mr. Muhammad Nauman Khurshid Mayo, Mr. Waseem Ahmad, Ch. Babar Waheed, Syed Tassadaq Mustafa Naqvi, Syed Tassadaq Murtaza Naqvi, Mr. Ali Naqi Zaidi, Mr. Muhammad Anwar Khan, Mr. Muhammad Usman Latif, Mr. Muhammad Arfan Randhawa, Mr. Muhammad Umar, Syed Muhammad Ali Abdullah Mashhadi, Mr. Omer Daraz Sheikh, Sardar Jehangir Hassan Dogar, Barrister Ch. Hasnain Yunus, Mr. Mujtaba Hassan Tatla, Mian Aqeel Chaudhary, Mr. Muhammad Nadeem Abbasi, Barrister Taimoor Malik, Barrister Maleeha Bukhari, Mr. Mohsin Iqbal, Barrister Maryam Hayat, Mr. Naveed Anjum, Mr. Muhammad Irfan Khan, Mr. Fazal Elahi Akbar, Mr. Muhammad Usman Rafiq, Mr. Muhammad Imran Mansha, Mr. Moiz Tariq, Mr. Riasat Noor

	<p>Zaman, Mr. Muhammad Aslam Sheikh, Mr. Muhammad Shehzad Wattoo, Mr. Muhammad Naeem, Mr. Muhammad Tahir, Mr. Haris Iftikhar, Mr. Mustafa Haroon, Mr. Mohib Ghazi, Mr. R.A. Majid, Mr. Abdul Qadus, Rana Zohaib, Mr. Anees Sherwani, Mr. Sher Baz Ali, Mr. Muhammad Imtiaz Gujjar, Mr. Muhammad Saad, Mr. Muhammad Javed Arshad, Mr. Hammad-ul-Hassan Hanjra, Malik Ghulam Hassan Ahmad, Mr. Waqar Hassan, Mian Muhammad Hussain, Mr. Nauman Azeem Butt, Mr. Abuzar Hussain, Sardar Azam Mehmood Kasana, Mian Ijaz Latif, Mr. Anees-ur-Rehman, Malik Nadir Ali Sherazi, Mehar Junaid Masood Ahmad, Mr. Faisal Zaffar, Ch. Ahsan Gujjar, Mr. Tanvir Abbas Bhatti, Mr. Muhammad Muzahir Chaudhary, Syed Alamdar Hussain, Mr. Muhammad Irfan Liaqat, Mian Subah Sadiq Klasson, Mr. Muhammad Faizan Sadiq, Syed Waqas Zafar, Mr. Aasim Sohaib, Mr. Muhammad Tahir Munir, Rana Muhammad Usama, Mr. Saad Waqas, Mr. Muhammad Imtiaz-ur-Rehman, Azeem Ullah Virk, Ch. Usman Latif, Mr. Sagheer Ahmad, advocates.</p>
<p>Respondents By</p>	<p>Mr. Nasar Ahmad, Additional Attorney General for Pakistan, Mr. Badar Munir Malik, Deputy Attorney General and Ch. Usman Ghani, Assistant Attorney General.</p> <p>Mr. Shoaib Rashid, Mr. Waleed Khalid, advocates for LESCO.</p> <p>Mr. Muhammad Bilal Munir, advocate for LESCO/FBR/NTDC.</p> <p>Mehr Shahid Mehmood, Deputy Manager (Legal), Mr. Basharat Ali Mehmood, Deputy Manager (Legal) LESCO.</p> <p>Mirza Aurangzeb and Mr. Muhammad Imran Naru, advocates for GEPCO.</p> <p>Mr. Waqar A. Sheikh, Muhammad Azeem Daniyal and Syed Faisal G.Meeran, Sarfraz Ahmad Cheema, Shehzad Ahmad Cheema, advocates for FESCO.</p> <p>Mian Muhammad Javed and Malik Asif Rafiq Rajwana, Barrister Kashif Rafiq Rajwana, Mr. Hammad Khan Babar, Mr. Ahtisham-ud-Din Khan, Muhammad Nauman Sarwar advocates for MEPCO/GEPCO with Ansar Mehmood, Chief Law Officer GEPCO.</p> <p>Mr. Shehzad Ahmad Cheema, advocate for respondent in W.P.No.27763-2023 and W.P.No.24401-2023.</p> <p>Mr. Muhammad Saqlain Arshad and Ehsan Malik</p>

	<p>for NTDC.</p> <p>Mr. Shahid Sarwar Chahil, advocate for FBR Faisalabad.</p> <p>Barrister Pirzada Muhammad Aurangzaib, advocate for NEPRA.</p> <p>Mr. Afaq Shaheen, advocate for IESCO.</p> <p>Mr. Muhammad Ijaz Jamal, advocate for Model Town Society</p>
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ALI BAQAR NAJAFI, J:- Through all these constitutional petitions under Article 199 of the Constitution of Islamic Republic of Pakistan enumerated in **Schedule (A)**, the petitioners have prayed for setting-aside the **impugned notification** No.PF-5-(02-ZR) 2020, dated 28.02.2023 being unconstitutional, illegal, unlawful, coram non-judice and without lawful authority with a declaration that the petitioner company be entitled to cape tariff of Rs.19.99 Kwh at least until 30.06.2023 as already committed. It is further prayed that DISCOs be directed to issue present and future electricity bills @ concessionary cape rate of Rs.19.99 Kwh until 30.06.2023 and that during the pendency of the writ petitions, the operation of the impugned notification be suspended and the Respondent Distribution Companies (LESCO, FESCO, GEPCO, MEPCO, IESCO etc.) be directed to issue to the petitioners with revised bills for the month of April, 2023 onward accordingly and they be also restrained from taking any adverse action against the petitioner-company.

2. **Briefly facts** giving rise to the filing of these constitutional petitions are that the petitioners are aggrieved of the notification dated 28.02.2023 issued in complete disregard of the obligation and the lawful promise made by the Respondent/Federal Government to the petitioners companies as they have already booked numerous export orders in contemplation of the subsidized

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energy charges. The impugned industrial tariff in electricity bills after withdrawal of subsidy for the month of April, 2023 onward have been challenged as the impugned actions. The case of the petitioners-companies are that they are the industrial consumers of electricity by DISCOs in the category of consumers under B-3 & B-4 class tariff. Being the members of All Pakistan Textile Association (APTA), the petitioners are the manufacturers and exporters of textile products for the last many years. The facilitation of export and value added manufacturer goods have always been a preferred policy objective of the Federation since they are essential for economic growth as well as national dignity and economic strength of the country. In the last financial year, the textile sector alone had given 20 billion US dollars by its export to the country. It is, therefore, stated that without these earnings by export oriented sector it would become eventually impossible for the government to run the country and meet the financial obligation of the foreign currency rates. The Respondent/Federal Government has always been meeting requirements of the textile sectors from time to time as it granted various subsidy and exemptions schemes in order to make Pakistani export regionally and globally competitive. The export oriented textile sectors have been identified as viable manufacturing units, therefore, are allowed to benefit of exemptions in utility costs through subsidy schemes as it contributes to the export of finished goods. According to the learned counsel, the yarn manufacturer may not be a direct exporter but may affect the manufacturing and export of garments by other entities and, therefore, are exporters of goods. Keeping in view this fact the textile export industry was granted subsidies. A study was made whereafter the Federal Government realized that the tariff rates of electricity and gas in regional competitors contains China, India, Bangladesh and Sri Lanka are comparatively much lower

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than the tariff rates in Pakistan. The result of this exorbitant electricity rate is that the high price of finished products from Pakistan are not competitive in the other countries of the region. It was therefore considered inevitable that the exporters of Pakistan be given boost up. Keeping in view the remedial solutions for the exporters the Respondent/Federal Government issued concessionary notification dated 01.01.2019, No.12(1)/2019 which reduced electricity rates for members of the export sectors called zero rated industrial consumers and directed all DISCOs (including LESCO & FESCO) to bill and receive payment from zero rated industrial consumer at the rate 7.50 US \$ per Kwh. The notification further provided that dollar exchange rate will be considered at the national bank day and dollar sold sale rate on the last working day of the preceding month. The difference between the payments from zero rated sector shall be paid to the DISCOs by the Federal Government. The petitioner company was notified under sales tax order with subsidized electricity tariff on account of being an export oriented sector. The fact regarding applicability of all inclusive tariff at the rate of 7.5 \$ cent Kwh to the export sectors industry was clarified by the Federal Government through letters dated 08.02.2019 and 29.03.2019. It was finalized that no such charge will be levied to such exporters oriented sector and only tariff @ 7.5 US cent Kwh will be applicable to them by following the Economic Coordination Committee decision of the Cabinet on the revised concession rate for zero rated consumers/export sector dated 09.09.2020 and the decision dated 16.08.2021 notified by the Federal Government on 24.08.2021 communicated to the Ministry of Commerce through office memo dated 31.08.2021. The Federal Government through its decision dated 19.10.2022 and office memorandum dated 14.12.2022 decided that the said subsidy shall continue untill 30.06.2023. The case of the petitioner is that it was

on the basis of sovereign guarantees provided by the Federal Government that the petitioner-companies calculated the cost of finished textile products and, therefore, entered into various contracts for export of its products. The supply of the raw material like yarn, chemical colours of fabrics etc. were ordered for the export purposes since it was in the category of export sector. Meanwhile, vide impugned order the said subsidy was withdrawn w.e.f. 01.03.2023 as a result of which the export sector is now being charged normal industrial tariff rates which includes fixed charges. The obvious consequences of the said impugned notification is that the petitioner-company would pay for the electricity consumed at the rate of 45 per unit instead of 19.99 per unit. The definite result would be that it will not complete their export contracts for which calculations have been made on the basis of lawfully extended promises by the Respondent/Federal Government. The threat is that it may result in immediate closure of the industries, hence these petitions.

3. **Learned counsel for the petitioners contend** that the sovereign guarantee has been violated in the impugned notification as the specific tariff of electricity has been provided until 30.06.2023 which cannot be withdrawn by neglecting the sovereign assurances. Adds that such sovereign commitment if extended to any segment of the society by the Federal Government are not to be ignored and that no government can be allowed to just revoke its undertaking unilaterally. It was further argued that the impugned action is against the rule of promissory stoppel under which the electricity tariffs were to be kept within certain rates. Adds that the export contracts made with the numbers of buyers from across the world are bound to suffer and, therefore, the Federal Government cannot back out from its stand. Further adds that the specially designed procedure for notifying the tariff of any category of consumers was

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made after tariff determination by the NEPRA but there was no such determination by NEPRA for withdrawal of subsidy through the impugned notification which was otherwise not issued under any provision of law. Adds that in contrast the SRO dated 01.01.2019 was issued after due compliance of section 31 of the NEPRA Act. It is further added that the notification dated 01.01.2019 has not been rescinded or amended until today which is enforceable under the law. It was also argued that the actual cost of the electricity which will go to the Government is not Rs.45 per unit. It was, therefore, argued that the unjustified cross-subsidy is allowed by withdrawal of the subsidy from the petitioner-companies. It was also argued that the minor change from 7.5 Kwh to 9 Kwh was analyzed by the Institute of Development of Economic, Islamabad and was found sufficient for textile industries to oust them in the competition of the exporters from the competitive countries. Finally argued that the impugned action is violative of Article 4, 10-A, 18, 24, 25 of the Constitution and therefore seeks the relief.

4. **Conversely**, learned Additional Attorney General appearing on behalf of Federation of Pakistan argues that the subsidy was not granted on the basis of any statutory powers but was a step considered economically feasible at the given time. It was also a policy decision which could be revoked by the Government on the basis of hard realities created due to subsequent developments. It was not a contract as there was not any proposal, acceptance and the consideration for creation of such type of legal right. A legal right has to be defined under a statute or created through a contract but none of the two pre-requisite are present in the present case. Adds that the subsidy was withdrawn with a view to give the benefits to the poor people of Pakistan like the recipients of Benazir Income Support Programme; etc. According to the

learned Additional Attorney General even the subsidy granted to agriculture sector was also withdrawn. Adds that half-yearly withdrawn of subsidy was a hard decision made due to compulsive circumstances. Also submits that in the contents of the writ petitions no contract was shown to have executed on the basis of the subsidies to calculate the possible loss or profit. Submits that petitioner-companies did not get any profit. The learned Additional Attorney General has questioned whether the petitioner-companies had thoroughly acted upon the said subsidies and also questions the challenging of the policy decision of the Federal Government. According to him, the Federal Government had been short of sources as the initial commitment was made due to un-budgetary proposals and that the executive benefits cannot be granted for providing subsidies. Places reliance upon case titled **“K-Electric Limited through Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Islamabad and others”** reported as **PLD 2023 Supreme Court 412** and referred to paragraph No.20 to argue that subsidy can be withdrawn at any moment.

5. In rebuttal, learned counsels for the petitioners submit that grant of subsidy was supported by sovereign guarantees and that approximately 7,00,000/- people will become unemployed because of the withdrawal of the subsidy and that giving the benefits to needy as a charity is incomparable with the dignified employment which the petitioners/Textile Industries have generated. Giving the example he contends that subsidy in the form of laptop scheme was also continued. It was also argued that under Injunctions of Islam the promises are to be fulfilled and that the Court had the jurisdiction on the basis of case titled **“Al-Samrez Enterprise Vs. The Federation of Pakistan”** reported as **1986 SCMR 1917**.

6. **Arguments heard. Files perused.**

7. **After hearing the learned counsel for the parties and perusing the record**, it is straightaway observed that the question whether a time subsidy granted through the decision of the Respondent/Federal Government sent in Federal Cabinet can be withdrawn before the expiry of its term has been raised before this Court. The main emphasis of the arguments advanced by the learned counsels for the petitioners is that the Respondent/Federal Government works under a definite and permanent system of understanding and the decisions taken under the Constitutional mandate and on the basis of the command of the Parliament through the Cabinet which have to be followed. The principles of promissory estoppel and *locus poenitentiae* have been relied upon in support of the contentions. It is also the case of the petitioners that based on this time-bound subsidy, the petitioner-companies engaged in many contracts and, therefore, any change of tariff is bound to affect their working. The stand of the Respondent/Federal Government, on the other hand, is that it is not in a position to continue with the time-bound subsidy due to the fluctuation in Dollar rates as well as other geo-strategic and geo-political situations. Also it is their case that executive subsidies are not supported and approved by international donors who have seriously objected to the said concessions granted to the petitioners. However, no Government can function if its policy is continuously reviewed without giving any permanence but no Government can earn a good reputation amongst its masses if it takes a decision without any economic viability. Similarly, no Government can survive unless it is in a position to give economic benefits to its subjects and it is equally important that no Government is acceptable unless it properly appropriate funds for the promotion of the export oriented industry to compete with the international commodities. But the policy

decisions are to be taken on the basis of hard ground realities which cannot be interfered with by this Court. Besides, subsidy is to be merged into tariff before it is charged to the petitioner-companies, hence its challenge is to be made before the appropriate forum.

8. On the legal premise learned counsel for the petitioners has emphasized upon case titled **“Messrs Elahi Cotton Mills Ltd and others Vs. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others”** reported as **PLD 1997 SC 582** which relates to the taxation having different set of laws and principle whereas the tariff is a different term having another connotation which is imposed under section 31 of the NEPRA Act, 1997 therefore, the citation is not applicable to the present case. In case titled **“Al-Samrez Enterprise Vs. The Federation of Pakistan”** reported as **1986 SCMR 1917**, it was held that the granting exemption in custom duty could not be taken away and destroyed by modification of earlier notification on ground that under section 21 of the General Clauses Act, Government could exercise power of modification. However, the said judgment relates to the custom duty and of course it is dealt with under Customs Laws, as opposed to the word “tariff” which is always chargeable on the electricity and is comprised on many other components, therefore, the judgment is also not applicable to the present case. The concept of estoppel is discussed in case titled **“National Saving Central Directorate, Islamabad through D.G. and another Vs. Muhammad Farooq Raja”** reported as **PLD 2021 SC 320** with reference to the change in “Bahbood Saving Certificate Scheme” which was the ownership of the aggrieved person and did not involve any additional executive subsidy benefit. On the other hand, in case titled **“Dossani Travels Pvt. Ltd. and others Vs. Messrs Travels Shop (Pvt) Ltd. and others”** reported as **PLD 2014 SC 1**, the

jurisdiction of this court under Article 199 of the Constitution have been well defined which are not comparable to the jurisdiction of the apex court of the country under Article 187 of the Constitution. The powers under Article 199 can be exercised and to enforce the fundamental right which are given in the judgment as under:-

- (i)
- (ii) (a)
- (b)
- (i)
- (ii)
- (c) *on the application of any aggrieved person, make an order giving such directions to any person or authority; including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the “enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II” (Fundamental Rights as interpreted by the Supreme Court of Pakistan).*
- (iii) *The ambit and scope of the power of High Court under Article 199 of the Constitution is not as wide, as of the Supreme Court under Article 187 of the Constitution to pass any order or issue any direction or decrees for doing “complete justice”.*

In a more recent judgment titled **“K-Electric Limited through Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Islamabad and others”** reported as **PLD 2023 SC 412**, the Hon’ble apex court has held that tariff determination cannot be challenged under Article 199 of the Constitution since separate mechanism has been provided under the NEPRA Act. The judgment does not distinguishable between time barred subsidy and normal subsidy. The relevant extract from para 20 is reproduced as under:-

“.....The Federal Government is well within its right to introduce, modify or withdraw subsidies. This is an integral part of its socio-economic policies, which NEPRA must give effect to as per Section 31 of the Act. So a consumer of electricity is entitled to a subsidy as long as it is offered by the Federal Government and is bound by any modifications or withdrawals made by the Government. To give effect to a subsidy it is built into the tariff, as its obvious outcome is to reduce the price of electricity. So a subsidy is given effect through the tariff. There is no vested right in favour of the consumer with reference to a subsidy, simply because the subsidy is built into the tariff. Effectively, a subsidy is a relief package offered to consumers and

remains operative for as long as it is required as per Government policy. IN order to take the benefit of the subsidy, it has to be calculated in terms of the tariff, therefore, even if, it is reflected as a part of the tariff or separately it remains a subsidy and does not merge into the tariff. Essentially, it is based on a policy decision of the Federal Government and is not the outcome of a NEPRA determination. As per section 31 of the Act, NEPRA is guided by government policies and must consider them, which means that it must reflect the subsidy through the tariff.....”

Another judgment titled **“Peshawar Electric Supply Company Ltd. (PESCO) and another Vs. SS Polypropylene (Pvt.) Ltd. Peshawar and others”** reported as **PLD 2023 SC 316**, in which it has been specifically held that this court does not interfere into policy matters. Extract from para 11 is reproduced for ready reference:-

“.....It is not the role of the Courts to determine policies and especially those, in which the Court lacks technical expertise. It is the mandate of the Constitution and, is also trite that Courts must confine themselves to legal interpretation. The learned High Court must satisfy itself that there is a breach of fundamental rights vested constitutional/legal rights before any direction is issued. Such directions must not be based on an understanding of the law which is contrary to the Constitution. Doing so goes against the principle of trichotomy of powers and is against the mandate of the Constitution. The High Court could not, therefore, have interfered with the matter and that too, based on personal view of what the policy should be without legal or constitutional basis or backing.”

Learned counsel for the petitioners have also relied upon case titled **“Mst. Fatima Faryad and others Vs. Government of Punjab and others”** reported as **2020 CLC 836** to argue that the commitment made by the government must be honoured. However, there is no cavil to the proposition that the commitment if not based on thorough research input and, understanding reached between stakeholder made superficially and cosmetically but if it cannot be practically acted upon should not bind the Government. In the said judgment the proposition “change of tariff” was not discussed hence not relevant. He also places reliance upon case titled **“Dewan Salman Fibber Ltd. and others V. Federation of Pakistan, through Secretary, M/o Finance and others** reported as **2015 PLD 2304**, in which the importance of the Government sovereign commitment have been made but such commitment must be given on

a statutory basis and not merely in the decision of the cabinet, therefore, is not applicable to the present case. The legislative command is not supporting the case of the petitioners. The principles of *locus poenitentiae* or promissory estoppel are not attracted in this case for the reasons. This court time and again asked the learned counsel for the petitioners to distinguish between the subsidy and time-bound subsidy but he could not find it on the basis of some authoritative case laws. Last but not least is that policy decision of Government cannot be interfered with.

CONCLUSIONS

- i. Policy decisions of the Government are the areas where jurisdiction under Article 199 cannot be exercised.**
- ii. Promissory estoppels are not attracted *stricto sensu* since the Government has taken the decision not on its own but based on certain contingencies which were not in its control.**
- iii. Although the petitioner-companies have not played any fraud and the decision taken by the Government to offer subsidy has been partially acted upon until the time when the impugned notification was issued but the power to take decision includes power to recall, therefore, recalling of subsidy is with the prospective effect.**
- iv. The subsidies (time-bound or otherwise) is part of the tariff can be challenged under the NEPRA, 1997 through alternate remedies.**

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10. For the foregoing reasons, these writ petitions (mentioned in Schedule-A) have been found meritless and, therefore, are **dismissed**.

**(ALI BAQAR NAJAFI)
JUDGE**

Announced in open court on 12.07.2023.

Judge

*S. Khalid/A.Qadoos**