IN THE HIGH COURT OF SINDH, KARACHI

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI.
MR. JUSTICE ABDUL MAALIK GADDI.

1.	C.P.No.D-4658/2018	Dewan Motors (Pvt) Ltd. and another	Petitioners
2.	C.P.No.D-1894/2017	Tariq Chobdar	Petitioner
3.	C.P.No.D-4660/2018	Al-Razzaq Fibres (Pvt) Ltd.	Petitioner
4.	C.P.No.D-4684/2018	PIVA Internation	Petitioner
5.	C.P.No.D-4685/2018	AKK Enterprise (SMC-Pvt) Ltd. and others	Petitioners
6.	C.P.No.D-4696/2018	Firhaj Foot Wear (Pvt) Ltd.	Petitioner
7.	C.P.No.D-4697/2018	M/s. Nishat Hotels & Properties Ltd.	Petitioner
8.	C.P.No.D-4700/2018	Shaikh Muhammad Ishtiaq and others	Petitioners
9.	C.P.No.D-4706/2018	Nishat Linen (Pvt) Ltd.	Petitioner
10.	C.P.No.D-4707/2018	Nishat Mills (Pvt) Ltd.	Petitioner
11.	C.P.No.D-4708/2018	Tetra Pak (Pakistan) Ltd.	Petitioner
12.	C.P.No.D-4709/2018	M/s Ruby Steel Corp & others	Petitioners
13.	C.P.No.D-4710/2018	M/s. British Steel Traders & others	Petitioners
14.	C.P.No.D-4717/2018	M/s Inovi Technologies	Petitioner
15.	C.P.No.D-4718/2018	M/s Berger Paint Pak Ltd. & others	Petitioners
16.	C.P.No.D-4729/2018	Advance Telecom	Petitioner
17.	C.P.No.D-4730/2018	Tariq Chobdar & others	Petitioners
18.	C.P.No.D-4734/2018	M/s. Mehboob Steel Pipe Ind. & others	Petitioners
19.	C.P.No.D-4735/2018	M/s. Global Steel Corp. & others	Petitioners
20.	C.P.No.D-4736/2018	M/s. Majeed & Sons Steel (Pvt) Ltd and others	Petitioners
21.	C.P.No.D-4737/2018	M/s. Premiers Industrial Chemical Mfg: Co. (Pvt) Ltd.	Petitioner
22.	C.P.No.D-4738/2018	M/s. Salman Enterprises & others	Petitioners
23.	C.P.No.D-4739/2018	M/s. Ayoub Steel Traders & others	Petitioners
24.	C.P.No.D-4740/2018	M/s. Raja Steel and others	Petitioners
25.	C.P.No.D-4742/2018	M/s. Saify Iron (Pvt) Ltd.	Petitioner
26.	C.P.No.D-4743/2018	M/s. Shah Brothers	Petitioner
27.	C.P.No.D-4744/2018	M/s. Royal Trading Co.	Petitioner
28.	C.P.No.D-4745/2018	M/s. Kings Toys	Petitioner
29.	C.P.No.D-4753/2018	Reckitt Benkiser Pakistan Ltd.	Petitioner
30.	C.P.No.D-4760/2018	M/s. Indus Motor Company Ltd.	Petitioner
31.	C.P.No.D-4761/2018	M/s. Ayan Energy Ltd.	Petitioner
32.	C.P.No.D-4763/2018	M/s. Shakir Hassan Jivani & others	Petitioners
33.	C.P.No.D-4774/2018	M/s Pak Steel Imports Co. & others	Petitioners
34.	C.P.No.D-4792/2018	M/s. Izhar Steel (Pvt) Ltd.	Petitioner
35.	C.P.No.D-4793/2018	M/s. Bays International (Pvt) Ltd. & others	Petitioners
36.	C.P.No.D-4820/2018	M/s. H.A. Corp.	Petitioner
37.	C.P.No.D-4841/2018	M/s Tara Imperial Ind	Petitioner
38.	C.P.No.D-4857/2018	M/s. Perfect Craft (SMC-Pvt) Ltd & others	Petitioners
39.	C.P.No.D-4858/2018	M/s. SOR Steel & others	Petitioners

40	C.P.No.D-4864/2018	M/s. Ittefaq Electric Traders & others	Petitioners
41	C.P.No.D-4870/2018	M/s. Avari Hotels Ltd.	Petitioner
42	C.P.No.D-4875/2018	M/s. B.B. Energy (Pvt) Ltd.	Petitioner
43	C.P.No.D-4876/2018	M/s Univeroz	Petitioner
44	C.P.No.D-4877/2018	M/s Otsuka Pakistan Ltd.	Petitioner
45	C.P.No.D-4878/2018	M/s Akzo Nobel Pakistan Ltd.	Petitioner
46	C.P.No.D-4913/2018	Atlas Honda Ltd.	Petitioner
47	C.P.No.D-5512/2018	M/s. Faheem Enterprises & another	Petitioners
48	C.P.No.D-5699/2018	Chief Enterprises.	Petitioner
49	C.P.No.D-8584/2018	M/s. Tayyab Corp.	Petitioner
50	C.P.No.D-8585/2018	M/s. Ateeq Auto Traders	Petitioner
51	C.P.No.D-8586/2018	M/s. Shafiq Sons	Petitioner
52	C.P.No.D-8587/2018	M/s Mian Shafiq Business Int.	Petitioner
53	C.P.No.D-2317/2019	M/s. Islam Engineering (Pvt) Ltd.	Petitioner

Vs.

Federation of Pakistan & others **…..**……*Respondents*

FOR THE PETITIONERS: M/s. Khalid Jawaid Khan, Ms. Amber Lakhani, Abdul Moiz Jafery, Haider Waheed, Navin Merchant, Salman Yousuf, Hyder Ali Khan, Ali Aziz a/w Sami-ur-Rehman, Kashif Nazeer, Haroon Dugal, Muhammad Adnan Moton, Dil Khurram Shaheen, Zain-ul-Abdin Jatoi a/w Kelash, Ghulam Haider Shaikh a/w Manzar Hussain, Imran Iqbal Khan, Mansoor Usman Awan, M. Zaheer-ul-Hassan, Talha Makhdoom, Hanif F. Ahmed, Kashif Nazeer, Irfan Ali, Asad Raza Khan, Taimoor Ahmed, Rana Sakhawat Ali, Darvesh K. Mandhan & Muhammad Adeel Awan, Advocates

FOR THE RESPONDENTS M/s. Muhammad Anas Makhdoom, Dr. Shahnawaz Memon, Khalid Mehmood Rajpar, Masooda Siraj, S. Asif Ali, Muhammad Khalil Dogar, Muhammad Aqeel Qureshi, S. Mohsin Imam, Nuzhat Shah, Sohail Muzaffar a/w Maimoona Nasreen, Advocates

FEDERATION: through Mr. Muhammad Ameenullah Siddiqui, Assistant Attorney General

Date of Hearing: 06.07.2020.

Date of Judgment: 06.08.2020.

JUDGMENT

Aqeel Ahmed Abbasi, J.: The above petitions have been filed to challenge the vires of sub-section (2) of Section 221-A of the Customs Act, 1969 added vide Finance Act, 2018, as according to petitioners that no Regulatory Duty was or could be levied, charged or collected on imports under the Customs Act, 1969, nor any validation thereof, is constitutionally permissible during the period from the date of commencement of the Finance Act, 2017 till date of commencement of Finance Act, 2018. Whereas, in all the aforesaid petitions, similar relief has been sought in the following terms:

I. *Declare that sub-section (2) of Section 221A of the Customs Act, 1969, as inserted by the Finance Act 2018, is ultra vires of the Constitution of Pakistan, 1973, void ab initio and a nullity in the eyes of the law.*

II. *Declare that no regulatory duty was or could be levied, charged or collected on imports under the Customs Act, 1969, nor any validation thereof is permissible for the period starting from the date of commencement of the Finance Act, 2017 till the date of commencement of the Finance Act, 2018.*

III. *Direct the respondents to immediately refund the amount collected by them from the petitioners in the name of regulatory duty under Section 18(3) of the Customs Act, 1969, as it stood till the date of commencement of the Finance Act, 2018.*

IV. *Direct the respondents to immediately return the security or to refund the amount equivalent thereof collected by them from the petitioners under the orders passed by this Honourable Court in the earlier round of litigation challenging the levy and collection of regulatory duty.*

V. *Direct the Nazir to immediately return the security or refund the amount equivalent thereof deposited or secured by the petitioners under the orders passed by this Honourable Court in the earlier round of litigation challenging the levy and collection of regulatory duty.*

VI. *Restrain the respondents and their officers from taking any action for encashing the securities furnished by the petitioners with the customs or Nazir of the Court or from taking any action for recovery of regulatory duty and/or assessment of consignments of the petitioners on the basis thereof for the relevant period.*

VII. *Grant any other relief deemed fit in the circumstances of the case.*

VIII. *Grant order as to costs.*

2. It will be advantageous to examine the provisions of Section 221-A of the Customs Act, 1969, particularly, the impugned provisions of sub-section (2) of Section 221-A added by Finance Act, 2018, which is subject matter of challenge through instant petitions. The same reads as follows:

> *"[221-A. Validation.-47[(1)] All notifications and orders issued and notified in exercise of the powers conferred upon the Federal Government, before the commencement of Finance Act, 2017 shall be deemed to have been validly issued and notified in exercise of those powers.]*
>
> *47[(2) Notwithstanding any order or judgment of any court, a High Court and the Supreme Court, the regulatory duty already levied, collected and realized in exercise of any powers under this Act, before the commencement of the Finance Act, 2018 and after the commencement of the Finance Act, 2017, shall be deemed to have been validly levied, collected and realized under this Act, in exercise of the powers conferred on the commencement of the Finance Act, 2018, and where any such regulatory duty has not been levied, collected or realized, the same shall be recoverable in accordance with the provisions of this Act.]"*

3. From perusal of sub-section (2) of Section 221-A added through Finance Act, 2018, it appears that the legislature has made an attempt to validate the collection of regulatory duty made after commencement of Finance Act, 2017, Notwithstanding any order or judgment of any Court, High Court or Supreme Court relating to validity of imposition and collection of Regulatory Duty through **SRO 1035(I)/2017** dated 16.10.2017, which was under challenge before a Divisional Bench of this Court in number of Constitutional Petitions, whereas, such petitions were decided vide judgment reported as **2018 PTD 861** in the case of **Premier Systems v. Federation of Pakistan & others**, wherein, it was held that Section 18(3) of the Customs Act, 1969, as well as the SRO 1035(I)/2017 dated 16.10.2017, whereby, Regulatory Duty was imposed on the imports is ultra vires to the Constitution. The above judgment of the Divisional Bench of Sindh High Court was challenged by the FBR before the Hon'ble Supreme Court by filing CPLA (Civil Appeal No.321/2018), however, before the matter could be decided on merits, by the Hon'ble Supreme Court, the FBR moved an application under Order XXXIII Rules 5 & 6 of the Supreme Court Rules, 1980 being CMA No.1623 of 2018 [C.A. # 321 of 2018], contents of which, are reproduced as under, for the sake of brevity, and also to examine the effect and implications of the order passed by the Hon'ble Supreme court on such

application as learned counsel for the petitioners and respondents, have drawn different conclusions from the said order.

4. "**APPLICATION UNDER ORDER XXXIII RULES 5&6 OF THE SUPREME COURT RULES 1980**

It is respectfully submitted as under:-

(1) The titled appeal is pending before this August Court. Leave to appeal against the judgment of the Sindh High Court was granted on 06.03.2018 in earlier CPLA # 706/2018.

(2) The Parliament has since passed the Finance Act # XXX of 2018 ("Finance Act") which received the assent of the President of Pakistan on 22.05.2018 and was notified on 23.05.2018.

(3) As per sub-section 92) of section 3 of the Finance Act section 18 of the Customs Act 1969 has been further amended and it has been provided that in sub-section (3) of section 18 ibid the words "Federal Government" shall be substituted for the expression "Board, with the approval of the Federal Minister Incharge."

(4) Further, through sub-section (18) of section 3 of the Finance Act section 221A of the Customs Act 1969 has been renumbered as sub-section 91) and a new sub-section 92) has been added as under:-

> *"(2) Notwithstanding any order or judgment of any court, a High Court and the Supreme Court, the regulatory duty already levied, collected and realized in exercise of any powers under this Act, before the commencement of the Finance Act, 2018 and after the commencement of the Finance Act, 2017, shall be deemed to have been validly levied, collected and realized under this Act, in exercise of the powers conferred on the commencement of the Finance Act, 2018, and where any such regulatory duty has not been levied, collected or realized, the same shall be recoverable in accordance with the provisions of this Act."*

(5) In view of what has been stated above it appears to have become unnecessary for this August Court to adjudicate on the issues raised in the leaving granted order dated 06.03.2018 because:-

(i) Parliament has restored the words "Federal Government" for the expression "Board, with the approval of the Federal Minister Incharge" in section 18(3) of the Customs Act, 1969.

(ii) The regulatory duty levied, collected and realized, and to be levied, collected and realized, under the notification9s) issued after commencement of the Finance Act, 2017 and before commencement of

the Finance Act 2018, have been fully validated/protected.

(iii) The appellant FBR and its Collect orates will now continue to levy, collect and realize the afore-mentioned regulatory duties including any arrears not so far collected/realized in accordance with the provisions of section 18 and 221A(2) of the Customs Act, 1969.

It is, therefore, respectfully prayed that the titled appeal may graciously be disposed of in terms of para 5 as there is no longer any live issue that remains to be adjudicated."

5. The aforesaid application has been disposed of by the Hon'ble Supreme Court vide order dated 11.06.2018 in the following terms:-

"Federal Board of Revenue through
the Secretary, Revenue Division/Chairman,
FBR House,
Constitution Avenue, Islamabad and others…….Applicants

Versus

M/s. Premier Systems (Pvt) Ltd.
and others. ……Respondents

"O R D E R

*"**MIAN SAQIB NISAR, CJ**.- The contents of C.M.A. No. 1623-L/2018 disclose the latest developments which have taken place after filing of these appeals with regard to amendment in law and consequent issuance of certain SROs. The learned ASCs for the Appellants state that on account of subsequent developments and amendments in the relevant provisions of law, **the present matters have been rendered infructuous. In this view of the matter, these appeals are disposed of**.*

*2. It is however clarified that any observation made or finding given in the impugned judgment(s) on the basis of the erstwhile law shall not cause any prejudice to the appellants/petitions. **Further, in case at any point in time, the question of validation of the amended law or SRO(s) is raised before any Court of competent jurisdiction, the same shall be independently decided on merits.**"*

6. Keeping in view the above of factual and legal position, as well as the fate of earlier petitions, and the judgment of a Divisional Bench of this

Court regarding invalidity of provisions of Section 18(3) of the Customs Act, 1969, and the SRO 1035(I)/2017 dated 16.10.2017, we may now examine the submissions of learned counsel for the petitioners, whereas, to avoid the repetition of arguments advanced by number of counsel for the petitioners in these cases, we would summarize their verbal and written arguments, mainly advanced by M/s. Khalid Jawaid Khan and Ms. Amber Lakhani, and Mr. Abdul Moiz Jafri, Advocates in the following terms:-

A. Outline of submissions:

* Section 221A, sub-section (2) of the Customs Act, 1969 [hereinafter referred to as the 'impugned provision'] as inserted by the Finance, 2018 [the '2018 Act'], is unlawful and ultra vires the Constitution, and consequently liable to be declared void.

* The impugned provision unlawfully seeks to validate the regulatory duty imposed and collected pursuant to SRO 1035(I)/2017 ['SRO 1035'] which was issued in exercise of powers that had previously been conferred — through the Finance Act, 2017 [the '2017 Act'] – upon the Federal Board of Revenue [the 'Board'] acting with the approval of the Federal Minister-in-Charge under Section 18(3) of the Customs Act, 1969 [the 'Customs Act']. The said conferment of power of inter alia the Board by the 2017 Act – as well as SRO 1035 and the regulatory duty imposed and collected in pursuance thereof – had been declared unconstitutional by a learned Divisional Bench of this Hon'ble Court in Premier Systems (Pvt.) Ltd & others vs. Federation of Pakistan & others, reported in 2018 PTD 861 ['Premier System'], as fully described herein below. Subsequently, the 2018 Act – while restoring Section 18(3) to its original position prior to the 2017 Act (i.e. whereby the Federal Government was empowered to impose regulatory duty) with prospective effect – attempted to subvert Premier Systems through the impugned provision by purporting to validate the regulatory duty that was declared unconstitutional by this Hon'ble Court in the said judgment.

* The impugned provision is unlawful inasmuch as, inter alia, it seeks to validate actions that were inherently unconstitutional and void (as declared in Premier Systems), and were therefore incapable of being cured through any act of parliament. It is a settled principle that while Parliament -–in certain circumstances – may have the power to retrospectively validate actions taken in violation of a pre-existing statutory requirement by enacting curative legislation and thereby removing the statutory defect, it does not have the power to validate any acts that violated the Constitution.

* The judgment in Premier Systems is premised on the seminal judgment of the Hon'ble Supreme Court in Mustafa Impex, Karachi & others vs. The Government of Pakistan & others, reported in PLD 2016 SC 808 ['Mustafa Impex'] wherein it was held inter alia {as fully described herein below) that the Federal Government is a collective entity described as the Cabinet constituted by the Prime Minister and Federal Minister; and the purported exercise of a statutory power exercisable by the Federal Government by a Secretary, a Minister or the Prime Minister acting on their own, especially in relation to fiscal matters, is constitutionally invalid and a nullity in law. It was also held that fiscal notifications enhancing the levy of tax issued by the Secretary, Revenue Division or the Minister are ultra vires.

* Although the Federal Government had filed an appeal against the judgment in Premier Systems before the Hon'ble Supreme Court, it later decided not to pursue the appeal in light of the subsequent enactment of the 2018 Act, and through the order dated 11.06.2018, the Hon'ble Supreme Court disposed of the appeal as having become infructuous. The judgment of this Hon'ble Court in Premier Systems was not disturbed or modified in any way, and the same therefore attained finality.

B. Background:

* Mustafa Impex:

The issues forming the subject matter of the instant petition (and the various connected matters) essentially originate from the Hon'ble

Supreme Court's judgment in Mustafa Impex, wherein the legality of various statutory notifications purporting to withdraw of modify various sales tax exemptions was challenged. The primary ground for such challenge was that the said notifications had been issued not by the Federal Government, as was required by law, but by the Additional Secretary, Revenue Division, who was not competent to do so.

* In order to elucidate the meaning of the term 'Federal Government' as well as the concept of 'executive powers', the apex court conducted a detailed exposition of Pakistan's constitutional and political history, beginning with the Government of India Act, 1935 and leading up to the 18the Amendment and its implications for the nation's government structure. In light of this exhaustive analysis, the Supreme Court identified numerous principles emanating from the Constitution, including but not limited to the following:

i. The Federal Government no longer has the power to delegate any of its functions to officers or authorities, and the exercise of any power by the Federal Government has to be strictly in accordance with the Rules of Business (Para 40, Placitum B)

ii. Powers relating to fiscal matters – such as those delegated to the Federal Government under the Sales Tax Act and exercise whereof by the Secretary was under challenge in Mustafa Impex – can only be delegated to the Federal Government, and the conferment of the same to any other authority would be unconstitutional (Para 63, Placitum T)

iii. Neither Article 98 nor any other provision of the Constitution permits the transfer of legislative powers to officials subordinate to the Federal Government, and any such transfer would violate the structure of the Constitution (Para 66, Placitum W)

iv. The regulation and issuance of fiscal notifications is in the nature of subordinate legislation, and the conferment of

such powers on the Executive per se would be violate of the doctrine of separation of powers and parliamentary sovereignty (Para 67)

v. The Federal Government means the Cabinet comprising the Federal Ministers and the Prime Minister (Para 54 & 79), and any statute that purports to provide a different definition of the Federal Government (such as the Pakistan Telecommunication (Re-organization) Act, 1996) is ultra vires to such extent (Para 68)

vi. It is not the Prime Minister acting singly, but the entire Cabinet that is collectively responsible to Parliament, and this applies with special force in relation to fiscal and budgetary matters. In all such matters, the prior decision of the Cabinet is required since it is that body alone which constitutes the Federal Government (Para 81, Placitum KK)

vii. The purported exercise of a statutory power exercisable by the Federal Government – especially in relation to fiscal matters – by a Secretary, Minister or the Prime Minister, are constitutionally invalid; and fiscal notifications enhancing the levy of tax issued by inter alia the Minister are ultra vires (Para 84, Placitum OO, UU)

* Premier Systems:

Thereafter, the 2017 Act was enacted, ostensibly in response to the judgment in Mustafa Impex, insofar as various amendments were made to, inter alia, the Sales Tax Act, 1990 (including the provision at issue in Mustafa Impex) and the Customs Act, One such amendment was made to Section 18(3) of the Customs Act. Prior to the 2017 Act, Section 18(3) read as follows:

"The Federal Government may, by notification in the official Gazette, levy, subject to such conditions, limitations or restrictions as it may deem fit to impose, a regulatory duty on all or any of the

goods imported or exported, as specified in the First Schedule at a rate not exceeding one hundred per cent of the value of such goods as determined under section 25, or, as the case may be, section 25A.

Pursuant to Section 2(6) of the 2017 Act, the words "Board, acting with the approval of the Minister-in-Charge" were substituted for the words "Federal Government" in Section 18(3) of the Customs Act. Thus, the power to impose regulatory duty was taken away from the Federal Government and instead conferred on the Board acting with the approval of the concerned Minister. This amendment – along with SRO 1035 issued in pursuance thereof – was challenged by the Petitions in the instant matter before this Hon'ble Court in Premier Systems, wherein a learned Divisional Bench – relying upon Mustafa Impex – declared the said amendment to be unconstitutional and void, on inter alia the following grounds:

i. Article 77 does not confer untrammeled power upon Parliament to delegate taxing powers on any person (other than the Federal Government) and is intended to limit Parliament's powers instead of expanding them. As such, Article 77 could not be invoked to protect the amendment made by the 2017 Act to Section 18(3) of the Customs Act (Para 17);

ii. The power to impose regulatory duty is a species of delegated legislation, and as such, it cannot be conferred under Article 98 on any authority subordinate to the Federal Government. If at all such power of delegated legislation is delegated upon the Executive, it can only be a function of the Federal Government as constitutionally constituted and understood being the Federal Cabinet (Para 23, 24)

iii. Since the whole purpose of the amendment was to take the Federal Government out of the loop, the fact that SRO

> 1035 had in fact been approved by the ECC of the Cabinet notwithstanding the amendment was of no consequence. The law had been altered and for the Cabinet to be brought back into the picture via the ECC was itself contrary to the law as amended, SRO 1035 could not there be saved on such basis (Para 27)

In view of the foregoing, Section 18(3) of the Customs Act as amended by the 2017 Act and SRO 1035 were struck down as unconstitutional and of no legal effect, and all sums paid by the Petitioners by way of regulatory duty in pursuance thereof – as well as the security submitted in court/to customs officials pursuant to the Hon'ble Court's interim orders – were directed to be refunded in full. The operation of the judgment was, however, suspended for 30 days so as to enable aggrieved parties to appeal, and the operation of the Court's interim orders continued.

* Appeal before the Supreme Court

The Federal Government appealed against the judgment in Premier Systems, and the Hon'ble Supreme Court was pleased to grant an interim order suspending the operation thereof. However, shortly thereafter, the 2018 Act (containing the impugned provision) was enacted, and in view of the same, the Federal Government submitted before the Hon'ble Supreme Court that in light of the 2018 Act, the matter has become "infructuous" and that it no longer wished to pursue the appeal. Accordingly, the Hon'ble Supreme Court through the order dated 11.06.2018 disposed of the appeal as having become infructuous. It is vital to note that the judgment in Premier Systems was not modified or disturbed in any way and the same has therefore, attained finality. Moreover, the Supreme Court also clarified that any question pertaining to the legality of the validation clause in the 2018 Act – i.e. the impugned provision – would be determined independently.

* Present controversy

The 2018 Act has – with prospective effect – restored Section 18(3) of the Customs Act to its original form i.e. the Federal Government has been

reinstated with authority to impose regulatory duty. However, the impugned provision as inserted by the 2018 Act, provides as follows:

"Notwithstanding any order or judgment of any court, a High Court and the Supreme Court, the regulatory duty already levied, collected and realized in exercise of any powers under this Act, before the commencement of the Finance Act, 2018 and after the commencement of the Finance Act, 2017, shall be deemed to have been validly levied, collected and realized under this Act, in exercise of the powers conferred on the commencement of the Finance Act, 2018, and where any such regulatory duty has not been levied, collected or realized, the same shall be recoverable in accordance with the provisions of this Act."

It is therefore clear that the impugned provision is a response – and an attempt to sidestep – the judgment in Premier Systems in the same way that the 2017 Act had been (unsuccessfully) enacted in response to Mustafa Impex.

In pursuance of the impugned provision, the Federal Government/FBR issued various notices to the petitioners seeking encashment of the security deposited with the court/customs officials in pursuance of the Hon'ble High Court's interim orders passed during the pendency of Premier Systems. The petitioner, being aggrieved by the same as well as by the impugned provision, therefore, preferred the instant petitions.

* Legal propositions

i. The impugned provision is unlawful and ultra vires the Constitution, and consequently liable to be declared void.

ii. The impugned provision unlawfully seeks to validate the regulatory duty imposed and collected pursuant to SRO 1035 that was issued in exercise of powers that had previously been conferred by the 2017 Act upon the Board, acting with the approval of the Federal Minister-in-Charge, under Section 18(3) of the Customs Act. The said conferment of power on inter alia the Board by the 2017 Act – as well as SRO 1035 and the regulatory duty imposed and collected in pursuance thereof – have already been declared unconstitutional and void by the Hon'ble High

Court of Sindh in Premier Systems, ,which judgment has attained finality. The impugned provision is therefore unlawful inasmuch as, inter alia, it seeks to validate actions that were inherently unconstitutional and void (as declared in Premier Systems), and were therefore incapable of being cured through any act of Parliament.

iii. While Parliament may – in certain circumstances – have the power to retrospectively validate actions taken in violation of a pre-existing statutory requirement by enacting curative legislation and thereby removing the statutory defect, it does not have the power to validate any acts that violated the Constitution, since all such acts are void (and not voidable) by their very nature and incapable of being cured.

iv. The acts sought to be validated by the impugned provision are unconstitutional not only by virtue of the judgment in Premier Systems, but also because they violate inter alia Articles 90, 91 and 98 of the Constitution, as held in Mustafa Impex. The Federal Government is a collective entity described as the Cabinet constituted by the Prime Minister and Federal Ministers; and the purported exercise of a statutory power exercisable by the Federal Government by a Secretary, a Minister or the Prime Minister acting on their own, especially in relation to fiscal matters, is constitutionally invalid and a nullity in law. it was also held that fiscal notifications enhancing the levy of tax issued by the Secretary, Revenue Division or the Minister are ultra vires. As such, the imposition and collection of regulatory duty by the Board acting with the Minister-in-Charge – which is not sought to be validated by the impugned provision – was squarely unconstitutional and a nullity in law in terms of Mustafa Impex, and cannot therefore be validated through any act of Parliament.

7. In addition to hereinabove submissions on behalf of the petitioners, following further verbal and written submissions have been made on behalf of learned counsel for petitioners:-

- That the curative powers of Parliament are not absolute; and statutes which suffer from defects that render them unconstitutional and void ab

initio cannot be saved by subsequent Acts of Parliament which deem them otherwise.

- That any law that is voidable may be cured by proper validation, but a law that is void ab initio for a lack of constitutional competence cannot be thus saved. As an analogy, a sick law can be cured, a dead law cannot be.
- That the unconstitutionality of RD collected post the FA, 2017 until the FA, 2018 is clear. The SC declared such delegation to be unconstitutional in the aforementioned judgment, Mustafa Impex through paragraphs 62, 64, 65 and as summarized in conclusions in paragraph 84 of the same. The RD judgment declared the specific illegality of the RD imposed through s. 18(3) of the Act, 1969 and SRO 1035/2017 which emanated therefrom and termed such delegation unconstitutional which is Relevant @ 878, paragraph 23 which states:

> "*In our respectful view, the following conclusions emerge from the foregoing passages. The "functions" of the Federal Government can be conferred on "officers or authorities" subordinate to the former in terms of Article 98. However, unlike the position in the original clause of Article 99, it is not every (i.e. "any") function that can be so conferred. Only "designated" functions can be conferred. Furthermore, those functions of the federal Government that relate to exercise of legislative power cannot be conferred at all, i.e. cannot be regarded as part of the "designated" functions. Now, the conferment of the power to impose regulatory duty on the Executive is clearly a species of delegated legislation. This position is well settled and attested in the case law, including such leading cases as Abdul Rahim, Allah Ditta v. Federation of Pakistan and others PLD 1988 SC 670, which as noted above was relied upon for the respondents. Thus, if at all such a power is delegated upon the Executive, it can only be a function of the Federal Government as constitutionally constituted and understood being, as explained in Mustafa Impex, the Federal Cabinet. It cannot be conferred on any officer or authority subordinate to the Federal Government in terms of Article 98 even if the Federal Cabinet itself so recommends."*

- That once a violation of the Constitution is established, what is left to be determined is the limitations placed by the Constitution upon the curative powers of Parliament.
- That in this regard, reference will be made to the case law booklet and the cases contained therein.
- That in 1993 SCMR 1905, Molasses Trading and Export (Pvt.) Ltd. v. Fed of Pakistan (hereinafter referred to as “Molasses”), concerned a challenge to several notifications modifying the rate of duty applicable on the import of soybean and palm oil and whether these were capable of having retrospective effect on past and closed transactions. Relevant excerpt is quoted @ 1920 of the judgment, which states:

> *“Before considering this question it would be appropriate to make certain general observations with regard to the power of validation possessed by the legislature in the domain of taxiing statutes. It has been held that when a legislature intends to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power, which is not within the domain of the legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. One of the accepted modes of achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The legislature can even give its own meaning and interpretation of the law under which the tax was collected and by "legislative fiat" make the new meaning binding upon Courts. It is in one of these ways that the legislature can neutralise the effect of the earlier decision of the Court. The legislature has within the bounds of the Constitutional limitations, the power to make such a law and give it retrospective effect so as to bind even past transactions. In ultimate analysis therefore the primary test of validating piece of legislation is whether the new provision removes the defect which the Court had found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made.”*

- That the Molasses case borrowed from AIR 1970 SC 192 ‘Shri Prithvi Cotton Mills Ltd. and Ors v. Broach Borough Municipality ad Ors (hereinafter referred to as “Prithvi”), a case which concerned a challenge

in the Indian Supreme Court of a validation of tax assessment rates. Wherein, according to learned counsel, Supreme Court of India, while examining the scope of validating law, has been pleased to hold as under:

> *"The validity of a Validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax."*

- In support of his arguments, learned counsel has placed reliance the judgments of Indian cases, in the following terms:

i. Dehli Cloth & General Mills Co. Ltd. and ors. v. State Rajasthan and ors (AIR 1996 SC 2930):

> "Mr. Shanti Bhushan, learned counsel for the appellants, submitted that the Validating Act was bad in law inasmuch as the defects which had been pointed out in the judgment of Full Bench of the Rajasthan High Court had not been removed by it. Reliance was placed upon the judgment of this Court in Shri Prithvi Cotton Mills Ltd. and Anr. V. Broach Borough Municipality and Ors. [1970] 1 SCR 338. The case of Prithvi Cotton Mills Ltd. is undoubtedly the leading case on the subject of validating statutes. The reasoning of Hidayatullah CJ in Prithvi as already quoted above, was reproduced verbatim on what validly constitutes a validation law."

ii. The Province of East Pakistan & Ors v.MD. Mehdi Ali Khan & Ors. (PLD 1959 SC (Pak) 387:

> "The position may be, and is indeed different where the legislature suffers from an inherent lack of power of enact a law. such law is void ab ignition and must be deemed never to have been enacted, and if it exists on the state book, it has no legal sanction and is essentially of the nature of an unauthorised writing on the state book. Even if the defect of lack of jurisdiction is removed by a subsequent conferment of the requisite legislative power, the law enacted when no such power

> existed will continue to be void and will create no rights or obligations unless it be re-enacted. There is a fundamental difference between a law made by an incompetent legislature and a law made by a competent legislature, but which is in conflict with a fundamental right, the former being void on general principles, the latter being void only to the extent of the repugnancy, in the sense that it cannot be applied to a particular case. The former remains void unless re-enacted by a competent legislature, the Australian cases cited above, becomes fully operative when the inconsistency or repugnancy is removed by an amendment of the Constitution or the central law."

- The General Principles for curative statutes as detailed in American jurisdiction are provided in Section 283 of the Construction of Statutes, which states:

> "Acts of this character are obviously retroactive, and hence entitled, as a general rule, to retrospective operation. Being retroactive in their very nature, they will not usually be given any prospective effect. Being subject to a liberal construction, any doubt should be resolved in favour of retrospective operation.
>
> Nevertheless, there are even limitations on the extent of the retroactive operation of curative acts. Obviously, they cannot violate provisions of the constitution. Nor should they with or destroy vested rights of third parties. They should be used only where the defect sought to be corrected resulted from a failure to comply with some formality which could have been originally dispensed with by the legislature, but which, under existing law, was material requirement… On the other hand, a curative statute cannot validate an act originally done without authority."

- The conclusion of the above additional arguments on behalf of the petitioners, can be summarized in the following terms:
  - Hence, in light of the above, it is submitted that the attempt at validating the unconstitutional levy, collection and realization of RD as originally imposed through SRO

1035/2017, as delegated by the FA, 2017 amendment to s. 18(3) of the Act, 1969 is similarly unconstitutional. The curative powers of the Parliament cannot be extended to revive acts originally done without Constitutional authority. The RD judgment has clearly held in paragraph 30(a) of the same that s. 18(3) of the Act, 1969 as amended by the FA, 2017 is ultra vires the Constitution. It is a natural consequence of this declaration that the Federal Government was incompetent to impose RD whilst the FA, 2017 was operative. It has also been declared that the said amendment was an incompetent and illegal legislative response to Mustafa Impex PLD 2016 SC 808.

- Hence, it is prayed that the declarations contained in paragraph 30 of the RD judgment 2018 PTD 861 @ 881 be affected immediately by the Respondents and any sums paid by the petitioners by way of RD under or in terms of SRO 1035/2017 be refunded in full and their bank guarantees of partially secured amounts also released. It is hence, humbly prayed that this Honourable Court may kindly allow the instant petitions as prayed.

8. Conversely, learned counsel for the respondents, including Mr. Anas Makhdoom appearing on behalf of respondent No.3 in C,P.No.D-4658/2018, have opposed the above submissions of the petitioners and have made following verbal and written submissions:-

BACKGROUND

* From time to time the Federal Government in exercise of the powers of delegated legislation under Section 18(3) Customs Act, 1969 imposed Regulatory duty in various items imported into Pakistan.
* The present lis pertains to the issuance and later validation of the issuance of SRO 1035(I)/2017 dated 16.10.2017 pursuant to

amendments made in the Finance Act, 2017 in Section 18(3) Customs Act, 1969.

* The Finance Act, 2017 inter alia made an amendment in Section 18(3) of the Customs Act, 1969 whereby in place of the words 'Federal Government' the words 'Board, with approval of the Federal Minister-in-charge were substituted. This was purportedly done to meet the requirements of the judgment of the Supreme Court in Mustafa Impex (PLD 2016 SC 808)

SRO 1035 WAS A CONSOLIDATING AND AMENDING SRO I.E. NO CHANGE IN RATE OF REGULATORY DUTY FOR 110 PCT HEADING

* At the outset it may be noted that immediately prior to the issuance of SRO 1035 (i.e. 15.10.2017 Regulatory Duty was imposed upon a number of items by way various SROs which has been validly issued under the Customs Act, 1969 namely

a. S.R.O. 482(I)/2009 dated 13.06.2009
b. S.R.O. 808(I)/2009 dated 19.09.2009
c. S.R.O. 214(I)/2009 dated 29.03.2010
d. S.R.O. 568(I)/2009 dated 26.06.2014
e. S.R.O. 1043(I)/2009 dated 25.11.2014
f. S.R.O. 254(I)/2009 dated 30.03.2015
g. S.R.O. 393(I)/2009 dated 30.04.2015 and
h. S.R.O. 1248(I)/2009 dated 17.12.2015

* As such SRO 1035 was a consolidating and amending SRO which was issued in supersession of the above 8 SROs. Together with consolidating the existing SROs on Regulatory Duty SRO 1035 also imposed Regulatory Duty and amended and rate of Regulatory Duty on various items.

* It is therefore important to note that by was of SRO 1035 no change in the existing rates of Regulatory Duty were made for items falling in 110 PCT Headings. The rates mentioned in the superseded SROs and SRO 1035 remained the same.

* In particular it may be noted that various items falling in Chapter 72 (imported by the Petitioners) were subject to the same rate of Regulatory Duty in SRO 568(I)/2014 dated 26.06.2014 and SRO 1035. These petitioners were paying Regulatory Duty on import of items in

Chapter 72 at the rates prescribed in SRO 568(I)/2014 prior to the issuance of SRO 1035.

ECC APPROVAL OF SRO 1035 AND CABINET RATIFICATION

* It is a matter of record (and also noted in the judgment of Premier Systems (2018 PTD 861) at para 26 and 27 (Pg 879-80) that SRO 1035 was prior to its issuance placed before the ECC of the Federal Cabinet and subject to certain amendments was approved on 13.10.2017. Crucially it may be noted that this was done "before the approval of the Federal Minister-in-Charge was obtained."

* It may be further noted that pursuant to Rule 17(1)(c) of the Rules of Business of the Federal Government, the decision of the ECC was "ratified by the Cabinet on or about 18.10.2017.

* The amendment made in Section 18(3) Customs Act, 1969 and the consequent issuance of SRO 1035 was challenged in the Sindh High Court.

* As an interim measure, the learned Divisional Bench was pleased to direct (by its order dated 26.10.2017 and followed in later petitions) that one-half of the Regulatory Duty that has been imposed shall be paid to the department whereas for the remaining half the petitioners would give security by way of bank guarantee/pay orders to either the Collectorate or the Nazir of this Court. Furthermore, the petitioners were also required to furnish security for the difference in the calculated taxes and duties arising from the imposed Regulatory Duty.

* By way of judgment in the CP No. 7150 of 2017 (and connected petitions) (reported as Premier Systems (Pvt) Ltd and others v. Federation of Pakistan and others 2018 PTD 861) the learned Divisional Bench of this Court was pleased to inter alia declare the amendments made in Section 18(3) Customs Act, 1969 as ultra vires the Constitution and of no legal effect and also declare SRO 1035, having been issued in terms of and in purported exercise of the powers of amended Section 18(3) as ultra vires and of no legal effect. SRO 1035 was quashed.

* In respect of the approval of the ECC and its ratification by the Cabinet, the learned Divisional Bench was pleased to hold that the Federal Government could not “have it both ways”. It went on to hold that the bringing back of the Federal Government/Cabinet into the picture via the ECC was contrary to Section 18(3) (as amended by Finance Act 2017) and consequently SRO 1035 could not be ‘saved’ on such basis.

* The judgment of the learned Divisional Bench was appealed by the Federal Government, the FBR and various Collectorates before the Hon’ble Supreme Court.

LEAVE GRANTED BY THE SUPREME COURT

* By way of Order dated 06.03.2018 in CPLA No. 706 of 2018 (Federal Board of Revenue and others v. Premier Systems and others) the Hon’ble Supreme Court was pleased to grant leave to appeal. In particular it may be noted that leave was also granted on inter alia the following questions:

(e) Whether the regulatory duty, having been approved by the Economic Coordination Committee and the Federal Cabinet, as also notified and levied under SRO No. 1035/2017 dated16.10.2017, the said notification should even otherwise have been adjudged to be valid?

(g) Whether the provisions of Section 19A of the Customs Act escaped the notice of the learned High Court of Sindh in directing refund of collections made under SRO 1035/2017?

* By way of the same order dated 06.03.2018 the Hon’ble Supreme Court was also pleased to hold that “the interim order of the learned High Court dated 26.10.2017 shall remain in force and subject to that order, operation of the impugned judgment is suspended”. As such the said security lying with the Collectorates and Nazir of this Court remained intact.

FINANCE ACT, 2018; AMENDMENTS MADE DURING PENDENCY OF APPEALS

* Customs Act, 1969 was amended vide Finance Act, 2018 during the pendency of the Appeals before the Supreme Court with effect from 22.05.2018.

Section 3(2) Finance Act, 2018 amended Section 18(3) Customs Act and substituted the words 'Board, with approval of the Federal Minister-in-Charge' with the words 'Federal Government'.

Section 3(18) Finance Act, 2018 inserted a Section 221A(2) Customs Act. This read as follows:

> *(2) Notwithstanding any order or judgment of any court, a High Court and the Supreme Court, the regulatory duty already levied, collected and realized in exercise of any powers under this Act, before the commencement of the Finance Act, 2018 and after the commencement of the Finance Act, 2017, shall be deemed to have been validly levied, collected and realized under this Act, in exercise of the powers conferred on the commencement of the Finance Act, 2018, and where any such regulatory duty has not been levied, collected or realized, the same shall be recoverable in accordance with the provisions of this Act.*

It is submitted that the express aim of Section 221A(2) was two-fold (albeit interconnected) i.e.

(i) Deem that any regulatory duty levied, collected and realized between Finance Act, 2017 and Finance Act, 2018 (i.e. by way of SRO 1035) to have been validly collected in exercise of powers conferred on the commencement of Finance Act, 2018, and

(ii) Where any such regulatory duty had not been levied, collected or realized (under SRO 1035), the same was to be recoverable in accordance with the provisions of Finance Act, 2018.

- It may be noted that a new SRO 640(I)/2018 was issued supersession of SRO 1035 on 24.05.2018.

<u>APPLICATION MOVED BEFORE THE HON'BLE SUPREME COURT</u>

- An application bearing CMA No. 1623-L of 2018 was moved by the FBR and the Collectorates in CA 321 of 2018 before the Hon'ble Supreme Court. The said application prayed for the Appeals/CPLAs to

be disposed off for the reason that no live issue remained to be adjudicated in light of the amendments made in the Finance Act, 2018.

- In particular it may be noted that it was inter alia submitted to the Hon'ble Supreme Court that in terms of the newly inserted Section 221A(2) Customs Act that (a) all regulatory duty levied, collected and realized had been fully validated/protected and (b) any regulatory duty including arrears not so far collected/realized could now be levied, collected and realized.
- Through its order dated 11.06.2018 the Hon'ble Supreme Court was pleased to dispose of the appeals at the request of the FBR and the Collectorates in view of the subsequent developments and amendments in Sections 18(3) and 221A(2) Customs Act.
- The Hon'ble Supreme Court went on to hold that any observation made or finding given in the Premier Systems judgment on the basis of the amendments made in the Finance Act, 2017 would not cause any prejudice to the FBR and the Collectorates.
- It is submitted that consequently, the Hon'ble Supreme Court, after reviewing the amendments came to the conclusion that the levy, collection and realization of the regulatory duty pursuant to SRO 1035 had been properly validated and as a consequence it was pleased to observe that the observations made on the old law by this Court would not prejudice the FBR and the Collectorates i.e. in levying, collecting and realizing regulatory duties.

<u>ENCASHMENT NOTICES ISSUED</u>

The FBR issued notices to the Collectorates asking them to seek encashment of the bank guarantees lyingn with the Nazir of this Court.

- As a consequence thereof the present petitions were filed seeking a declaration that Section 221A(2) Customs Act is ultra vires and consequently seeking return of the security lying with the Nazir and also refund of the one-half of the regulatory duty already paid.

LEGAL SUBMISSIONS

- It is the case of the petitioners that Section 221A(2) could not validate levy, recovery and realization of regulatory duty as the same was not inserted with retrospective effect from or before SRO 1035 was issued.
- It is also the case of the petitioners that even otherwise validation could never be conferred on an unconstitutional act; and SRO 1035 had been declared unconstitutional on the touchstone or Mustafa Impex. Put another way only voidable acts in contradistinction to void acts could be validated.

A. ISSUANCE OF sro 1035 WAS PROPERLY VALIDATED

- It is submitted that the issuance of SRO 1035 was properly validated by way of Section 221A(2) Customs Act. This would include, as discussed below, it being placed before the ECC and also the ratification of the decision of the ECC by the Federal Cabinet.
- First point to note is that Section 221A(2) was inserted during the pendency of the Appeals to the Supreme Court. It is submitted that once an appeal is admitted in the Supreme Court against a judgment of High Court, the finality of the High Court's judgment is destroyed and the matter becomes subjudice. The Court is then required to consider the matter in light of any amendments made in the law during the pendency of the Appeals.

  Reliance is placed on Commissioner of Sales Tax (West), Karachi v. Kruddsons Ltd [PLD 1974 SC 180} at P: 184

- It is submitted that the Hon'ble Supreme Court therefore, properly considered the amendments and acceded to the view of the FBR that the SRO 1035 had been properly validated by Section 221A(2) Customs Act.
- It is submitted that a remedial and curative enactment should be construed to advance the remedy and suppress the mischief as otherwise it would frustrate the legislative intendment. Such statutes are generally retroactive in their application. Reliance is placed on

Collector of Sales Tax and Central Excise v. Pak Suzuki Co. Ltd. {2016 SCMR 646) P: 653 para 14 placitum A

- Keeping in view the above, it is to be noted that superior Courts have time and again held that the legislature has the power to validate taxes declared to be collected by a Court as long as it removes the cause for invalidity.

  Reliance is placed on Molasses Trading & Export (Pvt) Limited v. Federation of Pakistan [1993 SCMR 1905] at 1920 – placitum B

- It is further submitted that within these general powers, as noted in Molassess Trading (above) the Supreme Court expressly laid down that the Legislature may adopt any one of the means available to it to validate a tax declared illegal.

- In

  Income Tax Officer v. Sulaiman Bhai Jiwa [PLD 1970 SC 80 (4 Member) P: 89-90; placitum C, D and E.

  The Supreme Court construed a similar provision and held that the use of the words denoting past time such as ‘has been’ clearly denote the past and “could not be construed except retrospectively” (pg 90 PLD)

- It is further submitted that Section 221A(2) specifically refers to the period between Finance Act, 2017 and Finance Act, 2018 and seeks to validate the levy of regulatory duty in that period. As a result it is humbly submitted that it this Court were to construe that Section 221A(2) does not have retrospective effect as urged by the petitioners, Section 221A(2) would be a nullity and would rendered redundant.

- By way of example reliance may be placed on Wajid Ali v. Globe Automobiles [1993 SCMR 819) see pg 827-828: paras 13 & 16.

  In this case wherein a similarly worded validating statue (reproduced in para 16 of the judgment) to Section 221A(2) was held to have the effect of validating all past actions.

- Reliance by way of example is also placed on

Mamukanjan Cotton Factory v. Punjab Province [PLD 1975 SC 50]

On pg. 52 the provision which is strikingly similar to Section 221A(2) was reproduced. This purported to validate the levy, charging, collection or realization of cotton fee.

The Hon'ble Supreme Court held that the legislature was competent to undertake any remedial or curative legislation after discovery of a defect in a law and dismissed the appeals thereby upholding the provision.

Reference was also made to another judgment namely Haji Dossa Limited v. Province of Punjab [1973 SCMR 2]

Where the same provision had been held to be retrospective although it did not expressly state it was.

It is submitted that Section 221A(2) Customs Act should be held to properly validate SRO 1035 and the levy, collection and realization of Regulatory Duty therein.

- The attention of this Court is also invited to the judgment of the Supreme Court of India in Indian Aluminum C. v. State of Kerala [AIR 1996 SC 1431] para 31 to 37, 57 to 58

  In this case a strikingly similar validating provision in a law was under consideration (with express reference to certain periods of time) as in Section 221A(2) Customs Act (reproduced in para 31)

  The Supreme Court of India after exhaustively reviewing all the case law in para 57 stated the principles settled by the Supreme Court.

  The law was therefore held to be valid.

  <u>EC/CABINET DECISION</u>

- It may also be helpful to recall that as noted in <u>Premier Systems</u> (para 26 and 27) SRO 1035 was prior to its issuance placed before the ECC of the Federal Cabinet and subject to certain amendments was approved on 13.10.2017. Crucially it may be noted that this was done "before the approval of the Federal Minister-in-charge was obtained". Thereafter pursuant to Rule 17(1)(c) of the Rules of Business of the

Federal Government, the decision of the ECC was “ratified by the Cabinet on or about 18.10.2017”.

- It is submitted that the only vice noted in Premier Systems was that amendments made Section 18(3) were unconstitutional on the touchstone of Mustafa Impex and as such even ECC and Cabinet approval were contrary to the law as it then stood.
- It has been urged before this Court that even if Section 221A(2) was validly enacted it could never validate a thing that was unconstitutional to begin with.
- In addition to what has been submitted herein it is may be particularly noted that if the ECC and Federal Cabinet approval is seen in the context of Section 221A(2) the entire controversy can be put to rest. The said levy/approval of SRO 1035 by the ECC/Cabinet is ‘deemed to have been validly levied… in exercise of the powers conferred on the commencement of the Finance Act, 2018’ i.e. by the Federal Government being ECC/Cabinet.

  Reliance in this respect is placed on

  Shahmurad Sugar Mills v Union Council
  1990 MLD 305 (DB SHC)

  wherein it was held, construing a similarly drafted provision of law, at para 4 that where a law validates a particular act or transaction it validates the act or transaction as a whole and not merely by various ingredients thereof. As such the ECC/Cabinet approval was also validated.
- It was also urged before this Court that (without noting the ECC/Cabinet approval) that SRO 1035 could never be validated being unconstitutional and thereby ab initio void as opposed to voidable.
- It is submitted in response that while it would not be open to the legislature to reenact Section 18(3) as was amended by way of Finance Act, 2017, there can be no issue if validation is accorded to the ECC/Cabinet approval and the subsequent issuance of SRO 1035.

- In addition it is submitted that the validation of unconstitutional taxes sue was considered by a 7 member bench of the Supreme Court of India. This it is submitted, should be relevant to uphold the validation of SRO 1035. In

  Misrilal Jain v State of Orissa

  AIR 1977 SC 1686

  The Supreme Court of India was asked to strike down a law which purportedly retrospectively sought to validate a law which was struck down for being unconstitutional as having been passed without sanction of the President. The Supreme Court held that as the constitutional vice from which the law suffered had been cured by a new legislative enactment.

  It is submitted that it is not in dispute that the power to impose Regulatory Duty on items is constitutional and valid. It also cannot be disputed that the ECC/Cabinet approved SRO 1035. The only vice noted by this Court in Premier Systems was the amendments made in Section 18(3).

  Consequently, it is submitted, once these are removed and the ECC/Cabinet approval is deemed to have been accorded 'in exercise of power conferred on the commencement of the Finance Act, 2018' the constitutional vice stood cured and SRO 1035 should be declared to be valid.

B. PAST AND CLOSED TRANSACTIONS

- It is submitted that as the amendments had been made during the pendency of the Appeals, the Hon'ble Supreme Court was well within its rights to review the same and conclude as to their effect. In addition it is submitted that as the interim arrangement put in place by this Court had remained in place (and the Judgment had remained suspended in the terms noted above) no vested rights accrued to the Petitioners. In the alternative it is submitted such vested rights were

validly taken away. It is further submitted that no transactions become past and closed.

Reliance is placed on

Collector of Sales Tax and Central Excise v Pak Suzuki Co. Ltd.
2016 SCMR 646 (at pg 653, para 14 placitum A)

wherein it was held that where the legislature so intended, the finality of judgments may be destroyed during pendency of appeals.

Reliance is also placed on

Molasses Trading & Export (Pvt) Limited v Federation of Pakistan
1993 SCMR 1905 (at pg 1923-24 – placitums H and L)

C. REVIVAL OF EARLIER NOTIFICATIONS

- It is submitted (without conceding) that an important consequence of the striking down and non-validation of SRO 1035 is that

  a. S.R.O.482(1)/2009 dated 13.06.2009
  b. S.R.O.808(1)/2009 dated 19.09.2009
  c. S.R.O.214(1)/2010 dated 29.03.2010.
  d. S.R.O.568(1)/2014 dated 26.06.2014
  e. S.R.O.1043(1)/2014 dated 25.11.2014
  f. S.R.O.254(1)/2015 dated 30.03.2015
  g. S.R.O.393(1)/2015 dated 30.04.2015
  h. S.R.O.1248(1)/2015 dated 17.12.2015

  All of which had been superseded by SRO 1035, which were not under challenge and which had been otherwise properly issued stood revived.

  This is because SRO 1035 would in its entirely be considered ab initio void and non-est being ultra vires the Constitution. Even otherwise no intention to repeal the 8 SROs without replacing them with SRO 1035, can be borne out. This is especially when for 110 PCT headings no change in Regulatory Duty was made.

  Reliance is placed on

  State of Maharashtra v Central Provinces Managanese Ore Co
  AIR 1977 SC 879 (para 16 onwards)

  The Court held in para 20 that the real test one of gathering intent from the use of words in the enacting provision seen in the light of the procedure gone through and where on intention of repeal without

substitution was deducible the could be no repeal if substitution/supersession failed. (Also see paras 24, 25, 27).

Koteswar Vittal Kamath v K. Rangappa Baliga
AIR 1974 SC 1480

Reliance is also placed on

Mohd. Shaukat Hussain Khan v State of Andhra Pradesh
AIR 1974 SC 1480

Where it was held (para 11) that where a repealing act was struck down as being still-born, null and void and as such unconstitutional from its inception it cannot have the effect as if it had repealed the previous Acts at all.

- Without prejudice to the other submissions herein, it is submitted that even if SRO 1035 was not properly validated by Section 221A(2) Customs Act, the items imported during the period it was in place would have been imported under and pursuant to the above SROs and regulatory duty would be levied thereon as provided in the same. In particular it would be relevant to note that the Premier Systems judgment never became final.
- As noted above for items falling in 110 PCT Headings listed in the above 8 SROs which stood revived no change in Regulatory Duty was made. For a number of items a different rate (from SRO 1305) was prescribed. For other items SRO 1035 removed the Regulatory Duty.
- Consequently, and without prejudice to the other submissions, the effect of the revival of 8 SROs would be that

a. Regulatory Duty was imposed on the items and at the rates provided in the 8 SROs.

b. the security deposited with the Nazir of this Court in respect of Regulatory Duty would be encashed to the extent required (for example for those items for which the rate of duty did not change between the 8 superseded SROs and SRO 1035 the security would be liable to be encahsed in its entirety).

D. REGULATORY DUTY IS NOT REQUIRED TO BE REFUNDED

- It is submitted that Regulatory Duty is a species of Customs Duty (see Collector of Customs v Revi Spinning Ltd (1999 SCMR 412; para 13). As a result regulatory duty is also a species of indirect tax.
- Section 19A Customs Act, 1969 (inserted by Finance Act, 2005) provides as follows:

  > **"19A. Presumption that incidence of duty has been passed on to the buyer.**
  >
  > Every person who has paid the customs duty and other levies on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such customs duty and other levies to the buyer as a part of the price of such goods."

- In Army Welfare Sugar Mills v Federation of Pakistan (1992 SCMR 1652) the Hon'ble Supreme Court at para 55 was pleased to direct that where additional amount of excise duty had been passed on to the purchasers/consumers, the same would be refunded. In Fecto Belarus Tractor v Government of Pakistan (PLD 2005 SC 605) (a pre-Section 19A case) the Hon'ble Supreme Court in para 71 held that as the Services Charges, Sales Tax and Customs Duty had been passed on to the purchasers, any refund would amount to unjust enrichment.
- It is submitted that even if the Petitions were allowed, the Petitioners would not be entitled to a refund and return of the securities deposited with the Nazir of this Court as the same would amount to unjust enrichment.

9. We have heard the learned counsel for the parties, perused the record with their assistance and have also gone through with the judgment relied upon by learned counsel for the parties in support of their submissions. We have also taken note of the earlier petitions, whereby, amendment made in sub-section (3) of Section 18 of the Customs Act, 1969, by Finance Act, 2017, and imposition of Regulatory Duty through SRO No.1035(1)/2017 dated 16.10.2017 issued under

purported exercise conferred under amended Section 18(3) with the approval of Federal Minister-In-charge (being the Finance Minister), was challenged before the Divisional Bench of this Court, which were allowed vide judgment reported as **2018 PTD 861** in the case of **Premier System (Pvt) Ltd. and others v. Federation of Pakistan and others**, by learned Divisional Bench while placing reliance in the case of **Mustafa Impex and others v. Government of Pakistan and others** reported as **2016 PTD 2269,** in the following terms:-

> *"30. In view of the foregoing, we declare and hold as follows:-*
>
> *a. Section 18(3) of the Customs Act, 1969 as and to the extent as amended by the Finance Act, 2017 is declared to be ultra vires the Constitution, and of no legal effect;*
>
> *b. S.R.O. 1035(I)/2017 dated 16.10.2017, issued in terms of, and in purported exercise of the powers conferred by, the amended section 18(3) is declared to be ultra vires, of no legal effect and is hereby quashed;*
>
> *c. The respondents or any authority or officer thereof are restrained from demanding any duty in terms of S.R.O. 1035 or from enforcing the same in any manner whatsoever, whether by way of detaining or refusing release of imported goods or otherwise;*
>
> *d. The security given by the petitioners under interim orders is directed to be released forthwith;*
>
> *e. Any sums paid by the petitioners by way of regulatory duty under or in terms of SRO 1035 must be refunded in full. Such refund may be made by way of direct repayment or adjustment (against any tax or duty) and in one lumpsum or in installments, as the FBR may determine (but the same policy must be adopted in all cases). However, the entire amount that is refundable must in each case be settled in full not later than 31.10.2018."*

10. The above judgment of the learned Divisional Bench of this Court was assailed by the FBR by filing CPLA being Civil Appeal No.321/2018 before the Hon'ble Supreme Court of Pakistan, however, instead of getting the impugned judgment of the Divisional Bench of this Court in the case of Premier Systems (Pvt) Ltd. set-aside, or seeking a declaration on the legal issues involved therein from the Hon'ble Supreme Court relating to validity of amendment in sub-section

(3) of Section 18 of the Customs Act, 1969, introduced through Finance Act, 2017, and imposition of Regulatory Duty vide SRO 1035(I)/2017 dated 16.10.2017, respondents(FBR) moved an application under Order XXXIII Rules 5 & 6 of the Supreme Court Rules 1980, (being CMA No.1623/2018), before the Honourable Supreme Court, with a prayer that titled appeal may be disposed of in terms of paragraph 5 of such application. However, from perusal of the order dated 11.06.2018 passed by the Hon'ble Supreme Court of Pakistan, it appears that the application filed by the FBR has not been disposed of in terms of paragraph 5 of the application, on the contrary, the application has been disposed of while taking note of the submission of the learned counsel for the FBR to the extent that ***on account of subsequent development, an amendment in the relevant provision of law, the present matters have been rendered infructuous***. Accordingly, the Hon'ble Supreme Court was pleased to observe that "**in this view of the matter, these appeals are disposed of**". It is pertinent to note that while disposing of matter, the Hon'ble Supreme Court was pleased to clarify that any observation made or finding given in the impugned judgment(s) on the basis of Erstwhile Law, shall not cause any prejudice to the appellants/petitioners, whereas, it was further observed that ***in case at any point of time, the question of validation of the amended law or SRO(s) is raised before any Court of competent jurisdiction, the same shall be independently decided on its own merits***. There seems no ambiguity in the order passed by the Hon'ble Supreme Court on the application filed by the FBR, whereby, without setting aside the judgment of the learned Divisional Bench of this Court in the case of **Premier Systems (Pvt) Ltd and others v. Federation of Pakistan and others**, or modifying the effect of the legal position as emerged in respect of amendment made in Section 18(3) of the Customs Act, 1969, through Finance Act, 2017, and the imposition of Regulatory Duty through SRO 1035(I)/2-17 dated 16.10.2017, the Civil Appeals filed by the FBR were finally disposed of in the above terms. Suffice to state that the legal position with regard to **invalidity of imposition of Regulatory Duty** during the period starting from the date of commencement of Finance Act, 2017 and till the date of commencement of Finance Act, 2018 remains unchanged. This factual and legal

position is clear in view of paragraph 2 of the order of the Hon'ble Supreme Court, wherein, to examine the validity or otherwise of the amendment made through Finance Act, 2018, while inserting sub-section (2) of Section 221-A of the Customs Act, 1969, has been left open to be decided by the Court of competent jurisdiction independently on its own merits in accordance with law.

11. Keeping in view the above factual and legal position as emerged in these cases, we may now examine as to whether sub-section (2) added by Finance Act, 2018, in Section 221-A of the Customs Act, 1969, whereby, the legislature has attempted to validate the amendment in Section 18(3) of the Customs Act, 1969, through Finance Act, 2017, and imposition of Regulatory Duty through SRO 1035(I)/2017 dated 16.10.2017, by giving it retrospective effect for the period during Finance Act, 2017 and 2018, is in accordance with law and the Constitution or otherwise. We will also examine the effect and the application of the above cited judgments of Hon'ble Supreme Court in the case of Mustafa Impex and the judgment of the Sindh High Court in the case of Premier Systems (Pvt.) Ltd. on the impugned amendments through Finance Act, 2018, whereby, sub-section (2) has been added in Section 221-A of the Customs Act, 1969, attempting to validate the imposition of Regulatory Duty and its retrospective application, if any. The judgment of the Hon'ble Supreme Court of Pakistan in the case of **Mustafa Impex** is a comprehensive judgment defining the term, "**Federal Government**" and its authority to issue Notifications and SROs in tax and other fiscal matters, whereas, the scope and extent of delegated legislation has also been explained in terms of relevant Constitutional provisions, including Articles 73, 77, 90, 91, 92, 98 and 99 etc. of the Constitution of Islamic Republic of Pakistan, 1973. The Hon'ble Supreme Court has decided that **Federal Government means the Prime Minister and the Federal Ministers (the Cabinet)** and not just Prime Minister, Federal Minister, or any Federal Minister-in-Charge alone, therefore, any Notification or SRO issued without approval of the Federal Government (Federal Cabinet) is without jurisdiction and of no legal effect. The Hon'ble Supreme Court has been further pleased to declare Rule 16(2) of the Rules of Business of Federal Government, 1973, as ultra-vires, while observing that **it apparently enables the Prime Minister to by-pass the**

Federal Cabinet, while delegating the authority of delegated legislation to a person other than the Federal Government for the purposes of issuing Notification/SRO in fiscal and tax matters. The Divisional Bench of this Court in the case of **Premier Systems (Pvt) Ltd.**, has been pleased to declare the amendment in sub-section (3) of Section 18 of the Customs Act, 1969, **as and to the extent as amended by Finance Act, 2017**, and **imposition of Regulatory Duty through SRO 1035(I)/2017 dated 16.10.2017**, as **ultra-vires** to the Constitution, while placing reliance on the judgment of the Hon'ble Supreme Court in the case of **Mustafa Impex**, wherein, it has been held that authority to delegate the taxing powers by the parliament to the Federal Government cannot be further delegated to any other authority or officer sub-ordinate to Federal Government in terms of Article 98 of the Constitution. This aspect of the matter has been dealt with in the following terms:-

> *"23. In our respectful view, the following conclusions emerge from the foregoing passages. The "functions" of the Federal Government can be conferred on "officers or authorities" subordinate to the former in terms of Article 98. However, unlike the position in the original clause of Article 99, it is not every (i.e., "any") function that can be so conferred. Only "designated" functions can be conferred. Furthermore, those functions of the Federal Government that relate to exercise of legislative power cannot be conferred at all, i.e., cannot be regarded as part of the "designated" functions. Now, the conferment of the power to impose regulatory duty on the Executive is clearly a species of delegated legislation. This position is well settled and attested in the case law, including such leading cases as Abdul Rahim, Allah Ditta v. Federation of Pakistan and others PLD 1988 SC 670, which as noted above was relied upon for the respondents. Thus, if at all such a power is delegated upon the Executive, it can only be a function of the Federal Government as constitutionally constituted and understood being, as explained in Mustafa Impex, the Federal Cabinet. It cannot be conferred on any officer or authority subordinate to the Federal Government in terms of Article 98 even if the Federal Cabinet itself so recommends.*
>
> *24. It follows from the foregoing that notwithstanding our conclusion as regards the combination of FBR acting with the approval of the Minister-in-charge coming within the scope of Article 98, the function with which we are here concerned (i.e., the delegated legislative power to impose a regulatory duty) is a function that can vest only in the Federal Government itself and not elsewhere or otherwise. The amendment made to section*

> *18(3) by the Finance Act, 2017, being contrary to the constitutional position, must therefore necessarily fail."*

12. It is pertinent to note, that in the above judgment, the learned Divisional Bench has been further pleased to examine the effect and implication of the impugned amendment in law made through Finance Act, 2018, after decision of the Hon'ble Supreme Court in the case of **Mustafa Impex**, as well as the judgment of the Divisional Bench of this Court in the case of Premier Systems (Pvt.) Ltd. in the following terms:-

> *"27. With respect, we are unable to agree. The respondents cannot have it both ways. It cannot be correct that although in response to* ***Mustafa Impex*** *the law was altered to, as it were, remove the Federal Government (i.e. Cabinet) from the equation it can nonetheless step back in at any time, either on its own or at the request of those on whom the statutory power has been conferred by the change in law. If at all the FBR, with the approval of the Minister-incharge, could have lawfully and validly exercised the powers conferred on them by section 18(3) then the said powers had to be so exercised. Seeking the approval of, or acting on the behest of, anyone else including the Federal Cabinet would be contrary to well known and well established principles of administrative law. And it matters not that the ECC is invariably chaired by the very Minister-in-charge empowered by the statute, i.e., the Finance Minister.* ***The whole purpose of the amendment was, as it were, to take the Federal Government out of the loop****. After all, that is what the Federal Cabinet itself recommended since, as correctly pointed out by the learned AAG, the Finance Act, 2017 was only tabled as a Bill with its approval.* ***If Parliament acceded to the request and changed the law, then the amendment (if of course, otherwise constitutionally valid) would have to be read literally and applied strictly and rigidly. For the Federal Government/Cabinet to be brought back into the picture via the ECC was itself contrary to the law as amended SRO 1035(I)/2017 cannot therefore be "saved" on such basis****."*

13. The FBR or the Federal government, instead of getting the above judgment of the Divisional Bench of this Court reversed, set-aside, or modified, chose to withdraw the Civil Appeal No.321/2018 from the Hon'ble Supreme Court

of Pakistan, therefore, the decision of the learned Divisional Bench of this Court on the subject legal issues attained finality and cannot be allowed to be re-agitated on the same grounds and reasoning before same forum. Through impugned amendment, while inserting sub-section (2) of Section 221-A of the Customs Act, 1969, it appears that an attempt has been made to render the judgment of the Divisional Bench of this Court in the case of **Premier Systems (Pvt) Ltd**. as well as the judgment of the Hon'ble Supreme in the case of **Mustafa Impex** as redundant and of no legal effect at the one hand, and also to validate the amendment in sub-section (3) of Section 18 of the Customs Act, 1969 vide Finance Act, 2017 and the imposition of Regulatory Duty through SRO 1035(I)/2017 dated 16.10.2017, by giving retrospective effect i.e. from the date of commencement of Finance Act, 2017 till the date of commencement of Finance Act, 2018.

13. We are in agreement with the submissions of the learned counsel for the petitioners that Article 98 of the Constitution does not confer unfettered powers upon the Parliament to delegate the taxing powers to any person or authority, other than the Federal Government, however, only to the extent of permissible delegated legislation. Since, **Imposition of Regulatory Duty is a species of delegated legislation**, therefore, it can only be a function of the **Federal Government** i.e. Federal Cabinet comprising of Prime Minister and other Federal Ministers. Having realized the Constitutional and legal position relating to the scope and extent of delegation of authority by the Parliament to the Federal Government, and issuance of any Notification and SRO relating to imposition of taxes etc. as emerged in the light of judgment of the Hon'ble Supreme Court in the case of **Mustafa Impex** as well as the judgment of the Divisional Bench of this Court in the case of **Premier Systems (Pvt) Ltd.**, in sub-section (3) of Section 18 of the Customs Act, 1969, the expression "**Federal Government**" has been substituted for **"Board, with the approval of Federal Minister-in-Charge**. However, while doing so, it has been observed that no retrospective effect has been given to such amendment in sub-section (3) of Section 18 of the Customs Act, 1969 either expressly or through any intendment. On the contrary, through

impugned amendment, while inserting sub-section (2) in Section 221-A of the Customs Act, 1969, an attempt has been made to revive imposition of Regulatory Duty through amendment in sub-section (3) of Section 18 and issuance of SRO 1035(I)/2017 dated 16.10.2017 through Finance Act, 2017, which has already been declared to be unconstitutional, illegal and of no legal effect by Divisional Bench of this Court in the case of Premier Systems (Pvt.) Ltd. Moreover, in view of withdrawal of Civil Appeal by the FBR before the Hon'ble Supreme Court, the legal positions as emerged in view of the judgment in the case of **Premier Systems (Pvt) Ltd.** has attained finality, particularly, in respect of amendment made through Finance Act, 2017 in sub-section (3) of Section 18 of the Customs Act, 1969, and issuance of SRO 1035(I)/2017 dated 16.10.2017, therefore, any subsequent legislation in this regard without removing the legal and Constitutional defect, would be equally illegal and un-Constitutional. It is pertinent to note that the Divisional Bench of this Court in the case of **Premier Systems (Pvt) Ltd.** while placing reliance on the judgment of the Hon'ble Supreme Court in the case of **Mustafa Impex**, wherein, it was held that Rule 16(2) of the Rules of Business, 1973, is ultra-vires to the Constitution for the reasons it enabled the Prime Minister to by-pass the Cabinet, has been pleased to hold that such defect, **being a constitutional defect** in terms of Articles 90, 91 and 98 of the Constitution, therefore, cannot be cured through subsequent legislation, particularly, in past and closed transaction unless, there is amendment in Constitution . It has been further held that Rules of Business 1973, are mandatory in nature and binding on the Federal Government, therefore, **failure to follow them would lead to an order lacking any legal validity**. Any other interpretation of the legal position or inference drawn from above facts, would be contrary to the judicial pronouncements by the Hon'ble Supreme Court in the case of **Mustafa Impex** and judgment of the Divisional Bench of this Court in the case of **Premier Systems (Pvt) Ltd**.

14. It is settled legal position that any legislation or enactment declared to be ultra-vires to the law and the Constitution by the competent Court of jurisdiction, seizes to has its effect from the date of its commencement, therefore, any charge created or recovery of tax made during the period from its

commencement till the judicial pronouncement declaring the same to be ultra vires becomes illegal and without jurisdiction. In the instant case, the imposition of regulatory duty through delegated legislation with the approval by an authority other than the Federal Government (i.e. Federal Minister-in-Charge) has already been declared to be illegal and un-Constitutional, whereas, there has been no amendment in the Constitution to alter the above legal position relating to delegated legislation by the Parliament to the Federal Government. Therefore, the impugned amendment through Finance Act, 2018 by adding sub-section (2) in Section 221-A of the Customs Act, 1969 attempting to validate imposition of regulatory duty through illegal and un-Constitutional amendment in law, is un-Constitutional and without lawful authority. While applying the ratio of the aforesaid judgment on the facts and the legal grounds agitated through instant petitions, particularly, relating to validation of provisions of Section 18(3) of the Customs Act, 1969, and issuance of SRO 1035(I)/2017 dated 16.10.2017, imposing Regulatory Duty on imports, through impugned amendment in sub-section (2) of Section 221-A of the Customs Act, 1969, we are of the opinion that legislature has erred in law, while attempting to revive an illegal and unconstitutional amendment made under Section 18(3) of the Customs Act, 1969, through Finance Act, 2017 and also issuance of SRO 1035(I)/2017 dated 16.10.2017, whereby, the authority of delegated legislation was given from Federal Government (Federal Cabinet) to the Federal Minister-In-Charge. Reliance in this regard can be placed in the case of **Molasses Trading & Export (Pvt) Limited v. Federation of Pakistan [1993 SCMR 1905]**, wherein, this aspect of

the matter relating to scope of validation of any legislation has been dealt with in the following terms:-

> " Before considering this question it would be appropriate to make certain general observations with regard to the power of validation possessed by the legislature in the domain of taxing statutes. It has been held that when a legislature intends to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power, which is not within the domain of the legislature. **It is**

> **therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances**. One of the accepted modes of achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The legislature can even give its own meaning and interpretation of the law under which the tax was collected and by "legislative fiat" make the new meaning binding upon Courts. It is in one of these ways that the legislature can neutralise the effect of the earlier decision of the Court. The legislature has within the bounds of the Constitutional limitations, the power to make such a law and give it retrospective effect so as to bind even past transactions. **In ultimate analysis therefore the primary test of validating piece of legislation is whether the new provision removes the defect which the Court had found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made**.

Further reliance in this regard can be placed in the case of **MIRPURKHAS SUGAR MILLS LIMITED V. DISTRICT COUNCIL, THARPARKAR through Chairman and 3 others (1991 MLD 715),** wherein, a Divisional Bench of this Court has been pleased to hold as under:-

> "Therefore any Act which validates any law, notification or action which is ultra vires the Constitution will also be ultra vires as the legislature cannot impose by law or validate that which is against the Constitution."

Reference in this regard can also be made to the following reported judgments:-

(i) The Province of East Pakistan and another v. MD. Mehdi Ali Khan & others [**PLD 1959 SC 387**]

(ii) Shukar Din (Naik No. 411) and others v. Major Abaidur Rehman and others [**PLD 1965 (W.P.) Lahore 522**]

(iii) B. Krishna Bhat v. State of Karnataka and another [**AIR 2001 SC 1885**]

15. The aforesaid petitions are, therefore, disposed of in the following terms:-

(i) The impugned sub-section (2) of Section 221-A of the Customs Act, 1969, as added vide Finance Act, 2018, is **ultra vires** to the Constitution of Islamic Republic of Pakistan, 1973, as through impugned amendment the legislature has attempted to validate constitutional defect while making amendment in sub-section (3) of Section 18 of the Customs Act, 1969, and issuance of SRO 1035(I)/2017 dated 16.10.2017, through Finance Act,

2017, however, without making the required constitutional amendment.

(ii) The Regulatory Duty charged and collected pursuant to amendment in sub-section (3) of Section 18 of the Customs Act, 1969, and issuance of SRO 1035(I)/2017, through Finance Act, 2017, has already been declared by the Divisional Bench of this Court in the case of **Premier Systems (Pvt) Ltd. v. Federation of Pakistan and others (2018 PTD 861)**, as illegal and unconstitutional in the light of judgment of the Hon'ble Supreme Court of Pakistan in the case of **Mustafa Impex**, **Karachi & others vs. The Government of Pakistan & others, (PLD 2016 SC 808)**, therefore, in the absence of any constitutional amendment, cannot be validated through subsequent amendment in law, while giving it retrospective effect in respect of past and closed transaction, therefore, no Regulatory Duty can be charged, collected or recovered for the period starting from the date of commencement of Finance Act, 2017 till the date of commencement of Finance Act, 2018.

The aforesaid petitions stand disposed of in the above terms along with listed application(s).

JUDGE

Dated: 06.08.2020. ***JUDGE***