# IN THE HIGH COURT OF SINDH, KARACHI

**Present: Mr. Justice Muhammad Junaid Ghaffar**
**Mr. Justice Agha Faisal**

| | | |
|---|---|---|
| 1. | Const. P. D-1089/2016 | MAL Pakistan Ltd. Vs. Pakistan & Another |
| 2. | Const. P. 1720/2016 | Muhammad Kashif **VS** Fed. of Pakistan and Ors |
| 3. | Const. P. 1950/2016 | Muhammad Imran **VS** Fed. of Pakistan & ors |
| 4. | Const. P. 5038/2016 | M/s Zahid Majeed Corp. **VS** Fed. of Pakistan and Ors |
| 5. | Const. P. 5039/2016 | M/s I.T Impex **VS** Fed. of Pakistan and Ors |
| 6. | Const. P. 5708/2016 | M/s Khurram Enterprises **VS** Fed. of Pakistan and Ors |
| 7. | Const. P. 5709/2016 | M/s Aziz Sons **VS** Fed. of Pakistan and Ors |
| 8. | Const. P. 5710/2016 | M/s MSMS Trading Co. **VS** Fed. of Pakistan and Ors |
| 9. | Const. P. 6495/2016 | M/s S.Q.M & Ors **VS** Govt of Sindh & Ors |
| 10. | Const. P. 1054/2017 | Muhammad Ateeq Shaikh **VS** Fed. of Pakistan and Ors |
| 11. | Const. P. 2275/2017 | M/s Precision Polymres (Pvt) Ltd and Ors **VS** Fed. of Pakistan and Ors |
| 12. | Const. P. 2471/2017 | M/s Rashid Autos **VS** Govt. of Pakistan and Ors |
| 13. | Const. P. 2650/2017 | M/s Tariq Autos Traders **VS** Govt. of Pakistan and Ors |
| 14. | Const. P. 2982/2017 | M/s Saz Enterprises **VS** Fed. of Pakistan and Ors |
| 15. | Const. P. 2983/2017 | M/s R.K Co. **VS** Fed. of Pakistan and Ors |
| 16. | Const. P. 2984/2017 | M/s Fatima Enterprises **VS** Fed. of Pakistan and Ors |
| 17. | Const. P. 4470/2017 | Faraz Brothers **VS** Government of Pakistan & Ors |
| 18. | Const. P. 4699/2017 | Shahzad Riaz **VS** Fed. of Pakistan and Ors |
| 19. | Const. P. 4733/2017 | Sajjad Riaz **VS** Fed. of Pakistan and Ors |
| 20. | Const. P. 4946/2017 | M/s Ateeq Auto Traders **VS** Govt of Sindh & Ors |
| 21. | Const. P. 5046/2017 | Muhammad Anwar Rashid **VS** Fed. of Pakistan and Ors |
| 22. | Const. P. 5103/2017 | M/s Sonia International **VS** Fed. of Pakistan and Ors |
| 23. | Const. P. 5320/2017 | Ayesha Abdul Samad **VS** Fed. Of Pakistan and Ors |

| | | |
|---|---|---|
| 24. | Const. P. 7139/2017 | M/s Ori Tech Oils (Pvt) Ltd and Ors **VS** Fed. of Pakistan and Ors |
| 25. | Const. P. 7172/2017 | M/s Cotex (Pvt) Ltd **VS** Fed. of Pakistan and Ors |
| 26. | Const. P. 7204/2017 | Muhammad Danish **VS** Fed. of Pakistan and Ors |
| 27. | Const. P. 8670/2017 | M/s Mehran Oil (Pvt) Ltd **VS** Fed. of Pakistan and Ors |
| 28. | Const. P. 8725/2017 | Ovais Suleman and Ors **VS** Fed. of Pakistan and Ors |
| 29. | Const. P. 1843/2018 | Futur Tech **VS** Fed. of Pakistan and Others |
| 30. | Const. P. 1879/2018 | M/s A.R Corp & Ors **VS** Govt of Sindh & Ors |
| 31. | Const. P. 1950/2018 | M/s World Trader Management **VS** Dir: Investigation & Intelligence & Ors |
| 32. | Const. P. 2137/2018 | M/s Bath & Beyond **VS** Fed. of Pakistan and Others |
| 33. | Const. P. 2234/2018 | M/s Rabia Corp. **VS** Govt. of Pakistan and Others |
| 34. | Const. P. 2383/2018 | M/s Export Apparel **VS** Govt of Sindh & Ors |
| 35. | Const. P. 5263/2018 | M/s Attractive International & Ors **VS** Fed. of Pakistan and Others |
| 36. | Const. P. 530/2018 | M/s Mehran Oil (Pvt) Ltd **VS** Fed. of Pakistan and Ors |
| 37. | Const. P. 5892/2018 | M/s A.S & Sons & Ors **VS** Fed. of Pakistan and Others |
| 38. | Const. P. 63/2018 | M/s R.R International **VS** Fed. of Pakistan and Ors |
| 39. | Const. P. 7534/2018 | M/s Basil Impex & Ors **VS** Govt. of Pakistan & Others |
| 40. | Const. P. 7763/2018 | M/s Precision Appliances (Pvt) Ltd **VS** Fed. of Pakistan and Others |
| 41. | Const. P. 7910/2018 | M/s Ahmed Trading Co. **VS** Fed. of Pakistan and Others |
| 42. | Const. P. 7911/2018 | M/s Aliza Traders **VS** Fed. of Pakistan and Others |
| 43. | Const. P. 7912/2018 | M/s A.S Autos **VS** Fed. of Pakistan and Others |
| 44. | Const. P. 7913/2018 | M/s Emaan Enterprises **VS** Fed. of Pakistan and Others |
| 45. | Const. P. 7914/2018 | M/s H.F Corp **VS** Fed. of Pakistan and Others |
| 46. | Const. P. 7915/2018 | M/s Ihsan & Sons **VS** Fed. of Pakistan and Others |
| 47. | Const. P. 7916/2018 | M/s Kalwala & Sons **VS** Fed. of Pakistan and Others |
| 48. | Const. P. 7917/2018 | M/s Magoon Brothers **VS** Fed. of Pakistan and Others |
| 49. | Const. P. 7918/2018 | M/s Shaikh Brothers **VS** Fed. of Pakistan and Others |

| | | |
|---|---|---|
| 50. | Const. P. 7919/2018 | M/s Shakeel Traders **VS** Fed. of Pakistan and Others |
| 51. | Const. P. 8131/2018 | M/s Mehrab Traders **VS** Fed. of Pakistan and Others |
| 52. | Const. P. 8195/2018 | Saud Younus **VS** Fed. of Pakistan and Others |
| 53. | Const. P. 8605/2018 | Muhammad Younus **VS** Fed. of Pakistan and Others |
| 54. | Const. P. 8795/2018 | Muhammad Shahid and Ors **VS** Fed. of Pakistan and Others |
| 55. | Const. P. 8811/2018 | Samir Shafi Khan **VS** Fed. of Pakistan and Others |
| 56. | Const. P. 1378/2019 | Zainab Salman **VS** Fed. of Pakistan and Others |
| 57. | Const. P. 2049/2019 | M/s Oil Ind Pakistan Pvt Ltd **VS** Fed. of Pakistan and Others |
| 58. | Const. P. 2242/2019 | M/s Matrix Enterprises and Ors **VS** Fed. of Pakistan and Others |
| 59. | Const. P. 2483/2019 | M/s Al Wasi Trading **VS** Fed. of Pakistan and Others |
| 60. | Const. P. 4518/2019 | M/s Mehran Oil Pvt Ltd **VS** Fed. of Pakistan and Others |
| 61. | Const. P. 5314/2019 | Dawood Muhammad Yousuf **VS** Fed. of Pakistan and Others |
| 62. | Const. P. 2353/2021 | Aamir Dada **VS** Fed. of Pakistan and Others |
| 63. | Const. P. 468/2021 | M/s Oil Ind Pakistan **VS** Fed. of Pakistan and Others |

**Advocates for the Petitioners**

M/s. Dr. Muhammad Farogh Naseem, Ameen Bandukda, Fouzia Rasheed, Ahmed Hussain, Ammar Yasser, Naeem Suleman, Arshad Hussain Shehzad, Kashan Ahmed, Asghar Bangush, Tauqir Randhawa, M. Saad Shafiq Siddiqui, Saiyed Younus Saeed, Ajeet Kumar, Nadir Hussain Abro, Raghib Ibrahim Junejo, Fahad Khan, Mushtaque Hussain Qazi, Ghazala Rafiq, Ellahi Buksh Qureshi, Muhammad Arif, Abdul Sattar Silat, Muhammad Arif, Zain A. Jatoi, Muhammad Mustafa Namdani, Syed Arshad Ali, Sagar Ladhani, Shehanshah Hussain, Syed Irshad-ur-Rehman, Abdul Rehman Adeed, Mariam Salahuddin, M. Adeel Awan, Duaa Aryaan and Asadullah, Muhammad Jehangir holding brief for Is mat-un-Nissa.

**Advocates for the Respondents**

M/s. Shahid Ali Qureshi, Ameer Bakhsh Metlo, Dr. Shah Nawaz, Nusrat Ali Shar, Imran Ahmed Metlo, Abdul Mujeeb Zeeshan, Afsheen Aman, Muhammad Aqeel Qureshi, Khalid Rajpar, Muhammad Khalil Dogar, Nuzhat Shah, Fozia M. Murad, Zohaib Ahmed, Abdul Saim Malik, Muhammad Taseer Khan, Abdul Sami Malik, Muhammad Idress Rahimoon, Qaim Ali Memon, Syed Ahsan Ali Shah, Bilal Memon, Waleed Khanzada, Muhammad Bilal Bhatti, Fayaz Ali Metlo, Farha Naz Qazi, Ashfaq Ali Gilal, Kashif Nazeer,

Preetam Das, Jawed Hussain, Irshad Ali Tunio, Sajjad Ali Solangi, Ghulam Rasool Korai, Masooda Siraj, Umer Zd Gul, Khalid Mehmood Siddiqui, M. Rashid Arfi, Ayaz Sarwar Jamali, Mohsin Mithani, Danyal Muzaffar, Syed Shohrat Hussain Rizvi, Pervaiz Ahmad Memon, Bushra Zia for Muhammad Zubair Qureshi.

Mr. Qazi Ayazuddin Qureshi, Assistant Attorney General.
Mr. G. M. Bhutto Assistant Attorney General.
Mr. Kafeel Ahmed Abbasi Additional Advocate General Sindh.

**Date of hearing:** **23.01.2023, 02.02.023, 01.03.2023.**

**Date of Order:** **15.05.2023.**

## J U D G M E N T

**Muhammad Junaid Ghaffar, J:** All these Petitions involve a common legal question and are therefore, being decided through this common Judgment. The Petitioners have primarily (except in CP No. 1089 of 2016) challenged SRO 896(I)/2013 dated 4.10.2013 read with Sales Tax General Order No.27 of 2014 dated 18.3.2014, whereby, an amendment has been made in the Sales Tax Special Procedure Rules 2007(notified vide SRO 480(I)/2007 dated 9.6.2007-since repealed) by substitution and amendment of Rules 58S and 58T, issued in terms of Section 3(5) of the Sales Tax Act, 1990, ("**Act**") whereby, extra tax @ 2% has been levied on goods so notified in addition to the Tax already levied in terms of Section 3(1) of the Act. Some of the Petitioners have also challenged respective show cause notices issued pursuant to such amendment. Insofar as CP No. 1089 of 2016 is concerned, initially only the said SRO was challenged like other petitioners; however, thereafter an application was moved in terms of Order 6 Rule 17 CPC for amending the petition; challenging the vires of Section 3(5) ibid; and was allowed vide order dated 27.2.2017 (also reported as **2017 CLC 1204**). It further appears that on this basis this Court has further passed an order on 16.8.2017, whereby, all petitioners who have not even filed any application in such terms to amend their petitions, were also permitted to amend the petitions on a verbal motion; however, at the time of arguments, we have not been assisted in any manner to that effect. Nonetheless, it is now the challenge to such vires of law which is to be primarily adjudicated by this Court, as it will also decide the fate of all other petitions as well.

2. At the very outset we may state, and this is without disrespect to any of the learned Counsel for the Petitioners as well as Respondents,

that their arguments have been noted and recorded in this judgment collectively for ease, convenience and to avoid overlapping, if any. Petitioners Counsel[1] have contended that Section 3(5) of the Act is ultra vires and unconstitutional as the legislature cannot delegate its authority and functions to the Executive; that such delegation of authority is otherwise without any guidelines and amounts to conferring unfettered discretion upon the Executive; that no tax can be levied by way of a Rule making power; that section 3(5) of the Act has been legislated in violation of Article 77 of the Constitution; that levying a tax is an essential function of the legislature; hence, cannot be delegated; that an Executive cannot be delegated unbridled powers to levy a tax; that even otherwise, the impugned legislation is in violation of the dicta laid down in the case of ***Mustafa Impex***[2]; that any curative legislation by way of Section 74A of the Act is also illegal and in violation of the law settled by the Supreme Court; that such a defect can only be cured by amending Article 90 of the Constitution which is not the case of Respondents; that it is a case of impermissible taxation, and therefore, cannot be upheld; that it is also excessive and confiscatory in nature as it is taxing the same transaction twice; that Rule making powers under section 71 of the Act cannot be used to levy any tax; that insofar as Petitioners are concerned, they have been burdened with such tax which ought not to have been levied upon them as it was primarily meant for commercial Importers; that there cannot be any two charging sections in an Act; hence, section 3(5) is liable to be declared as ultra vires; that STGO 27 of 2014 has been issued without any jurisdiction being vested in FBR; that since the main charging section is Section 3(1) of the Act, which prescribes a tax @17%, therefore, no extra tax in excess of 17@ can be levied under Section 3(5) ibid; that abolishment of the impugned SRO[3] otherwise confirms that the levy was not proper and justified; that in terms of Article 77 of the Constitution tax can only be levied by the Parliament through an Act, hence, no tax can be levied through delegation of such powers; that delegation can only be made for implementation of policies and procedures; that it is a case of conferring of arbitrary and excessive powers upon the Executive which is not permissible; that the impugned tax is also applicable upon such buyers who are otherwise exempt from the levy of sales tax, and therefore, the entire burden has been shifted upon the Petitioners; that this tax has also

---

[1] led by Mr. Farogh Naseem, and supplemented by Arshad Shehzad; Ajit Kumar; Mushtaque Qazi; Muhammad Hussain; Abdul Moiz Jaferi: Ms. Wajiha Mehdi; Ms. Fouzia Rasheed; Mr. Imran Iqbal Khan; Advocates

[22] Mustafa Impex v Government of Pakistan (PLD 2016 SC 808)

[3] Vide SRO 694(I)/2019 dated 29.6.2019

been levied on exempt supplies, which is impermissible. They have relied upon various reported[4] cases as and have prayed to declare the impugned provision as being ultra vires by allowing these petitions.

3. On the other hand, Respondents Counsel[5] have contended that the impugned tax is in addition to the tax already levied under section 3(1) of the Act and there is no prohibition in levying such extra tax; that no tax has been levied in terms of Section 71 ibid and it is only the procedure of collection which has been notified through impugned SRO; that the procedure so adopted and the tax levied is in fact beneficial for the tax-payers and has been introduced at their behest, whereas, it exempts the tax leviable at retail stage, hence, the petitioners are estopped by their conduct; that a tax which was to be levied at retail stage is being recovered at one stage earlier, whereas, the petitioners do not pay such tax as the burden is upon the consumer or purchaser, hence, they do not have any locus standi to challenge the same; that even otherwise delegated legislation is not prohibited as settled by the Supreme Court in the case of *Zaibtun Textiles*[6]; that no legislative power has been delegated to the Executive, therefore, the levy cannot be challenged on this ground alone; that the impugned SRO was issued before the judgment was rendered in *Mustafa Impex (Supra)*, which per ***PMDC***[7] case is prospective, therefore, the same cannot be declared ultra vires; that though a judgment of Supreme Court applies retrospectively; however, it is for the Court to observe otherwise, and since in *PMDC (Supra)* it has been held that *Mustafa Impex (Supra)* will be applicable prospectively, no exception can be drawn; that the impugned levy under Section 3(5) is permissible in addition to the tax already levied under Section 3(1) of the Act; that the tax in question is neither confiscatory nor excessive, rather a normal tax which otherwise is not payable by the petitioners and it is an indirect tax upon the consumer; that the impugned levy is not without limitations inasmuch as it cannot exceed the maximum tax @17% under section 3(1) of the Act, hence, is not a case of conferring any unfettered discretion upon the

---

[4] Pakistan Medical & Dental Council v Muhammad Fahad Malik (2018 SCMR 1956); Govt. of Sindh v Dr. Nadeem Rizvi (2020 SCMR 1); Muhammad Fahad Malik v PMDC (PLD 2018 Lahore 75): Eng. Zafar Iqbal Jhagra v Fed of Pakistan (2013 SCMR 1337); M.Afzal & Son v Federal Govt. (PLD 1977 Lahore 1327): New Allied Electronics Ind. Ltd v Fed. Of Pakistan (2017 PTD 130); Sakrand Sugar Mills Limited v Fed. Of Pakistan (PTCL 2014 CL 154); Cannon Products Ltd. V Income Tax Officer (PLD 1985 Karachi 572); Province of Sindh v MQM (PLD 2014 SC 531); Jurist Foundation v Fed. Government (PLD 2020 SC 1); Director Food v Madina Flour & General Mills Ltd (PLD 2001 SC 1); Human Rights Case No.14392 of 2013 (2014 SCMR 220); Shakeel Ahmed v Fed. Of Pakistan (2016 PTD 577); Mir Muhammad Khan v Haider & Others (PLD 2020 SC 233); Almoiz Industries Ltd v Fed. Of Pakistan (2018 PTD 1633); Ziaullah Afridi v Govt. of KPK (PLD 2018 Peshawar 83); Haji Sultan Ahmed v Chairman CBR (2008 PTD 103); All Pakistan Paramedical Staff v Fed of Pakistan (PLD 2017 Lahore 640);

[5] M/s Ameer Baksh Metlo; Shahid Qureshi; Aqeel Qureshi Advocates

[6] PLD 1983 SC 385

[7] 2018 SCMR 1956

Executive; the Executive is only collecting the impugned tax by way of simplifying procedure under the impugned SRO, whereas, the tax has been levied lawfully by the legislature, therefore, no exception can be drawn to such powers; that without prejudice, section 74A of the Act protects all acts done or performed by the Federal Government even after the judgment in *Mustafa Impex (Supra)*; that reliance on the case of *Sakrand Sugar*[8] by one of the petitioners Counsel is misplaced as in that case the levy was only struck down on the ground that there were no guidelines; nor any proper rules were framed, therefore to that extent the said judgment is of no help; and therefore, by placing reliance on various cases[9] they have prayed for dismissal of all listed petitions. Insofar as the Federation is concerned, notwithstanding that vires of law are under challenge, an oral statement has been made that comments and arguments of Respondents Counsel stands adopted.

4. We have heard all the learned Counsel for the parties and have perused the record. The main objection raised by Petitioners Counsel[10] in CP No.1089 of 2016 is that the provisions of Section 3(5) are ultra vires to the Act inasmuch as it has delegated the authority of the legislature to the executive which is impermissible and is in violation of Article 77 of the Constitution. According to him, the said delegation is without any restrictive parameters, which is in violation of the settled dicta, that if at all, any such delegation of legislative powers could be validly made, it cannot have unfettered delegation without any guidelines by the legislature. This, per learned Counsel is impermissible in view of various pronouncements of the Courts, whereas, even otherwise the impugned legislation is also in violation of the dicta laid down by the Supreme Court in the case of *Mustafa Impex (Supra)*. Before proceeding further, we may refer to the impugned provision of Section 3(5) of the Act which reads as under;

> 3(5) The [Federal Government] may, in addition to the tax levied under sub-section (1) sub-section (2) and sub-section (4), levy and collect ["tax at such extra rate or amount"] not exceeding [seventeen] per cent of the value of such goods or class of goods and on such persons or class of persons, in such mode, manner and at time, and subject to such conditions and limitations at it may, by rules prescribe.

---

[8] PTCL 2014 CL 154 (DB-SHC)

[9] Muhammad Rafiq v FOP (2014 PTD 1881); Quality Steel Re Rolling Mills v FOP (2022 PTD 39); Asad Ali v FOP (PLD 1998 SC 161); Application by A.R.Faruq Pirzada (PLD 2013 SC 829); ZAK Re Rolling Mills v Appellate Trib (2020 SCMR 131); Tandliawala Sugar Mills v FOP (2001 SCMR 1398); Pak Telecommunication v GOP (2017 PTD 1359); LDA v Imrana Tiwana (2015 SCMR 1739); State of M.P v Rakesh Kohli (2013 SCMR 34); Elahi Cotton v FOP (PLD 97 SC 582); Hakimsons Impex v FOP (CP 4614 of 2022 SHC); Fecto Belarus Tractors Ltd v GOP (PLD 2005 SC 605); Pir Baksh v Chairman Allotment Committee (PLD 1987 SC 145); OGRA v Midway CNG (2014 SCMR 220)

[10] Farogh Naseem Advocate

5. The above provision empowers the Federal Government, to levy an extra tax not exceeding 17% (which is the maximum tax under Section 3(1)) in addition to the tax already levied under Sections 3(1), (2) & (4) of the Act on such goods or class of goods and on such persons or class of persons, in such mode, manner and at time, and subject to such conditions and limitations at it may, by rules prescribe. Insofar as the impugned SRO is concerned, it has substituted Rule 58S and has amended Rule 58T of SRO 480(I)/2007. The substitution makes the Rule applicable to a number of Industries so specified in the Table to such Rule, whereas, amendment in Rule 58T enhances the rate from 0.75% to 2%. Further, Sub Rule (5) of Rule 58T already provided that the specified goods on which extra sales tax has been paid in the manner so provided, shall be exempt from payment of sales tax on subsequent supplies including those as made by a retailer.

6. Now the first objection of the Petitioners Counsel that this provision has delegated the legislative powers to the Federal Government without any restrictions or guidelines appears to be ill-founded. The legislature has put a fetter upon the Federal Government that the said tax can only be to a maximum extent of 17% and not beyond that. Therefore, to that extent the contention of the Petitioners Counsel is incorrect. In fact, levy of tax in such manner is not a new phenomenon. Time and again the legislature has exercised its powers and has been delegating its authority to the Government for levying tax in such manner. The tax-payers being aggrieved have been challenging it before the Courts as it being ultra vires. In ***ZaibTun***[11] the owners of Textile Mills were aggrieved by the levy and demand of duty on the production capacity of the plants and machinery of their factories by the CBR under section 3(4) of the Central Excise and Salt Act of 1944 and their main ground for such challenge was in identical terms that in absence of any guiding principles in the Act it was unconstitutional on the part of the Legislature to delegate its legislative function to the Central Board of Revenue and to empower the Board to determine the production capacity of a Textile Mill; that the Legislature had effaced itself and abdicated its power in favour of a subordinate authority viz. the Central Board of Revenue, since the levy, assessment and collection of the duty has been placed within the power of that authority in all its dimensions; that by means of delegation, authority has been given to the Board of Revenue not only to override subsection (1) of section 3,

[11] ZaibTun Textile Mills Ltd v CBR (PLD 1983 SC 358)

which was the pre-existing charging section but the provisions in question also affirmatively authorized it to impose the duty and to lay down the guiding principles which were to operate as constraints on itself to determine the production capacity; that section 3 as amended comprises two competing systems, one visualized by subsection (1) on the basis of actual production and another by subsection (4) on the basis of production capacity; and the Board of Revenue has been empowered to choose between these two types of taxes, without the Legislature laying down any guidelines; that conferment of powers of such amplitude embracing the entire gamut of the taxing power vesting in the Legislature, amounts to handing over the Legislative function itself to be exercised by the Board of Revenue.

7. The contention of the Mill owners was repelled in many terms; that the doctrine of delegation has now been authoritatively held not to apply to the colonial Legislatures established under the Acts of the British Parliament prior to the independence and this view still holds the field after the independence in this country under the Constitutions adopted in Pakistan, as it has been held that the powers of the Legislature under the written Constitutions to make laws within the allotted sphere are in the nature of plenary and sovereign power. It was further held that it is too late in the day to maintain that the Legislature cannot delegate authority to subordinate or outside authorities for carrying the laws enacted by it into effect and operation, in view of the long history of legislative practice committing the rule-making powers having the force of law, to such subordinate functionaries or agencies. The Court also held that the question raised in this argument essentially concerns the question of the constitutional limits to legislative power. In other words, the question is as to what extent and on what principles delegation of legislative power to outside authorities is permissible under the Constitution. The Constitution does not expressly lay down and prescribe the limits within which such delegation would be permissible. Nor is there any provision in the Constitution which may define what constitutes the essential legislative function, which may then be kept as a norm to strike down the legislation by which such essential legislative power is entrusted to other agencies. It was further held that the question whether in a given case the Legislature has incompetently delegated its power has to be determined by the Courts in the exercise of their judicial power under the Constitution. The cases reviewed in this judgment bear testimony to the fact that the Courts in the

various jurisdictions have not been able to evolve a consensus on a fixed rule or test to determine this question. Indeed, they illustrate the difficulty with which the objection regarding impermissible delegation of administrative power has been applied in individual cases. No uniform test has been laid down in. these cases to determine this objection. Finally, the Court held that thus it will be futile to attempt to further narrow down the broad constitutional position mentioned above into the form of fixed and determined rule for ready application as each case has to be determined in the context of its particular circumstances and considerations, in the background of the broad principles mentioned above, and then dismissed the Appeals by further holding that there is no force in the contention that the Legislature has abdicated its function in favour of the Board of Revenue in a manner contrary to the constitutional requirements.

8. As to the present levy of extra tax by way of impugned legislation, though the Petitioners Counsel have made their best efforts to distinguish the facts and the conclusion drawn by the Supreme Court in ***Zaibtun's*** case; however, we do not see much of a difference in the cited case and the legislation dealt with therein as against the present law under challenge. Learned Counsel for the Petitioner also made an attempt to rely upon the case of *Sakrand Sugar* (Supra) by arguing that this judgment of ***Zaibtun*** (Supra) has been distinguished by a learned Division Bench in that case; hence, this Court is bound by such observations. To that we may observe that insofar as a precedent being binding in nature is concerned, we are required to follow the principles settled to this effect in *Multiline*[12], and to that there cannot be any exception. However, in this matter, we have a Supreme Court Judgment which in the present facts and circumstances appears to be fully applicable to the arguments of the Petitioners Counsel; hence, the same will remain binding on us in terms of Article 189 of the Constitution. Nonetheless, the case of *Sakrand Sugar* wherein the learned Division Bench of this Court came to the conclusion that the dicta laid down in *Zaibtun* was not applicable, was based on certain facts which are not germane to the present levy itself; hence, the judgment of *Sakrand Sugar* is otherwise distinguishable.

9. In the case of *Province of East Pakistan*[13] the scope of delegated legislation under the American Constitution as against our Constitution was discussed and it was observed by Hamoodur Rahman, J., as he then

[12] Multiline Associates v Ardeshir Cowasjee (1995 SCMR 1362)
[13] Province of East Pakistan v. Sirajul Haq Patwari (PLD 1966 SC 854)

was, that even though our Constitution has a similar division of powers, namely, legislative, executive and judicial, it does not necessarily follow that the doctrine of excessive and impermissible delegation which has been considered to be a special characteristic of the American constitutional system, must necessarily also be imported into our own constitutional system. It was further held that where the Legislature has sufficiently expressed its will and exercised its judgment as to the territorial extent, scope and subject-matter of the legislation, the provision of details, particularly when such details are by their very nature incapable of being laid down by the Legislature itself, can well be left to be done by another agency in whom the Legislature places confidence.

10. In the case of *Abur Rahim-Allah Ditta*[14] a four member Bench of the Supreme Court has also dilated upon this aspect of delegated legislation in a taxing statute. Pursuant to Section 18 of the Customs Act, 1969, the Federal Government was empowered to levy Regulatory Duty by way of a Notification subject to certain limitations and restrictions as may be prescribed in the said Notification. Such imposition of Regulatory Duty by way of SRO 910(I)/75 dated 21.8.1975 on certain items of Iron and Steel was impugned, inter alia on various grounds including the ground that it being a case of delegated legislation is ultra vires. The learned High Court of Lahore dismissed the petitions and matter ended up before the Supreme Court. The Court while maintaining the judgment of the learned Lahore High Court held that what is prohibited by the Legislature is the delegation of its function to make the law; but not the authority exercised under and in pursuance of the law itself to another agency in regard to the provision of details when by the very nature these are incapable of being laid down by the Legislature itself. While concluding and upholding the validity of the levy it was held that where it is expedient to do so, the legislature can delegate its authority if the facts and circumstances of a case so demand. It was held that what has to be seen is the nature of the power delegated which determines whether the delegation is proper or invalid. If the Legislature delegates its power to make the law, that is, its own legislative function, then it would be invalid but if what is delegated is the authority to exercise the discretion in respect of matters which had been finally determined by the Legislature itself, the delegated authority does not exercise a legislative function. It was further held that the law itself provided the framework and left it to the Federal Government to

[14] Sh. Abdur Rahim, Allah Ditta v Fed. Of Pakistan (PLD 1988 SC 670)

exercise the discretion in the manner laid down within the framework, hence, it cannot, therefore, be regarded as an abdication of its function by the Legislature but by law a valid delegation of a discretion to achieve the purpose of the law. This judgment has then been followed in a number of cases regarding challenge to the levy of Regulatory Duty by way of delegated legislation from time to time including the cases of Ravi Spinning[15]; Yousuf Re-Rolling[16]; Qaiser Brothers[17] and various other cases.

11. In *East West Steamship Company*[18] it has been held that the generally accepted position is that no provision of the law can fall within the rule against delegated legislation if it is based on a policy, discoverable from that provision itself, which has to be implemented by the person against whom the charge of unauthorized legislation is made. It is not that every delegated legislation can be declared ultra vires on the ground that it suffers from excessive delegation of legislative functions as there are adequate principles to guide framing of delegated legislation. If it is found to be within such guiding principles, then there will not be a question of it being declared as ultra vires. It is but axiomatic that Parliament is not expected to deal with all matters and it can delegate certain "non-essential" matters to the executive, whereas, every condition need not be laid down by the Legislature itself. This is for the reason that the legislature cannot be expected to legislate on all issues and has the power to delegate non-essential functions to a delegate. In the present case it does not appear to be correct as contended by the Petitioners Counsel that some "essential legislative functions" have been delegated to the Executive. Moreover, the legislature by its own wisdom has empowered the Federal Government to exercise such powers, as and when needed, to levy extra tax at the rate not exceeding the maximum rate of 17% as is applicable under Section 3(1) of the Act. Therefore, the argument that not only essential legislative functions have been delegated; but so also the Federal Government has been empowered to levy tax on its own is unwarranted and misconceived. What we see is that the legislature has got control and functional powers over the delegate. The levy has already been introduced by the legislature at the rate of 17% by enacting the provision in question, whereas, it is only the effective date and the percentage (2% presently and up to a maximum of 17%) which has been

---

15 1999 SCMR 412
16 PLD 1989 SC 232
17 PLD 1991 SC 884
18 PLD 1958 SC (Pak) 41

notified for all concerned. The incorporation of Rules 58S and 58T in SRO 480(I)/2007 is not *per-se* an introduction of a levy; rather it is the procedure by way of which this extra tax is to be collected; adjusted and paid by the registered persons. It is just a mechanism to regulate this extra tax and nothing beyond that. In our considered view it is a case wherein the delegatee is exercising powers delegated to it being under legislative control of the legislature. It can be argued that the mode and manner so prescribed by way of delegated legislation may not be perfect and may have certain aberrations. However, a wide discretion is given to the policy makers in this regard and only if the formula is arbitrary and violative of the Constitution, can it be struck down. Per settled law economic legislation ought not to be measured by abstract symmetry, since it is essentially empirical in nature and is based on experimentation[19].

12. It has been continuously held by the Courts in the Sub-Continent that a delegated legislation can be declared invalid by the Court mainly on two grounds. Firstly, that it violates any provision of the Constitution and secondly, it is violative of the enabling Act. If the delegate which has been given a rule-making authority exceeds its authority and makes any provision inconsistent with the Act and thus overrides it, it can be held to be a case of violating the provisions of the enabling Act but where the enabling Act itself permits ancillary and subsidiary functions of the Legislature to be performed by the executive as its delegate, the delegated legislation cannot be held to be in violation of the enabling Act. Here in the case before us, it is not the case of the petitioners that Rules 58S and 58T ibid are in violation of the provision of Section 3(5) of the Act. Before us, the Act itself has delegated certain functions, which otherwise are more of procedural in nature as to the effective date and its paraphernalia regarding input adjustment and payment in lieu thereof; hence, it is not a case of excessive delegation or for that matter, delegation of any legislative functions.

13. Lastly, it may be of relevance to note that by way of impugned SRO, though an extra tax of 2% was being collected in terms of Section 3(5) of the Act; however, this SRO through Rule (5) of Rule 58T, also provided that the specified goods on which extra sales tax has been paid in the manner so provided, shall be exempt from payment of sales tax on subsequent supplies including those as made by a retailer. Now this in fact was never an extra tax in essence; rather a mode to facilitate the

[19] R.K. Garg v. Union of India (1981) 4 SCC 675

trade merely by making collection of a tax which was to be paid subsequently on supplies or at retail stage. Therefore, the Petitioners and other tax-payers were also estopped by their conduct and the facility being availed by them. And lastly, this was never a direct tax upon the Petitioners; but on the end consumer and was to be made part of cost of goods and value of supply for the purposes of paying sales tax under the Act. Therefore, any challenge as to discrimination; being confiscatory in nature and impinging upon any fundamental rights is also ill-founded.

14. In view of hereinabove facts and circumstances, in our considered view no exception can be drawn to the competence and validity of the impugned legislation i.e. Section 3(5) of the Act, as well as Rules 58S and 58T introduced by way of an amending SRO 896(I)/2013 dated 4.10.2013. The impugned provision of the Act and the SRO in question are held to be validly and competently enacted / issued; hence, are not ultra vires. Accordingly, all listed Petitions do not merit any consideration and are hereby ***dismissed***.

Dated: **15.05.2023**

**J U D G E**

**J U D G E**

Arshad/