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Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Case No: ICA No. 1179 of 2015.

Federation of Pakistan etc. **Versus** Digicom Trading etc.

JUDGMENT

Date of hearing:	07.02.2017.
Appellants/ Department by:	Ch. Muhammad Zafar Iqbal, Advocate. M/s Sarfraz Ahmad Cheema, Sh. Muhammad Akram, Babar Sattar and Izharul Haque, Advocates for the appellants in connected appeals. Mr. Nayyar Ali, Additional Collector.
Respondents/ Taxpayers by:	Ch. Nabeel Razaqat, Advocate. M/s Shahbaz Butt, Shazib Masud, Shafqat Mehmood Chohan, Malik Hafiz Muhammad Arshad, Monim Sultan, Sumaira Khanum, Rai Khadim Hussain Kharal, Muhammad Mohsin Virk, Shahzad Rabbani, Akhtar Ali, Sumair Saeed Ahmed, Hashim Aslam Butt, Usman Malik, Shahid Paracha, M. M. Akram, Khurram Shahbaz Butt, Muhammad Yousaf Khan-II, M. Hafeez Uppal, Abdul Rehman, Mian Abdul Bari Rashid, Muhammad Yousaf Khan, Muhammad Ayub Aheer, Adnan Ahmad, Muhammad Shahzad Tanveer, Ch. Aamir Shehzad, Muhammad Azam Zafar, Hafiz Ahmad Yar Khan and Waqar Ahmad Khan, Advocates for the respondents in connected appeals. Dr. Jamal Ahmad Shahzad, Advocate for OPPO Mobiles. Mr. Adeel Nawaz Mohal, Advocate for Club International.

Shahid Jamil Khan, J:- This and connected appeals are filed by Revenue Division of Federal Government against the judgment dated 13.05.2015 passed by learned Single Bench of this Court in Writ Petition No.4879 of 2015 (“**The impugned judgment**”).

Levy and charging of Regulatory Duty under SRO 568(I)/2014 dated 26.06.2014 as amended by SRO 18(I)/2015 dated 14.01.2015 (“**the SRO 568**”) was declared as inconsistent and *ultra vires* of proviso to Section 18(5) of the Customs Act, 1969 (“**Act of 1969**”).

2. Representative facts; based on which impugned judgment was delivered, are that petitioner was importer of ‘*cellular mobile phones*’ (PTC Heading-8517.1210), which were allowed to be imported free of customs duty under SRO 659(I)/2007 dated 30.06.2007 (“**the SRO 659**”), issued under Section 19 of the Act of 1969. This SRO was claimed to have been issued in pursuance of Article 8 of ‘*Free Trade Agreement between Pakistan and China*’ (“**FTA**”), which envisaged progressive elimination of customs duties on import of goods originating in the territory of other party. By gradual decrease, as per schedule of tariff thereto, zero customs duty was chargeable on the imported ‘*cellular mobile phones*’ with effect from 01.01.2010. A demand of Rs.200/- per set was raised by Appellant Customs Department as Regulatory Duty under the SRO 568. The levy and charging of Regulatory Duty, in presence of the SRO 659, was challenged.

3. Learned Single Bench allowed the petition, through impugned judgment, and following the ratio connected petitions were also allowed; The **FTA** was held to be offshoot of ‘*General Agreement on Tariff and Trade*’ (“**GATT**”), hence was declared a multilateral agreement for the purpose of the proviso to Section 18(5); based on this finding and keeping in view the exemption under the SRO 659, charging of Regulatory Duty, under Section 18(3) was held *ultra vires* to the proviso, which prohibited cumulative incidence of customs duties in excess of the rates agreed under multilateral agreements.

4. Ch. Muhammad Zafar Iqbal, Advocate, arguing for appellant’s side, submitted that the issue has been settled by the Supreme Court of Pakistan in case reported as *Majeed and Sons Steels (Pvt.) Ltd. and others v. Federation of Pakistan through Secretary M/o Economic*

Affairs, Islamabad and others (2016 SCMR 655), which was delivered in a Civil Petition filed against the decision by learned Sindh High Court in *M/s Haider Industries through Sole Proprietor and 7 others v. Federation of Pakistan through Secretary, Ministry of Finance and 3 others* (2015 PTD 2447), whereby constitutional petitions on same issue were dismissed. He apprised that the impugned judgment was referred, during proceeding, before learned Division Bench of Sindh High Court but disagreement was recorded in paragraph No.16 of the judgment. He argued that bilateral agreement cannot be read in the proviso to Section 18(5). Further submitted that to enforce any multilateral or bilateral agreement, legislation is a pre-requisite; Contended that no legislation to exempt charging of Regulatory Duty exists. For this submission, he has placed reliance on *Societe Generale De Surveillance S. A. v. Pakistan through Secretary, Ministry of Finance, Revenue Division, Islamabad* (2002 SCMR 1694) and *Ms. Shehla Zia and others v. WAPDA* (PLD 1994 SC 693).

Mr. Babar Sattar Advocate, appearing for appellant's side, has supported the reasons given by learned Sindh High Court for judgment in *Haider Industries' case*. He submitted that imposition of Regulatory Duty is a policy issue to promote local industry, therefore, is delegated to executive. He argued that FTA, being a bilateral agreement between Pakistan and China, is consistent with the provisions of Article XXIV of the GATT, however, is not executed as a consequence, hence could not termed as its offshoot; It is elaborated that Pakistan and China were not obliged under GATT, to enter into FTA; Clause (5) of Article XXIV provided an exception from the terms of GATT, availing which the FTA had been executed. He reiterated the earlier argument that impugned judgment was considered but not agreed upon by learned Sindh High Court, as well as, by Apex Court, being conscious of the impugned judgment.

5. Mr. Shafqat Mahmood Chohan, Advocate, appearing in connected ICA for respondent's side, has referred to China-Pakistan Free Trade Area Rules of Origin, 2005 ("The **Rules of Origin, 2005**") and submitted that FTA has been translated into Rules, which has status of Law under Section 18C of the Act of 1969 and is being implemented since 2005; Submitted that this legal aspect was not brought before Hon'ble Supreme Court of Pakistan during proceedings in *Majeed and Sons' case*. He argued that duty is defined under subsection (2) of the Section 18C, which includes Regulatory Duty. Further argued that the SRO 568 was signed by Additional Secretary, therefore, could not be treated as issued by the Federal Government, hence has no legal value in view of law laid down by Hon'ble Supreme Court of Pakistan in *M/s Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others (PLD 2016 SC 808)*.

Mr. Shazib Masud, Advocate, appearing for respondents in a connected appeal, submitted that FTA was being implemented through the SRO 659. He supported the findings given in impugned judgment that the FTA, being offshoot of GATT, is to be treated as multilateral agreement. He further submitted that all SROs imposing Regulatory Duty, issued prior to the SRO 568, had an exclusion clause to exempt the items covered under FTA from Regulatory Duty. It was reiterated that impugned notification being signed by Additional Secretary is against the spirit of law laid down in *M/s Mustafa Impex's case (supra)* and read its paragraph No.80 in support.

Mr. Shahbaz Butt, Advocate submitted that there is distinction between the decision impugned in these appeals and the one which was passed by learned Sindh High Court. He explained; in those cases accumulative effect of duties under subsections (1), (3) and (5) of Section 18 of the Act of 1969 was not more than the rates provided in bilateral agreement whereas in instant case accumulative effect of the

duties after issuance of impugned notification of Regulatory Duty has gone beyond rates agreed in FTA.

6. Arguing in rebuttal; Ch. Muhammad Zafar Iqbal, Advocate, assisted by Nayyar Ali, Additional Collector, submitted that Regulatory Duty is chargeable under subsection (3) of Section 18, which empowers the Federal Government to impose Regulatory Duty and provide its rate; Argued that the Regulatory Duty and its rate, under the Notification, are distinct from the Duty and rates provided in the First Schedule. Explained; that Regulatory Duty being an independent levy is to be charged in addition to the Custom Duty. Further argued; that the SRO 568 was challenged for the reason that exclusion clause exempting charging of Regulatory Duty in excess of the rate provided in the FTA was excluded. Further submitted that challenge to the notification, imposing Regulatory Duty, being signed by Additional Secretary was not ground in writ petitions; Contended that this argument was an afterthought, hence could not be raised, at appellate stage, on the basis of a subsequent judgment by Hon'ble Supreme Court of Pakistan, as same is not applicable retrospectively.

7. Heard Record perused.

8. Examination of the impugned judgment, in light of the arguments, shows that the decision is based on the findings, mainly, that FTA is an offshoot of GATT (a multilateral agreement) of which Pakistan is signatory. The issue, whether FTA is a bilateral agreement or was arrived at under influence of GATT, was discussed in *Haider Industries' case* and it was held that FTA is an independent agreement between two states, therefore, could not be construed as an offshoot of or consequent to GAAT. In paragraph No.16 of the judgment, learned Division Bench of Sindh High Court respectfully disagreed from the findings in impugned judgment.

The judgment in *Haider Industries' case*, being assailed by importers, was upheld by Supreme Court in *Majeed and Sons' case*,

(*supra*), relevant excerpt from the judgment is reproduced for ease of reference:-

“7. A look at the proviso to subsection (5) of section 18 of the Customs Act in general and the words "rates agreed to" in particular shows that rates have all along been agreed to. Reference to Part-A-2 of the relevant table will clinch the whole matter as it not only provides final bound duties but also duties prescribed for the most favoured nations. Regulatory duty imposed through the impugned S.R.O does not in any case exceed the duties prescribed by the table. Once the table referred to above shows the rates agreed to, reference to any other provision of the General Agreement on Tariffs and Trade would not be of much significance. When we asked the learned ASCs as to how does the expression "rates agreed to" imply or contemplate the duties in force at the time of executing the multilateral agreement when they were in force independently of such agreement, he could not give any satisfactory reply and rightly so because proviso to subsection (5) of section 18 of the Customs Act being clear and unequivocal does not admit of the interpretation sought to be placed thereon by the learned ASCs for the petitioner. Had the proviso been inserted before the execution of the agreement, the argument advanced by the learned ASC would have had some force. But where the insertion of the proviso was made long after the execution of the agreement, the words "agreed to" cannot be lightly ignored. The rates reflected in the relevant heading vis-a-vis the most favoured nations clearly point to what was agreed to. An effort was made to turn the bilateral agreement into a multilateral agreement by alluding to what has been provided by clauses 7 and 8 of Article XXIV of the General Agreement on Tariffs and Trade but an agreement which is essentially bilateral cannot be given multilateral hue especially when it is between the two nations. Much stress was laid on Article 8 of Free Trade Agreement between Government of Islamic Republic of Pakistan and the Government of Peoples Republic of China providing for progressive elimination of Customs Duty on goods originating in the territory of another party but it does not provide anywhere that the rates agreed to would cease to have effect as soon as the agreement is entered into. The words "progressive elimination" used in the Article envision step by step rather than immediate elimination of the duties.

8. **Absence of the word bilateral from the proviso to subsection (5) of section 18 of the Customs Act being significant and self-speaking further narrows the gamut of controversy. We, thus cannot read bilateral in the proviso when it is not there.** When the provisions of the Customs Act are clear and unambiguous, we would not like to supply omission and read in the statute what has been deliberately omitted. "It is not our function, as was held by Mr. Justice Walsh, in the case of Attorney General v. Bihari, re Australia Factors Limited (1966) 67 S. R. (N.S.W) 150; to repair the blunders that are to be found in the legislation." Let them be corrected by the legislature itself if at all they constitute blunders.”

(emphasis supplied)

After the findings by August Court, *ibid*, that FTA is a bilateral agreement, hence cannot be read in the proviso to the Section 18(5); no room left for this Court to further discuss or delineate upon the issue. The judgment in *Majeed and Sons' case* is subsequent and binding upon this Court under Article 189 of the Constitution of Pakistan, 1973 (“**Constitution**”). The principle, entrenched in Article 189 has been reiterated in *Shahid Pervaiz v. Ejaz Ahmad and other (2017 SCMR 206)*, holding that ‘decisions of the Supreme Court are binding on all, including the Courts, regardless whether they were party to the proceedings before the Supreme Court or not’.

9. Now we advert to other arguments, from respondents’ side, which were asserted to have not been decided through judgment in *Majeed and Sons' case*. Examination of the arguments is required to be made in backdrop of the facts leading to the controversy, therefore, are recapitulated briefly, hereunder;

The controversy triggered on amendment in the SRO 568 through SRO 18(I)/2015 dated 14.01.2015, issued under Section 18(3) to impose Regulatory Duty on imported goods described in its table. The amending SRO 18 added some other goods, including “*cellular mobile phones*”, in the table and as a consequence impugned notice was served for charging Regulatory Duty at Rs.200/- per set. It is important to notice the fact; that SRO 568 was distinguishable from previous notifications issued under the same Section i.e., SRO 896(I)/2008 and SRO 482(I)/2009. Unlike previous notification; exemption was not provided for goods imported under Free Trade Agreements (FTAs) and Preferential Trade Agreements (PTAs). The levy and charging of Regulatory Duty was challenged through writ petition on the ground, amongst others, that “*cellular mobile phones including its battery and one battery charger*” being mentioned at Sr. No.4073 of table to the SRO 659 was chargeable at zero w.e.f. 01.01.2010. To understand the nature and extent of the exemption, operative part of the SRO 659 is reproduced:-

**“GOVERNMENT OF PAKISTAN
MINISTRY OF FINANCE, ECONOMIC AFFAIRS, REVENUE AND
STATISTICS
REVENUE DIVISION**

Islamabad, the 30th June, 2007

**NOTIFICATION
(CUSTOMS)**

S.R.O. 659(I)/2007. In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), **the Federal Government is pleased to exempt**, with effect from the first day of July, 2007, **the import into Pakistan from Peoples Republic of China** of:

(a) the goods specified in column (3) of the Table I below, falling under the Heading and sub-Heading numbers of the First Schedule to the said Act as specified in column (2) of the said table, **from so much of the customs duty specified in the First Schedule** as on 1st July, 2006, to the said Act as is in excess of the rates specified in columns (4), (5), (6), (7), (8) or (9) of that table with effect from the corresponding date; and

(b) the goods specified in column (3) of the Table II below, falling under the Heading and sub-Heading numbers of the First Schedule to the said Act as specified in column (2) of the said table, from so much of the customs duty as specified in SRO 1296(I)/2005 dated, the 31st December, 2005; or in the said First Schedule as on 1st July, 2006, as is in excess of the rates specified in columns (4), (5), (6), (7), (8) or (9) of that table with effect from the corresponding date;”

(emphasis supplied)

The emphasized parts of exemption notification show that exemption is only from the rates specified in the First Schedule to the Act of 1969, which provides rates of customs duty levied under Section 18(1), whereas Regulatory Duty is levied and its rates are provided through notification, issued under the Section 18(3). This legal position is discernable from bare reading of both the subsections in comparison, which are reproduced for this purpose:-

“18. Goods dutiable.----

(1) Except as hereinafter provided, *customs duties shall be levied at such **rates as are prescribed in the First Schedule*** or under any other law for the time being in force on,-

(3) *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** to be 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 25-A;

(emphasis supplied)

10. Similar proposition was examined in Collector of Customs and others v. Ravi Spinning Ltd. and others (1999 SCMR 412); when imposition of Regulatory Duty [under section 18 (2) as it stood then] was challenged on the goods exempted under Section 19. The August Court examined the exemption notifications *vis-a-vis* the provisions of Section 18 to hold:-

“The statutory duty prescribed under the First Schedule to the Act has nexus only with the duty levied under section 18(1) of the Act. Therefore, on the language of these S.R.Os., it is not possible to hold that the exemption granted under these notifications also applied to the customs duty levied in addition to the statutory duty under section 18(2) of the Act or under other laws for the time being enforced. We have already pointed out earlier in this judgment that in contradiction to the customs duty levied under section 18 (1), of the Act, which is prescribed and predetermined, the regulatory duty is neither prescribed nor pre-determined but is levied at a rate which may vary according to the circumstances. Therefore, regulatory duty imposed by the Government under section 18(2) of the Act though a species of customs duty, is a duty in addition to the duty prescribed under the First Schedule to the Act to meet a particular situation, not covered by the statutory duty. —

Regulatory duty, on the other hand, is neither fixed nor pre-determined. It is imposed in exercise of the delegated authority, by the Government subject to limitations mentioned in clauses (2) to (4) of section 18, —

The **regulatory duty**, therefore, **by its very nature is a transitory measure intended to cover and meet a situation or condition not covered by the statutory duty prescribed under section 18(1) of the Act.**

(emphasis supplied)

The law enunciated, *ibid*, has been reiterated in a recent judgment in Indus Trading and Contracting Company v. Collector of Customs (Preventive) Karachi and others (2016 SCMR 842), relevant excerpt is reproduced:-

“5. Under section 18 of the Customs Act, 1969, customs duties are levied under different nomenclatures. Under section 18(1) statutory customs duty is imposed whereas under section 18(2) (after amendment regulatory duty is covered under section 18(3) of

the Customs Act) the legislature has empowered the Federal Government to impose regulatory duty through notifications. Therefore, **statutory duty under section 18(1) and regulatory duty under section 18(2) are two distinct categories of duties.** One should not be taken to be the same as the other. ***It is by now well settled by the judicial pronouncements of this Court that where import or export of any commodity enjoys exemption from statutory customs duty, even then the Federal Government can impose regulatory duty, within the confines described in section 18(2) of Customs Act through sub-ordinate legislation. Where the legislature grants exemption from the payment of customs duty that falls under section 18(1), the same cannot be made basis to avoid payment of regulatory duty imposed subsequently unless there is also a promise that such concession would also be applied to regulatory duty in case it is levied in future.*** As the exemption in the present case does not contain such a promise it is to be applied only to duty that was chargeable under section 18(2) and not to a duty which can be competently levied under a different nomenclature.”

(emphasis supplied)

11. In instant case, the SRO 659 was issued under Section 19 of the Act of 1969 for granting exemption to the goods imported into Pakistan from Peoples Republic of China under FTA. The exemption is from the rates of statutory customs duty already specified in First Schedule under Section 18(1) and not from Regulatory Duty imposed under Section 18(3). Even this exemption is subject to conditions mentioned in the SRO 659 and its proviso. The proviso is to be read with Section 18C of the Act of 1969, which deals with determination of origin, of goods, under trade agreements. The trade agreements, between the Government of Pakistan and the Government of foreign country or territory, are meant only for those goods which are produce or manufacture of the foreign country or territory. To ensure this objective, Government of Pakistan may make rules for determination the origin of the goods to be imported under the Trade Agreements. SRO 1286(I)/2005 dated 24.12.2005 was issued under the Section 18C (1) to promulgate ‘The Rules of Origin, 2005’ under FTA. The precondition of the origin for grant of exemption is ensured through proviso to the SRO 659, which is reproduced:-

“**Provided** that *the goods are manufactured or produced and imported in conformity with the Rules of Determination of Origin of*

Goods and the operational certification procedures for the Rules of Origin notified by the Ministry of Commerce vide SRO 1286(I)/2005, dated the 24th December, 2005 and read with the Import Policy Order and its amendments notified by the Ministry of Commerce, from time to time.

(emphasis supplied)

In Section 18C; the rates of duty agreed and notified to be charged under FTA (the Trade Agreement), are termed as ‘*Preferential Rates*’ and the rates already specified in First Schedule to the Act of 1969 are called ‘*Standard Rates*’. Under subsection (2) of Section 18C, unless the importer claims preferential rates by submitting certificate of origin, the duty on imported goods shall be charged at standard rate. For facility, provisions of Section 18C are reproduced:-

“18-C Rates of duty and taxes and determination of origin under trade agreements:---

(1) Where under a trade agreement between the Government of Pakistan and the Government of a foreign country or territory, duty at a **rate lower than that specified in the First Schedule** is to be charged on articles which are the produce or manufacture of such foreign country or territory, *the Federal Government may, by notification in the official Gazette, make rules for determining if any article is the produce or manufacture of such foreign country or territory* and for requiring the owner to make a claim at the time of importation, supported by such evidence as may be prescribed in the said rules, for assessment at the appropriate lower rate under such agreement.

(2) Where in respect of any article, a **preferential rate of duty** is specified in the First Schedule, or is admissible by virtue of a notification under sub-section (1), the duty to be levied and collected shall be at the standard rate **unless the owner of the article claims at the time of importation that it is chargeable with a preferential rate of duty**, being the produce or manufacture of such preferential or free trade area, as is notified under sub-section (3) and the article is determined, in accordance with the rules made under sub-section (1) to be such produce or manufacture.

(3) For the purposes of this section and the First Schedule, “preferential area or free trade area” means any country or territory which the *Federal Government may, by notification in the official Gazette, declare to be such area.*

(4) Notwithstanding anything contained in sub-sections (1) and (2), where the Federal Government is satisfied that, ***in the interests of trade including promotion of exports***, it is necessary to take immediate action for **discontinuing the preferential rate or increasing the preferential rate** to a rate

not exceeding the standard rate, or decreasing the preferential rate, in respect of an article specified in the First Schedule, the ***Federal Government may, by notification in the official Gazette, direct discontinuation of, or increase or decrease, as the case may be, the preferential rate.***

(emphasis supplied)

Language of subsections (3) and (4) of Section 18C shows that Free Trade and Preferential Trade Agreements are not self-executory upon being signed between Government of Pakistan and Government of foreign country or territory. “Preferential Area or Free Trade Area” is defined, as an area so declared through notification by the Federal Government under subsection (3). Despite notifying the preferential rates under the Trade Agreements, Federal Government can direct its discontinuation; increase or decrease, through notification, in the interest of the ‘Trade and Promotion of Export’ of Pakistan. The legal position, that agreements and treaties with foreign countries are required to be enforced through consequent legislation, was examined and endorsed in *Majeed and Sons’ case*, in following words:-

“9. The questions whether an agreement or treaty be it bilateral or multilateral, can be stretched to alter or override an express and unambiguous provision of the statute and whether its breach, if any, can be sought to be repaired through the Courts of law unless they have been vested with such jurisdiction? In the case of *Ms. Shehla Zia v. Wapda (PLD 1994 SC 693)*, this Court while dealing with a similar question held as under:-

"The concern for protecting environment was first internationally recognized when the declaration of United Nations Conference on the Human Environment was adopted at the Stockholm on 16.6.1972. Thereafter it had taken two decades to create awareness and consensus among the countries when in 1992 Rio Declaration was adopted. Pakistan is a signatory to this declaration and according to Dr. Perwaiz Hasan although it has not been ratified or enacted, the principle so adopted has its own sanctity and it should be implemented, if not in letter, at least in spirit. An international agreement between the nations if signed by any country is always subject to ratification, but it can be enforced as a law only when legislation is made by the country through its legislature. Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor do they bind down any party."

(emphasis supplied)

In *Societe Generale's case (supra)*, the August Court reaffirmed what was held in *Ms. Shehla Zia's case* in following words:--

"Admittedly, in Pakistan, the provisions of the Treaty were not incorporated through legislation into the laws of the Country, therefore, the same did not have the effect of altering the existing laws, as such, rights arising therefrom called treaty rights cannot be enforced through Court as in such a situation, the Court is not vested with the power to do so.

It may be significantly mentioned here that according to Article 175(2) of the Constitution of Islamic Republic of Pakistan, no Court has any jurisdiction unless conferred by or under any law or the Constitution, therefore, treaty unless was incorporated into the law so that it become part of Municipal Laws of the Country, no Court shall have jurisdiction to enforce any right arising therefrom."

(emphasis supplied)

12. Scope, purpose and delegation of power, by legislature, to impose Regulatory Duty was first addressed in *M/s Sh. Abdur Rahim, Allah Ditta v. Federation of Pakistan and others (PLD 1988 SC 670)*. The scope was examined keeping in view the circumstances under which the challenged notification was issued to impose Regulatory Duty. The portion of judgment highlighting the purpose is reproduced for better understanding:-

"The levy was described as "regulatory duty" as it **was imposed to maintain a proper balance in a fluctuating market** as a result of sharp fall in the international prices of iron and steel scrap and certain other iron and steel items with the result that the importers imported these materials at a much lower costs but regardless of it the prices did not fall to any substantial extent in the domestic market, and it were the importers only who were the beneficiaries and were earning windfall profits. Therefore, **the discretion to levy 'regulatory duty' was a device to enhance the rate of duty at any time during the course of the year so as to achieve a balance.** The Legislature, in the circumstances could not know as to the details of the fluctuating international prices from time to time during the course of the year and for that matter could not also be in a position to enhance the levy to obtain a balance of the prices in the domestic market nor was it in a position to speculate the details of the conditions, limitations or restrictions which were necessary to be imposed for the levy of 'regulatory duty'. **It was in these circumstances that it provided the framework for the levy of 'regulatory duty' to be imposed and gave the discretion to the**

Federal Government to make a levy so as to achieve a balance in the prices in the local market.”

(emphasis supplied)

The purpose and scope of Regulatory Duty was supplemented in M/s Qaiser Brother (Pvt.) Limited v. Government of Pakistan and others (PLD 1991 SC 884) in following words:-

"7. It may further be observed that levy of Regulatory duty not only regulates the price structure of the item concerned, but it also generates additional fund for the public purpose.

(emphasis supplied)

Competence of legislature to delegate power to levy Regulatory Duty was also examined in *Sh. Abdur Rahim's case (supra)* and the delegation was held valid in following words:-

“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. In this context, the law itself provided the framework and left it to the Federal Government to exercise the discretion in the manner laid down within the framework. 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.”

(emphasis supplied)

The purpose and competence of legislature was endorsed in *Ravi Spinning's case (supra)*, relevant excerpt is reproduced:-

“13. Mr. Pirzada contended that in *Abdur Rahim's case (supra)* this Court while validating the delegated exercise of power by the Government to levy 'regulatory duty' had itself mentioned the reason in justification, of imposition of regulatory duty which necessarily implied that such reasons and justifications must always be there for exercise of power by the Government to levy regulatory duty. Firstly, the reasons stated by this Court for imposition of regulatory duty in Abdur Rahim's case (supra) are not exhaustive. There may be variety of other reasons depending on the facts and circumstances of each case which may persuade the Government to exercise its discretion to levy regulatory duty within the framework of section 18(2)(3) and (4) of the Act. Mr. K.M.A. Samdani rightly pointed out that apart from the reasons mentioned by this Court in Abdur Rehman's case, there could be several other reasons to justify the imposition of regulatory duty by the Government. The learned counsel as illustration, mentioned that Government may decide to impose regulatory duty in the event of

fluctuation of prices in the international market, to cater for recession in the international market, **to impose curb on import of luxury items, to provide protection to local industries or to maintain a balance of trade with other countries etc.**

14. We are, accordingly, of the view that the fact, that the Government is entitled to exercise the discretion to levy regulatory duty only if certain circumstances existed, would not, necessarily, mean that the Government cannot exercise that power/discretion without first mentioning those circumstances in justification in the notification imposing regulatory duty. *As earlier pointed out by us, the power to levy regulatory duty by the Government is subject, only, to those conditions and limitations which are mentioned in section 18(2), (3) and (4) of the Act and, therefore, no other condition or limitation, not mentioned in the section, could control the exercise of power by the Government in this behalf. **Therefore, in our view, the absence of the reasons/justification in the notification imposing regulatory duty did not render the exercise of power/discretion by the Government, under section 18(2) of the Act defective or invalid.***

(emphasis supplied)

Combined reading of the provisions of the Sections 18 and 18C and the judgment, *supra*, would lead to the conclusion that rational behind delegation of power to the Federal Government to impose Regulatory Duty in addition to the statutory rates provided in the First Schedule and/or in presence of exemptions from such rates, under FTAs, is to safeguard the interest of trade in Pakistan and to promote exports. Since local and international market positions are not foreseeable and are susceptible to quick changes, therefore, delegation was made by legislature to Federal Government for instant response, which cannot be done by the normal legislature procedure. As the words, “Regulatory Duty” denote, the duty, in addition, is allowed to be imposed by executive to regulate the balance between imports and exports in the interest of trade in Pakistan.

13. Now we advert to the argument, by respondents’ side that the impugned notification being signed by Additional Secretary is against the spirit of law laid down in *Mustafa Impex’s case (supra)*. It is admitted position that validity of the SRO 568 or the SRO 18 was neither pressed nor delineated upon in the impugned judgment.

Respondent's side has raised this issue first time in appeals filed by revenue, without challenging it independently.

The judgment in *Mustafa Impex's case* is examined; sole ground urged (*as noted in its paragraph No.49*) was that notifications, subject matter of that case, had not been issued by the Federal Government. It was pleaded that for one impugned notification *ex post facto* approval was obtained from Advisor to Prime Minister. And it was argued that under Article 90 of the Constitution, only Cabinet has privileged authority to grant exemption and that Prime Minister or his Advisor is not competent. The pleaded facts regarding issuance of impugned notifications were not disputed by respondents' side, however, it was argued that under sub-article (2), the Prime Minister or a Minister is empowered to exercise the executive authority, and not the Cabinet as a whole. In this backdrop; the August Court went on to examine the connotation of '*Federal Government*' and concept of '*Executive Powers*' exercised by it, in light of the historical perspective from Government of India Act 1935 till 18th Amendment in the Constitution of 1973. Article 99, after amendments through 18th Amendment, was examined and it was held that to '*conduct business of Federal Government*' power of delegation to officers and subordinate authorities has been taken away; and making of rules of business has been made mandatory. The rules are held as binding on the Government and violation of the terms thereof was termed as fatal to the exercise of executive power. Based on Rule 16 of the Rules of Business it was held, "*that it is mandatory to bring any proposal for the levy, abolition, remission, alteration or regulation of any tax to the Cabinet.*" Adherence to the Rules of Business was held necessary for good governance and structuring of discretion, based on existing case law, was reemphasised in these words; "*To allow the Executive to depart from the language of the Rules, in its discretion, would be to permit, and legitimize, unconstitutional executive actions. Quite independently of the above, there is ample case law stressing the importance of a structured exercise of discretionary power*". Chairman FBR's

power to issue a notification, as Secretary to Revenue Division was discussed and it was held,

“61. His reference to Rule 7(2), read with Schedule-IV which allows the Secretary to authenticate by signature all orders and other instruments made, or executed, in the name of President disregards the fact that this is a purely formal power. The exercise of this power establishes the genuineness of the document. It does not confer the statutory power to issue such a document.”

(emphasis supplied)

As mandatory Rule 16 of the Rules of Business was held to have been violated, therefore, the law laid down in the judgment was summarized in following paragraph:-

“84. We may now summarize our conclusions:--

(i) The Rules of Business, 1973 are binding on the Government and a failure to follow them would lead to an order lacking any legal validity.

(ii) The Federal Government is the collective entity described as the Cabinet constituting the Prime Minister and Federal Ministers.

(iii) Neither a Secretary, nor a Minister and nor the Prime Minister are the Federal Government and the exercise, or purported exercise, of a statutory power exercisable by the Federal Government by any of them, especially, in relation to fiscal matters, is constitutionally invalid and a nullity in the eyes of the law. Similarly budgetary expenditure, or discretionary governmental expenditure can only be authorized by the Federal Government i.e. the Cabinet, and not the Prime Minister on his own.

(iv) Any Act, or statutory instrument (e.g. the Telecommunication (Re-Organisation) Act, 1996) purporting to describe any entity or organization other than the Cabinet as the Federal Government is ultra vires and a nullity.

(v) The ordinance making power can only be exercised after a prior consideration by the Cabinet. An ordinance issued without the prior approval of the Cabinet is not valid. Similarly, no bill can be moved in Parliament on behalf of the Federal Government without having been approved in advance by the Cabinet. The Cabinet has to be given a reasonable opportunity to consider, deliberate on and take decisions in relation to all proposed legislation, including the Finance Bill or Ordinance or Act. Actions by the Prime Minister on his own, in this regard, are not valid and are declared ultra vires.

(vi) Rule 16(2) which apparently enables the Prime Minister to bypass the Cabinet is ultra vires and is so declared.

(vii) Fiscal notifications enhancing the levy of tax issued by the Secretary, Revenue Division, or the Minister, are ultra vires. (it is clarified, in passing, that this court has in the past consistently held that a greater latitude is allowed in relation to beneficial notifications and that principle still applies).

(viii) In consequence of the above findings the impugned notifications are declared ultra vires and are struck down."

(emphasis supplied)

The tenor of operative paragraph, *ibid*, or the judgment discussed, *supra*, does not suggest that all notifications issued / signed by Secretary Revenue Division or his subordinates are held as *ultra vires*. Rather it is held that by signature of the Secretary genuineness of a document is authenticated. The impugned notifications were held *ultra vires*, in presence of fact that mandatory Rule(s) of Business was violated.

In instant case; neither violation of any mandatory rule was pleaded, before learned Single Bench, nor is it admitted at appellate stage. To hold any notification as *ultra vires*, following the *ratio* of judgment in *Mustafa Impex's case*, it is imperative that violation of the Rules of Business is claimed, pleaded and examined by the Court and upon finding of fact that the mandatory Rule(s) is violated, the necessary consequence would be a declaration that such notification is *ultra vires*. Since SRO 568 was not examined or adjudicated on this touchstone, therefore, it cannot be held as ultra vires by mere placing of reliance, by respondents at appellate stage, on *Mustafa Impex's case*.

14. For the reasons, noted above, it can safely be concluded that exemptions granted through the SRO 659 was of statutory/standard duty levied under Section 18(1) only and not from the duty levied through the SRO 568 issued under Section 18(3). Despite grant of exemptions through SRO 659, in terms of FTA, Federal Government was/is competent to impose Regulatory Duty on the goods falling

under FTA; The exemption agreed to be granted under FTA is subject to consequential legislations, as well as, conditions mentioned in the exempting SRO 659. Decision in *Majeed and Sons' case*, being binding, is followed to hold that FTA is not offshoot of GATT, hence provisions of Section 18(5) does not apply.

This and connected appeals, mentioned below, are **allowed** in terms noted above.

Sr. No.	Case No.	
1.	ICA	1101 of 2015
2.	ICA	1192 of 2015
3.	ICA	1193 of 2015
4.	ICA	1194 of 2015
5.	ICA	1195 of 2015
6.	ICA	1196 of 2015
7.	ICA	1197 of 2015
8.	ICA	1205 of 2015
9.	ICA	1206 of 2015
10.	ICA	1207 of 2015
11.	ICA	1208 of 2015
12.	ICA	1209 of 2015
13.	ICA	1213 of 2015
14.	ICA	1214 of 2015
15.	ICA	1219 of 2015
16.	ICA	1221 of 2015
17.	ICA	1222 of 2015
18.	ICA	1223 of 2015
19.	ICA	1228 of 2015
20.	ICA	1252 of 2015
21.	ICA	1256 of 2015
22.	ICA	1257 of 2015
23.	ICA	1258 of 2015
24.	ICA	1259 of 2015
25.	ICA	1260 of 2015
26.	ICA	1263 of 2015
27.	ICA	1265 of 2015
28.	ICA	1267 of 2015
29.	ICA	1268 of 2015
30.	ICA	1300 of 2015
31.	ICA	1301 of 2015
32.	ICA	1302 of 2015
33.	ICA	1307 of 2015
34.	ICA	1340 of 2015
35.	ICA	1341 of 2015

36.	ICA	1342 of 2015
37.	ICA	1344 of 2015
38.	ICA	1347 of 2015
39.	ICA	1354 of 2015
40.	ICA	1387 of 2015
41.	ICA	1388 of 2015
42.	ICA	1389 of 2015
43.	ICA	1400 of 2015
44.	ICA	1411 of 2015
45.	ICA	1412 of 2015
46.	ICA	1444 of 2015
47.	ICA	1445 of 2015
48.	ICA	1455 of 2015
49.	ICA	1457 of 2015
50.	ICA	1467 of 2015
51.	ICA	1498 of 2015
52.	ICA	1493 of 2015
53.	ICA	1494 of 2015
54.	ICA	1495 of 2015
55.	ICA	1496 of 2015
56.	ICA	1499 of 2015
57.	ICA	1500 of 2015
58.	ICA	1501 of 2015
59.	ICA	1506 of 2015
60.	ICA	1509 of 2015
61.	ICA	1524 of 2015
62.	ICA	1525 of 2015
63.	ICA	1529 of 2015
64.	ICA	1535 of 2015
65.	ICA	1565 of 2015
66.	ICA	1571 of 2015
67.	ICA	1581 of 2015
68.	ICA	1582 of 2015
69.	ICA	1583 of 2015
70.	ICA	1599 of 2015
71.	ICA	1612 of 2015
72.	ICA	1613 of 2015
73.	ICA	1635 of 2015.
74.	ICA	1647 of 2015
75.	ICA	1654 of 2015
76.	ICA	1662 of 2015
77.	ICA	1701 of 2015
78.	ICA	1733 of 2015
79.	ICA	1804 of 2015
80.	ICA	1805 of 2015
81.	ICA	1807 of 2015
82.	ICA	1808 of 2015

83.	ICA	1820 of 2015
84.	ICA	1821 of 2015
85.	ICA	171 of 2016
86.	1CA	172 of 2016
87.	1CA	173 of 2016
88.	ICA	174 of 2016
89.	1CA	175 of 2016
90.	1CA	176 of 2016
91.	1CA	177 of 2016
92.	1CA	178 of 2016
93.	1CA	179 of 2016
94.	1CA	180 of 2016
95.	1CA	181 of 2016
96.	1CA	182 of 2016
97.	1CA	183 of 2016
98.	1CA	184 of 2016
99.	1CA	185 of 2016
100.	1CA	186 of 2016
101.	W.P.	2506 of 2016
102.	W.P.	14339 of 2016

(Masud Abid Naqvi)
Judge

(Shahid Jamil Khan)
Judge

Announced in Open Court on 14.04.2017.

Judge

Judge

APPROVED FOR REPORTING.

Judge

Judge

A.W.