

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 2444/2012

Nomee Industries & others.
Vs.
Government of Pakistan through Secretary Finance & others.

PETITIONERS BY: Malik Qamar Afzal and Ms. Sonia Yaseen, Advocates.

RESPONDENTS BY: Barrister Atif Rahim Burki, Dr. Farhat Zafar and Sheikh Anwar-ul-Haq, Advocates for FBR.
Mr. Muhammad Asif Khan, Advocate for IESCO.
Syed Kazim Hussain Kazmi and Mr. Naeem Ahmed Awan, Advocates for PESCO.
Mr. Farrukh Shahzad Dall, Assistant Attorney General.

DATE OF HEARING: 10.02.2022.

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BABAR SATTAR, J.- Through this judgment this Court will decide Writ Petitions No.2444 and 2460 of 2012 as the petitioners have impugned: (i) S.R.O. 592(I)/2012 dated 01.06.2012 through which amongst other provisions rule 58H of the Sales Tax Special Procedure Rules, 2007 ("**Rules**") was amended and the sales tax payable by the petitioners was increased to Rs.8 per unit of electricity consumed, and (ii) S.R.O. 801(I)/2012 dated 30.06.2012 by which rule 58H of the Rules was amended once again to decrease the sales tax payable from Rs.8 to Rs.7 per unit w.e.f. 01.07.2012.

2. The learned counsel for the petitioners contended that the Minister for Finance had represented to the petitioners and other taxpayers within the industries that the sales tax imposed through S.R.O. 592(I)/2012 would be revised downwards w.e.f.

01.06.2012. That through S.R.O. 801(I)/2012, the sales tax was reduced by Rs.1 per unit of electricity consumed. But such reduction was given effect as of 01.07.2012 as opposed to 01.06.2012 in accordance with the representation of the Minister for Finance. He contended that the failure of the Government to give retrospective effect to the reduction introduced through the S.R.O. 801(I)/2012 was in breach of the legitimate expectancy of the petitioners. That the recovery of additional sales tax during the period of twenty nine days in which S.R.O. 592(I)/2012 was in force was confiscatory. That S.R.O. 592(I)/2012 suffers from infirmity as the quantum of tax to be levied can only be determined by the legislature in view of Article 77 of the Constitution as interpreted by the august Supreme Court in **Engineer Iqbal Zafar Jhagra vs. Federation of Pakistan (2013 SCMR 1337)**. That the Federal Government or the Federal Board of Revenue (FBR) did not enjoy the legislative competence to alter the quantum of levy in the form of sales tax imposed through S.R.Os. 592(I)/2012.

3. The learned counsel for the respondents submitted that the impugned S.R.Os suffer from no infirmity and that the Federal Government was under no obligation to give retrospective effect to S.R.O. 801(I)/2012. That under Article 77 of the Constitution tax could be levied under the authority of an act of Parliament, which contemplated delegation of authority pursuant to an act of Parliament for purposes of determining the quantum of tax to be charged. That under Section 3(6) of the Sales Tax Act, 1990 (**"Act"**), the authority "to levy and collect such amount of tax as it may deem fit" had been delegated by

the legislature to the Federal Government or the FBR and such delegation suffered from no constitutional infirmity. He submitted that the principle of excessive delegation had been enumerated by the august Supreme Court in **Zaibtun Textile Mills Limited vs. Central Board of Revenue and others (PLD 1983 SC 358)** and **Khawaja Ahmad Hassan vs. Government of Punjab and others (2005 SCMR 186)** and it had been held that only in case where the Parliament abdicated its essential legislative function would delegation of its authority to an outside agency be regarded as excessive delegation.

4. The petitioners have largely staked their claims to not being charged the tax levy under S.R.O. 592(I)/2012 on the principle of legitimate expectancy. Legitimate expectancy based on the statement of the Minister for Finance that a levy duly imposed by the authority empowered to impose such levy by law will be reconsidered, is on rickety ground to start with. The rate of tax prescribed in rule 58H of the Rules through S.R.O. 592(I)/2012 was reconsidered and reduced through S.R.O. 801(I)/2012. The petitioner's grouse is that the reduction of rate of tax through S.R.O. 801(I)/2012 was not retrospective. The levy under challenged was imposed through S.R.O. 592(I)/2012 dated 01.06.2012 and was reduced by Rs.1 through S.R.O. 801(I)/2012 dated 30.06.2012. The petitioners' claim is that the rate of the levy ought to have been applied w.e.f. 01.06.2012, which was not done. The recovery of the tax imposed through S.R.O. 592(I)/2012 continued for a period of twenty nine days till the issuance of S.R.O. 801(I)/2012, which was given effect from 01.07.2012. None of the petitioners changed their positions

adversely due to any promise made by the Federal Government or any of its Minister's. The promise, if any, made by a Minister was to reconsider the quantum of tax rate prescribed in S.R.O. No. 592(I)/2012. That was done; only not retrospectively. The principle of promissory estoppel and the legitimate expectancy are simply not attracted in these cases. There was no representation made by the Federal Government that petitioners shall not be charged sale tax liable to be paid under the Rules. In any event there is no estoppel against the law.

5. The other contention of the learned counsel for the petitioners was that the impugned S.R.Os were issued without lawful authority as the FBR or the Federal Government had no power to change the rate of tax to be levied and such power vested exclusively in the Parliament. The impugned S.R.Os. were issued under Section 71 of the Act by the Federal Government through which amendments were introduced to the Rules. There can be two possible arguments made to challenge the authority backing the issuance of the impugned S.R.Os. One, that Federal Government for purposes of the Constitution means the Cabinet and not a Ministry, as enumerated by the august Supreme Court in **Messrs Mustafa Impex, Karachi and others vs. The Government of Pakistan through Secretary Finance, Islamabad and others (PLD 2018 SC 808)**. This objection was not raised by the learned counsel for the petitioners. Also the august Supreme itself held in **Pakistan Medical and Dental Council Vs. Muhammad Fahad Malik (2018 SCMR 1956)** that the law laid down in **Mustafa Impex** would apply prospectively. As the S.R.Os in question date back to 2012, the

legality of such S.R.Os cannot be impugned on the basis of law laid down by the august Supreme Court in **Mustafa Impex**. The second challenge to the legal authority of the impugned S.R.Os. can be that the determination of rate of tax falls exclusively within the domain of legislature and such rate cannot be fixed or changed by the Federal Government or the FBR. For this argument the learned counsel for the petitioners has relied on **Engineer Iqbal Zafar Jhagra**.

6. Let us consider the second challenge. Article 77 of the Constitution states the following:-

77. No tax shall be levied for the purposes of the Federation except by or under the authority of Act of Majlis-e-Shoora (Parliament).

The learned counsel for the petitioners has rightly pointed out that use of words "by or under the authority of Act of Parliament" contemplate delegation of authority for purposes of levy of tax. He has taken this Court to other provisions of the Constitution, where while describing the manner in which the authority is to be exercised pursuant to provisions of the Constitution, the relevant Articles use the expression "by Act of Parliament" (see for example Article 79 of the Constitution) or "by or under Act of Parliament" (see for example Article 169 of the Constitution) or "by or under the authority of Parliament" (see for example Article 66 of the Constitution). The use of words "by or under the authority of Act of Parliament" in Article 77 of the Constitution create an allowance to delegate authority pursuant to statute enacted by Parliament to authorize levy tax for purposes of the Federation. In exercise of such authority the

Parliament has promulgated the Act. Section 3(6) of the Act empowers Federal Government and the FBR "to levy and collect such amount of tax as it may deem fit on any suppliers or class of suppliers or any goods or class of goods", in lieu of tax under Section 3(1) of the Act, and further the power to "specify the mode, manner or time of payment of such amount of tax". The plain language of Section 3(6) of the Act therefore suggests that the legislature has bestowed on the Federal Government and the FBR the authority to levy and collect tax in lieu of sales tax levied under Section 3(1) of the Act. It is in exercise of such powers read together with Section 71 of the Act that the impugned S.R.Os have been notified pursuant to which, amongst other Rules, rule 58H of the Rules has been amended to affix the rate of sales tax payable by the petitioners.

7. The learned counsel for the petitioners appears to have misread the ratio in **Engineer Iqbal Zafar Jhagra**, which does not lay down a general principle of law that the authority to levy and collect tax can never be delegated by the legislature to the Federal Government in view of Article 77 of the Constitution. There is language within **Mustafa Impex**, which states that the power to levy tax belongs to the legislature that is what Article 77 of the Constitution provides. What the august Supreme Court has not held that the authority to levy tax can never be delegated by the legislature.

8. The challenge to vires of legislation on the basis of the doctrine of excessive delegation has received short shrift in Pakistan. The doctrine of excessive delegation was discussed at length in **Zaibtun Textile Mills Limited**, where the august

Supreme Court after discussing the jurisprudence from other common law jurisdictions noted that, “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”. The argument made before the apex Court 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 duty has been placed within the power of that authority in all its dimensions” was repealed.

9. In view of the law laid down in **Zaibtun Textile Mills** as well as **Khawaja Ahmad Hassan**, the argument that the legislature has abdicated its essential functions by delegating the authority to levy and collect tax to the Federal Government and/or the FBR under Section 3(6) of the Act is without force. The doctrine of excessive delegation has not found patronage in the jurisprudence that has evolved in Pakistan because the courts have felt that where, as a matter of policy, the legislature has felt that the Government needs to be allowed some play in the joints, it is not for the courts to strike down such legislative provision by treating it as abdication of an essential legislative function.

10. In the instant case, the Parliament has left to the Federal Government and/or the FBR to levy and collect sales tax in lieu of the sales tax prescribed by the legislature under

Section 3(1) of the Act. The authority delegated to the Federal Government and the FBR is to be exercised by them "as they deem fit". As such sales tax is in lieu of the sale tax imposed under Section 3(1) of the Act, the quantum of the levy under Section 3(1) of the Act can either be treated as a ceiling for purposes of imposition of levy under Section 3(6) of the Act or as a bench mark. In the instant case, the quantum of tax levied through the impugned S.R.Os remains much below the prescribed rate under Section 3(1) of the Act. And consequently, the question of whether the rate in Section 3(1) of the Act is the ceiling or the bench mark for purposes of prescription of rate under Section 3(6) of the Act does not arise and can be left for determination in an appropriate case.

11. In view of the above, the learned counsel for the petitioners has failed to make out a case that the impugned S.R.Os suffer from any legal infirmity. The petitions are therefore without merit and are **dismissed**.

12. This Court is grateful for the able assistance afforded by the learned counsel for the parties, especially by Barrister Atif Rahim Burki on the doctrine of excessive delegation.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **19.05.2022.**

JUDGE