

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Writ Petition No. 2547 of 2017

M/s Aimnaz (Pvt.) Limited.

Versus

***Federation of Pakistan, through the Secretary, Ministry of
Law, Federal Secretariat, Islamabad and two (02) others.***

**Petitioner's by : Mr. Munawar-us-Salam, Advocate.
(in W.P. No.2547/2017).**

**Mr. Aziz-ul-Haq Nishtar, Advocate.
(in W.P. No.2590/2017, W.P.
No.2653/2017).**

**Mr. Ali Nawaz Kharal and Malik Asif
Raza, Advocates.
(in W.P. No.2633/2017,
W.P.No.2662/2017, W.P. No.
2855/2017).**

**Mr. Karim-ud-Din Khilji and Ms.
Nazma Parveen, Advocates.
(in W.P. No.2662/2017).**

**Mr. Zulfikar Khalid Maluka, Advocate.
(in W.P. No.2849/2017).**

**Mr. Muhamad Wisal Khan, Barrister
Qasim Wadud and Wasi Ullah Khan
Surrani, Advocates.
(in W.P. No.2852/2017, W.P.
No.2853/2017, W.P. No.3076/2017,
W.P. No.3077/2017).**

**Mr. Syed Riaz Hussain and Malik Asif
Raza, Advocates.
(in W.P. No.2855/2017).**

**Mr. Farhan Shahzad, Advocate.
(in W.P. No.3250/2017,
W.P. No.3251/2017).**

Mr. Riaz Hanif Rahi, Advocate.

(in W.P. No.3252/2017).

**Ch. Khurram Shahzad, Advocate.
(in W.P. No.3260/2017).**

**Malik Jawad Khalid, Advocate.
(in W.P. No.3407/2017).**

**Barrister Syed Masood Raza,
Advocate.
(in W.P. No.3579/2017, W.P. No.
3580/2017, W.P. No. 3581/2017,
W.P. No.128/2018, W.P.
No.129/2018).**

**Mr. Aasim Shafi, Sardar Najib R.
Abbasi, Advocates.
(in W.P. No.3700/2017, W.P.
No.3701/2017, W.P. No. 3708/2017,
W.P. No. 4015/2017, W.P. No.
79/2018, W.P. No. 81/2018).**

**Mr. Muhammad Nazir Jawad,
Advocate.
(in W.P. No. 3868/2017).**

**Syed Pervaiz Zahoor Gillani, Advocate.
(in W.P. No. 4033/2017, W.P.
No.4034/2017, W.P. No. 4035/2017,
W.P. No. 4036/2017, W.P. No.
4037/2017, W.P. No. 4038/2017).**

**Mr. Muhammad Siddiq Mughal,
Advocate and Mazhar Marghoob,
Petitioner in Person.
(in W.P. No. 4069/2017).**

**Mr. Muhammad Afzal Awan, Ms.
Nazma Parveen, Advocates.
(in W.P. No. 4410/2017, W.P. No.
564/2018, W.P. No. 669/2018, W.P.
No. 701/2018).**

**Mr. Tariq Manzoor Sial, Advocate.
(in W.P. No. 194/2018, W.P. No.
195/2018, W.P. No. 811/2018).**

**Mr. Khalil-ur-Rehman, Advocate.
(in W.P. No. 694/2018, W.P. No.
1304/2018).**

**Mr. Monim Sultan, Advocate.
(in W.P. No. 794/2018).**

**Mr. Shaukat Ali and Mr. Sohail Akhtar,
Advocates.
(in W.P. No. 1274/2018).**

**Respondent's by : Mr. Sajid Abbas Khan, Mr. Ahmed Sheraz, Mr. Rashid Anwar, Mr. Ahmed Bashir, Mr. Salman Zaheer Khan, Mr. Musa Bashir Janjua, Mr. Jahanzab Awan, Mr. Muhammad Yousaf Nasim, Muhammad Adil Saeed, Sibah Farooq, Mr. Sajid Aurangzeb Khan, Mr. Irfan Ahmed, Advocates in their respective petitions.
Raja Khalid Mehmood Khan, learned Deputy Attorney-General.**

Date of hearing : 27.04.2018

AAMER FAROOQ, J. - This judgment shall decide the instant petition as well as petitions mentioned in the list attached herewith, as common questions of law and facts are involved.

2. The Petitioners, in all the petitions, are aggrieved of investigations initiated, Preliminary and Final Determinations made by National Tariff Commission (**NTC**) under the Anti-Dumping Duties Act, 2015 (**The Act**). In this behalf, the NTC is a body created under National Tariff Commission Act, 2015 (**NTC Act**) which has been given the power and has statutory duty to *inter-alia*, commence investigation; make Preliminary Determination and also the Final Determination with respect to the complaints made or *suo moto* proceedings initiated regarding the import of material by the importers at an extremely low price, so as to constitute dumping within the meaning of phrase as provided in the Act. The procedure adopted by NTC in investigating the matter, passing Preliminary and Final Determinations is governed by the Act, as well as NTC Act. As

noted hereinabove, the Petitioners are aggrieved of the initiation of the process or passing of order against them inasmuch as they are the importers and complaints have been made against them by Private Respondents/Complainants in the petitions and on the basis thereof, Anti-Dumping Duties have been imposed by NTC. The Petitioners are importers of various items and the same is not confined to any particular product, however, regardless of the fact that the import material is different in the petitions, all the petitions are being decided together since regardless of the material imported the procedure adopted for investigation or making determination and imposition of Duty is governed under the above mentioned law.

3. Mr. Munawar-us-Salam, Advocate Supreme Court, led the arguments on behalf of the Petitioners. The main thrust of the arguments on behalf of the Petitioners was that the imposition of Anti-Dumping Duty in essence is a tax which cannot be levied and imposed by NTC inasmuch as under Article 77 of the Constitution, it is only within the competence of the legislature i.e. the Parliament with respect to Federal Tax and cannot be done by an Executive act. In the alternative, it was argued that the levy and imposition of Anti-Dumping Duty is a result of excessive delegation by the Parliament which is not tenable under the scheme of the law. Learned counsel contended that all the three pillars of the State are required to observe the limits prescribed on the exercise of their powers by the

Constitution without transgressing into the sphere reserved for others.

4. It was further submitted that under Article 77 of the Constitution, no tax can be levied for the purposes of Federation except by or under the Authority of the Parliament/*Majlis-e-Shoora*. Attention was drawn towards Article 260 of the Constitution which defines taxation as including imposition of any tax or duty whether general, local, or special. In this context, it was submitted that the levy of Anti-Dumping Duty is a tax, which falls within the domain of the Parliament exclusively and the Executive is excluded to impose such a levy. It was argued that the Provisional Determination which imposes the Anti-Dumping Duty being violative of the scheme of the Constitution is liable to be set-aside.

5. Mr. Munawar-us-Salam, Advocate Supreme Court further submitted that in light of the Article 77 of the Constitution Parliament cannot delegate its power to impose tax/duty to the executive, hence, Sections 3, 37, 39, 43, 55 and 63 of the Act which provides for levy of the Anti-Dumping Duty and its determination by NTC are *ultra-vires* the Constitution, which needs to be declared so.

6. In the alternative, it was submitted that delegation of the powers to impose Anti-Dumping Duties under the Act are also hit by doctrine of excessive delegation of power without there being any parameters, scope or limits on such power.

Learned counsel further contended that NTC has been created under the statute and its function is to advice the Federal Government on tariff and other trade measures to provide assistance to the domestic industry and to improve the competitiveness of domestic industry. The provisions of the NTC Act overrides all other laws including the provisions of the Act, hence, the levy of the Anti-Dumping is in sheer violation of Article 77 of the Constitution as well as Sections 8 & 12 of the NTC Act.

7. Learned Counsel submitted that Section 37 of the Act read with Section 43 thereof, empowers NTC to impose Anti-Dumping Duties by way of Preliminary Determination provided as such determination is made within 180 days of the initiation of an Anti-Dumping Investigation. In case the Anti-Dumping Duty has been imposed after the expiry of 180 days the same shall be barred by law and would be without jurisdiction. In this context, it was argued that since the Preliminary Determination has been made beyond the period of 180 days in most of the cases, therefore, the assumption of jurisdiction by NTC upon application of the Complainants/ Private Respondents are absolutely without jurisdiction and beyond the scope of the Act. In support of his contentions, learned counsel placed reliance on the precedents from local jurisdiction as well foreign jurisdiction. Reliance was placed on cases reported as "*Muhammad Khalid Qureshi Vs. Province of Punjab through Secretary, Excise and Taxation Department, Lahore and another*" (**2017 PTD 805**), "*Messrs*

Khawar Paper Mart through Proprietor Vs. National Tariff Commission through Chairman and another" (2011 PTD 2243), "Sh. Abdur Rahim, Allah Ditta Vs Federation of Pakistan and others" (PTCL 1999 CL. 493), "Flying Cement Company Vs. Federation of Pakistan and others" (PLD 2016 Lahore 35), "J.K. Industries Ltd. Vs. Union of India (UOI)" [2005 (103) ECC 152], "Workers' Welfare Funds, M/o Human Resources Development, Islamabad through Secretary and others Vs. East Pakistan Chrome Tannery (Pvt.) Ltd. and others (PLD 2017 SC 28), "Engineer Iqbal Zafar Jhagra and another Vs. Federation of Pakistan and others." (2013 PTD 1491), and "Human Rights Case No.14392 of 2013" (2014 SCMR 220).

8. The foreign case law relied upon by the Petitioners was *"South African Reserve Bank and another Vs. Mark Richard Shuttleworth and another" [(2015) ZACC 17]*, *"Westbank First Nation Vs. British Columbia Hydro and Power Authority" [(1999) 3 SCR 134]*, *"State of Rajasthan and others Vs. Sajjanlal Panjawat and others". (1975 AIR SC 706)*, *"United States Vs. La Franca" (282 U.S. 568)*, *"United States Vs. Reorganized Cf & I Fabricators" (518 U.S. 213)*, and *"Leake Vs. Commissioner of Taxation (State)" [(1934) 36 WALR 66]*.

9. The other learned counsels for the Petitioners endorsed the submissions made by Mr. Munawar-us-Salam, Advocate Supreme Court, however, it was added that the investigation period for determining dumping is in contravention

of the stipulated time allowed under Section 36(2) of the Act. It was argued that pursuant to Section 36(2) of the Act, investigation period for determining dumping shall normally cover twelve (12) months preceding the month of initiation of the investigation, hence, the investigation period has to be a year before in which the imports were made, whereas, in some of the cases, the same was prior to the preceding 12 months i.e. W.P No.3581/2017, W.P.No.3579/2017 and W.P.No.129/2018. It was argued that though under the proviso discretion vests with NTC to allow investigation beyond the period of 12 months but the same has to be exercised in a reasonable and structural manner which has not been done in the instant case. Reliance was placed on "*Corruption in Hajj Arrangements in 2010*" (**PLD 2011 SC 963**), "*Tariq Aziz-ud-Din and others*" (**2010 SCMR 1301**), "*Abid Hassan and others Vs. PIAC and others*" (**2005 SCMR 25**), "*Allah Yar Vs. GM Railway, Headquarter*" (**2001 SCMR 256**) "*Muhammad Aslam Vs. Vice Chariman and others*" [**2010 PLC (CS) 266**]. It was also added that under Section 39 of the Act the Final Determination is to be made within one hundred eighty (180) days of the date of publication of a notice of Preliminary Determination, which also has not been done in the instant cases, therefore, the actions are without lawful authority. Reliance was placed on the principles that where law requires anything to be done in a particular way that ought to be done in that way. Reliance was placed on "*Ghulam Hussain Vs. Jamshaid Ali and others*" (**2001 SCMR 1001**). It was reiterated that only the

Parliament is competent to levy the tax in case of Federation. Reliance was placed on "*Pakistan Tobacco Company Ltd. Vs. NWFP*" **(2002 CLC 1910)**, "*Muhammad Aslam Vs. Punjab Government*" **(1996 MLD 685)**; that the Anti-Dumping Duty is a tax pursuant to Article 260 of the Constitution, hence, can only be levied by the Parliament in light of the dictum of the august Apex Court in "*Mustafa Impex Vs. Federation of Pakistan and others*" **(PLD 2016 SC 808)**; that the Anti Dumping Duty is a not a fee as there is no element of *Quid Pro Quo* in light of the recent decision of Hon'ble Supreme Court of Pakistan reported as *Workers' Welfare Funds, M/o Human Resources Development, Islamabad through Secretary and others Vs. East Pakistan Chrome Tannery (Pvt.) Ltd. and others* **(PLD 2017 SC 28)**, as well as "*Iqbal Zafar Jhagra and another Vs. Federation of Pakistan and others*" **(2013 SCMR 1337)**, "*M/s Sajid Traders, Lahore and 04 others Vs. M/o Commerce, Government of Pakistan and 4 others*" **(2013 PTD 698)**. It was contended that NTC is a creation of statutes and can only perform functions which are provided under the law. Reliance was placed on "*Gadoon Textile Mills Vs. WAPDA*" **(1997 SCMR 641)**. It was submitted that by virtue of Section 30 of the NTC Act, the Provision of the Act override all other laws. It was also contended that the Acts of the NTC are in violation of the fundamental rights of the Petitioners. Reliance was placed on "*Faisal Sultan Vs. E.D.O (Education) and others*" **[2011 PLC (C.S.) 419]**.

10. Conversely, the Respondents opposed the petitions. Mr. Ahmed Sheraz, Advocate High Court appearing on behalf of NTC explained that the word dumping is recognized as selling of product in the foreign country for less than the prevailing price of the said product in the domestic country. It was argued that Anti-Dumping Duty is not a tax, as there are features which make it distinguishable. In this behalf, learned counsel contended that Anti-Dumping Duty is to be imposed as a guard against the unfair trade and is a trade remedial measure in order to offset injurious effect to a specific industry. It was contended that it is not a compulsory exaction which is the fundamental feature of the tax and is only imposed on the dumped goods, it is country specific and export specific. Learned counsel in order to elaborate his contention regarding the concept of dumping and levy of the Anti-Dumping Duty took the Court through Sections 3, 43, 46 and 50 of the Act. It was also added that the matter is within the legislative competence of the Parliament and it has not abdicated its powers. In support of his contentions, learned counsel contended that it falls within the permissible delegation of power. Reliance was placed on "*Zaibun Textile Mills Ltd. Vs. Central Board of Revenue and others*" (**PLD 1983 SC 358**). Attention was also drawn towards Entries No.3, 32 and 59 of the Federal Legislative List. Reliance was also placed on the case law from English jurisdiction to substantiate that delegation of power is permissible. The case law relied upon was "*Hodge Vs. Regina*" (**1883 3 Appeal Cases 117**), "*Cobb and Co. Ltd Vs. Kropp*"

(1967 1 AC 141). Likewise, reliance was also made on cases from Indian and Local jurisdiction i.e. "*Calcutta and another Vs. Liberty Cinema*" **(AIR 1965 SC 1107)**, "*East and West Steamship Co. Vs. Pakistan*" **(PLD 1958 CIVIL SERVANT (Pak.) 41)**, "*Muhammad Ismail & Co. etc. Vs. Chief Colton Inspector*" **(PLD 1966 SC 388)**, "*Zaibtun Textile Mills Ltd. Vs. Central Board of Revenue and others*" **(PLD 1983 SC 358)**, "*Khauja Ahmed Hassan Vs. Government of the Punjab*" **(PLD 2004 SC 694)**. It was contended that the issue involved is distinguishable from "*Engineer Iqbal Zafar Jhagra and another Vs. Federation of Pakistan and others*" **(2013 PTD 1491)**. It was also submitted that there are judgments which are opposed to the case of Zafar Iqbal Jhagra which authorize the levy of Regulatory Duty through sub-ordinate legislation. Reliance was placed on "*Indus Trading and Contracting Company Vs. Collector of Customs (Preventive) Karachi and others*" **(2016 SCMR 842)**. In so far as, decision of the case or investigation within the prescribed time period is concerned, it was contended that the same is directory and not mandatory inasmuch as no consequence has been provided. Reliance was placed on "*Molana Noor-ul-Haq Vs. Ibrahim Khalil*" **(2000 SCMR 1305)**, "*Ghulam Hassan Vs. Jamshaid Ali and others*" **(2001 SCMR 1001)**. It was further submitted that there is a presumption in the constitutionality of any instrument and the Courts should exercise restraint in striking down any provision of the statute. Reliance was placed on "*Lahore Development Authority through D.G. and*

others Vs. Imrana Taiwana and others” (2015 SCMR 1739).

Learned counsel also took the Court through various provisions of the Act as well as NTC Act.

11. Arguments were also addressed by the learned counsels for the Private Respondents. In this behalf, learned counsel appearing on behalf of Private Respondents in W.P. No.2853/2017, W.P. No.3076/2017 and W.P. No.3251/2017, *inter-alia*, contended that the Act and NTC Act were enacted pursuant to the international treaties to protect the local industry. It was contended that the intent of the legislature is that Anti-Dumping Duty is not a tax and same can be borne out by the examination of preamble to the Act; the agreement establishing World Trade Organization, 1994 & agreement on implementation of Article 6 of GATT, 1994. It was further contended that all the three treaties which form the basis of the Act are concerned with trade regulation and have no nexus with taxation. It was contended that federal legislature has authority to promulgate the Act as it exists under items 3, 27 and 32 of the Federal Legislative List as provided in the Constitution. In order to substantiate his arguments that Anti-Dumping Duty is not a tax, learned counsel placed reliance on "*Federation of Pakistan and another Vs. Durrani Ceramics and others” (2014 SCMR 1630)*, "*Workers’ Welfare Funds, M/o Human Resources Development, Islamabad through Secretary and others Vs. East Pakistan Chrome Tannery (Pvt.) Ltd. and others” (PLD 2017*

SC 28). It was contended that NTC does not have any unbridled powers to determine dumping margin, the injury and levy Anti-Dumping Duty. Likewise, Mr. Salman Zaheer Khan, learned counsel for the Respondents in Writ Petition No. 694/2018 contended that the fact that Anti-Dumping duty is not a tax has been decided in a recent judgement by the Hon'ble Sindh High Court. Reliance was placed on the judgments already cited above, however, it was added that NTC performs quasi judicial functions under the Act. It was contended that even the Anti-Dumping Duty is a tax is not hit by Article 77 of the Constitution. Mr. Jahanzab Awan, appearing on behalf of Private Respondent i.e. M/s Engro Polymer & Chemicals Limited, in the instant petition, also took the Court through the provisions of the Act and NTC Act and contended that the Preliminary Determination dated 13.06.2017 cannot be set-aside on the basis that the provisions of the Act are *ultra-vires* Article 77. It was submitted that the Petitioners had an alternate remedy by way of appeal which they did not avail. It was submitted that the Petitioners are enjoying the interim relief by way of injunctive order by this Court. Learned Deputy Attorney General appearing pursuant to notice under Order 27-A C.P.C. adopted the arguments on behalf of Respondents.

12. Arguments advanced by the learned counsels for the parties have been heard and the documents placed on record have been examined with their able assistance.

13. For dilating upon the respective contentions by learned counsels for the parties, it is worthwhile to reproduce certain provisions/ Sections from the NTC Act as well as the Act. The preamble to the NTC Act provides that since it is expedient to provide for certain reforms in the National Tariff Commission by repealing National Tariff Commission Act, 1990 and re-enacting it for the purposes hereinafter appearing. Section 2 (f) of the NTC Act defines trade remedy laws as includes the Anti-Dumping Law, the Countervailing Duties Law and the Safeguard Measures Law for the time being in force. Section 8 provides for the functions of the Commission which reads as follows:

8. Function of the Commission.*(1) The functions of the Commission shall be to advise the Federal Government on,-*

(a) tariff and other trade measures to,-

(i) provide assistance to the domestic industry; and

(ii) improve the competitiveness of the domestic industry;

(b) trade remedy actions being faced by domestic producers and exporters;

(c) rationalization of tariff and proposals for tariff reform;

(d) removal of tariff anomalies; and

(e) any other matter relating to tariff or trade measures that the Federal Government may refer to the Commission.

(2) In addition to the functions specified in sub-section (I), the Commission shall also perform such functions with respect to international trade and other matters that may be assigned to it by the trade remedy laws or any other law for the time being in force.

(3) Where the Federal Government has adopted the recommendations of the Commission in whole or part, the

Commission shall periodically review the effect of such recommendations and in consequence of the review may give further recommendations to the Federal Government.

(4) The Commission shall advise, where possible, the domestic exporters and producers facing trade remedy investigations abroad.

(5) The Commission shall assist the Federal Government at the World Trade Organization dispute settlement body in respect of matters pertaining to the Trade Remedy Laws, WTO Covered Agreements and disputes under other trade agreements. The Federal Government may hire the services of a qualified and experienced international trade lawyer or international trade consultant for this purpose on a case-to-case basis.

(6) The Commission may undertake research to facilitate effective implementation of Trade Remedy Laws and tariff rationalization, in a manner to be prescribed.

14. The bare perusal of the Section 8 ibid shows that it has the functions as provided in Section 8 (1) and in addition it also shall perform functions with respect to international trade and other matters as well as trade remedy laws or any other laws for the time being in force. Sub-section 2 of section 8 read with Section 2 (f) of the NTC Act makes it clear that the NTC shall perform functions with respect to Anti-Dumping Laws as well.

15. The preamble to the Act reads as follows:

“Whereas it is expedient to give effect in Pakistan to the provisions of Article VI of the General Agreement on Tariffs and Trade, 1994, and to the Agreement on Implementation thereof and to amend and consolidate the law relating to imposition of anti-dumping duties to offset such dumping, to provide a framework for investigation and

determination of dumping and injury in respect of goods imported into Pakistan and for matters ancillary thereto or connected therewith;

And whereas the imposition of anti-dumping duties to offset injurious dumping is in the public interest;

And whereas it is expedient to provide for certain reforms in the Anti-Dumping Duties Ordinance, 2000 (LXV of 2000), by repealing the said Ordinance and re-enacting the law for the purposes hereinafter appearing;”

The perusal of above preamble shows that the Act was enacted to give effect to Article 6 of the General Agreement on Tariff and Trade and its implementation as well as the imposition of the Anti-Dumping Duty and to provide a framework for investigation and determination. The relevant Sections of the Act are as follows:

3. Levy of anti-dumping duty.-- (1) *The Commission shall, by notification in the official Gazette, impose anti-dumping measures on products imported into Pakistan when it determines, pursuant to an investigation initiated and conducted in accordance with the provisions of this Act that--*

- (a) *an investigated product is dumped within the meaning of this Act; and*
- (b) *injury is being caused to domestic industry within the meaning of this Act.*

21. Notice to government of exporting country.- *Upon receipt of a duly documented application compliant with the requirements of sections 20 and 24, the Commission shall promptly give notice to the government of each exporting country of the receipt of such application.*

36. Assessments to be on the basis of data relating to defined periods.(1) *The Commission shall base its assessments*

of dumping and injury on data relating to defined periods which shall be the periods for which information is required by the Commission.

(2) For the purposes of an investigation of dumping, an investigation period shall normally cover twelve months preceding the month of initiation of the investigation for which data is available and in no case the investigation period shall be shorter than six months.

(3) For the purposes of an investigation of injury, the investigation period shall normally cover thirty-six months:

Provided that the Commission may at its sole discretion, select a shorter or longer period if it deems it appropriate in view of available information regarding domestic industry and an investigated product.

37. Preliminary determination.—*(1) The Commission shall make a preliminary determination of dumping and injury, if any, not earlier than sixty days and not later than one hundred and eighty days, after initiation of an investigation. Such preliminary determination shall be based on the information available to the Commission at that time.*

(2) The Commission shall issue a notice of preliminary determination, whether affirmative or negative, which shall, subject to the requirements of section 3 l, set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material. Such notice of preliminary determination may also contain such other information as may be prescribed.

(3) The Commission shall publish a copy of the notice of preliminary determination in the official Gazette and in at least one issue each of a daily newspaper in the English language and a daily newspaper in the Urdu language having wide circulation in Pakistan.

(4) The Commission shall forward a copy of the notice of preliminary determination to exporting country and to other known interested parties.

39. Final determination.-- *(1) The Commission shall normally make a final determination of dumping and injury*

within one hundred and eighty days of the date of publication of a notice of preliminary determination in the official Gazette under sub-section (3) of section 37.

(2) The final determination shall be based on information obtained by the Commission during the course of the investigation that has been disclosed by the interested parties:

Provided that the Commission shall not be precluded from taking into consideration information or data received or collected from any other source.

(3) The Commission shall, subject to the requirements for the protection of confidential information under section 31, issue a notice of the final determination, whether affirmative or negative, containing relevant information on the matters of fact and law and reasons that have led to the determination.

(4) Without prejudice to the generality of the provisions of sub-section (3) and in addition to such further information as may be prescribed, the notice of the final determination referred to in sub-section (3) shall specify:-

- (a) the amount of the dumping margin, if any, found to exist and the basis for such determination;*
- (b) the amount of the definitive anti-dumping duties to be imposed, where applicable; and*
- (c) if definitive anti-dumping duties are to be collected with regard to the imports to which provisional measures were applied along with the reasons for the decision to do so.*

(5) The Commission shall publish a copy of the notice of the final determination referred to in sub-section (3) in the official Gazette and in at least one issue each of a daily newspaper in the English language and a daily newspaper in the Urdu language having wide circulation in Pakistan:

Provided that such notice may, if the Commission deems it fit, only contain a summary of the salient features of the final determination:

Provided further that where the notice of the final determination contains only a summary of the salient features of the final determination, the Commission shall make available to any interested party applying for the same in writing a copy of the complete notice of final determination.

(6) The copy of the notice of the final determination shall be forwarded by the Commission to the exporting country and to other known interested parties.

43. Imposition of provisional measures.-(1) *The Commission may impose provisional measures if it makes an affirmative preliminary determination of dumping and injury, and determines that provisional measures are necessary to prevent injury being caused during the course of an investigation:*

Provided that provisional measures shall not be applied sooner than sixty days from the date of initiation of the investigation:

Provided further that the amount of the provisional anti-dumping duty shall not exceed the margin of dumping as provisionally established, but it may be less than the margin if such lesser duty would be adequate to remove the injury to the Domestic Industry.

(2) A negative preliminary determination of dumping shall not automatically terminate an investigation, but no provisional measures shall be imposed in such case.

(3) The provisions of sections 51 and 52 shall be followed in the application of provisional measures.

46. Acceptance of price undertaking.-(1) *Where the Commission has made a preliminary affirmative determination of dumping and injury in accordance with the provisions of this Act the Commission may suspend or terminate an investigation without imposition of anti-dumping duties, whether preliminary or definitive, upon receipt of satisfactory price undertaking from an exporter to revise its*

prices or to cease export to the area in question at dumped prices so that the Commission is satisfied that injurious effect of dumping in question is eliminated:

Provided that the Commission shall not seek or accept any price undertaking from an exporter unless the Commission has made a preliminary affirmative determination of dumping and injury in accordance with the provisions of this Act.

(2) Price increases under such price undertakings shall not be higher than necessary to eliminate dumping margin and shall be less than the provisionally determined dumping margin set forth in the notice of preliminary determination referred to in sub-section (2) of section 37 if, the Commission determines that such lesser price increase would be adequate to remove injury to domestic industry.

(3) The Commission may suggest price undertakings, but no exporter shall be forced to enter into any such undertaking and the fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall not prejudice consideration of the case by the Commission:

Provided that in such circumstances the Commission shall be free to determine that a threat of injury is more likely to be realised if the dumped imports continue.

48. Completion of an investigation.- *(1) If one or more price undertakings are accepted by the Commission, it shall nevertheless complete an investigation of dumping and injury if it receives a request from an exporter in writing to continue such investigation, or where the Commission so decides of its own accord.*

(2) In the event the Commission makes a negative determination of dumping or injury pursuant to an investigation continued under sub-section (1), a price undertaking in question shall automatically lapse except in a case where the Commission determines that such a determination is due in large part to the existence of such price undertaking in which case, the Commission may require

that an undertaking be maintained for a reasonable period of time to be determined by the Commission.

(3) In the event the Commission makes an affirmative determination of dumping and injury pursuant to an investigation continued under sub-section (1), a price undertaking in question shall continue consistent with its terms and the provisions of this Act.

50. Mandatory imposition of anti-dumping duty.-- (1) *When the Commission has established the existence of dumping and injury in accordance with the provisions of this Act, it shall, by notification in the official Gazette, impose an anti-dumping duty:*

(2) The amount of the anti-dumping duty shall not exceed the margin of dumping established but it may be less than the margin if such lesser duty would be adequate to remove injury to the Domestic Industry.

51. Imposition and collection of anti-dumping duties.-- (1) *Antidumping duties, whether provisional or definitive. as the case may be, imposed under this Act shall—*

(a) take the form of ad valorem or specific duties:

Provided that provisional measures shall take the form of security by way of cash deposit;

(b) be imposed in addition to other import duties levied on an investigated product;

(c) be collected in the same manner as customs-duties under the Customs Act, 1969 (IV of 1969);

(d) be levied and collected on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings have been accepted by the Commission in accordance with the provisions of Part XII of this Act; or

(e) will not be levied on imports that are to be used as inputs in products destined solely for export and

are covered under any scheme exempting customs duty for exports under the Customs Act, 1969.

(2) Save as provided for in sub-section (3), the Commission shall establish an individual anti-dumping duty for each known exporter or producer of dumped imports.

(3) Subject to sub-sections (4) and (7), where the Commission has limited its examination of dumping margin in accordance with sub-sections (2) and (3) of section 14, any anti-dumping duty applied to imports from exporters or producers not included in an examination by the Commission shall not exceed a weighted average dumping margin established with respect to selected exporters or producers.

(4) The Commission shall disregard for the purposes of sub-section (3) any negligible margins, as defined in sub-section (3) of section 41, and margins established under the circumstances referred to in section 32.

(5) Save as provided for in sub-section (4) of section 14, the Commission shall apply individual anti-dumping duties to imports from any exporter or producer not included in an examination who has provided the necessary information during the course of an investigation.

(6) The Commission may apply a residual anti-dumping duty rate for imports from exporters and producers not known to the Commission at time of final determination at a rate which shall not exceed a weighted average of individual dumping margins established for exporters and producers examined during an investigation, excluding margins established in accordance with section 32.

(7) Where all dumping margins are established pursuant to section 32, the Commission shall use such alternative method of determining dumping margins for exporters or producers not included in its examination as it considers reasonable in the circumstances.

53. Anti-dumping and countervailing duties and fees to be held in a non-lapsable personal ledger account.—(1)
The Commission shall establish and maintain a non-lapsable

personal ledger account in its name for the purposes of Anti-Dumping Duties and Countervailing Duties.

(2) All anti-dumping and countervailing duties collected under the laws specified in sub-section (1) shall be held in that account.

(3) The account established under sub-section (1) shall be maintained and operated in such manner as may be prescribed.”

16. The examination of the above provisions of law shows that scheme has been provided under the Act by virtue of which an investigation can be initiated to see if the goods are dumped i.e. sold at price less than the price on which they are being sold in the country of their origin and if so under Section 3 Anti-Dumping Measures can be taken. The measures are not defined but include imposition of Anti-Dumping Duty as provided in Section 50 *ibid*.

17. The thrust of the arguments by the Petitioners is that Anti-Dumping Duty is in essence a tax. In the recent pronouncement by the Division Bench of Hon'ble Sindh High Court in case titled "*M/s R.A.D. Enterprises and another Vs. Anti-Dumping Appellate Tribunal*" (C.P. No. 2605/2017, dated 19.02.2018), the referred arguments of the Petitioners was spurned. The relevant portions of the judgment for the present controversy are as follows:-

“13. We now take up the first ground of attack, namely that the anti-dumping duty is a tax and the manner in which it is imposed in terms of the ADD Act is an impermissible delegation of legislative power to the NTC. For

reasons that follow, we are firmly of the view that the anti-dumping duty, as imposed by the ADD Act, is not a tax.....

..... Simply because it is dignified by the appellation “duty”, that does not necessarily, or in and of itself, mean that the anti-dumping duty is a tax.

16. *An examination of the AD Agreement and the ADD Act shows that one of the essential features of the imposition is that it has to be calculated and determined on an individual basis, i.e., in respect of each exporter or producer who is alleged to have dumped his goods in the country of import and thereby caused injury to its domestic industry.....*

..... The calculation and imposition of anti-dumping duty on an individualized basis is of the essence.

18. *.....In other words, it is obligatory to compute the dumping margins (s.14(1)) and the anti-dumping duty (s.51(2)) on an individual basis, particularized to each offending exporter or producer.....Now, the question is this: can a tax ever be imposed on such a basis? Is it lawful, in the constitutional sense, to impose a tax that is—indeed must be—tailored to specific individuals or persons? The answer to this must surely be in the negative. Any such tax would be struck down immediately as a gross violation of the Constitution, and this is so notwithstanding the latitude that the Courts are generally willing to grant in tax and fiscal matters.....*

.....During the course of the hearing, we specifically invited learned counsel to give any example of a tax imposed in the sort of individualized and particularized manner as envisaged by the AD Agreement and the ADD Act. No such example was forthcoming because, as far as we are aware, none exists. And no such example exists for the excellent reason that such a tax would be unconstitutional.

19. *..... It will be recalled that this footnote provides as follows: “As used in this Agreement “levy” shall mean the definite or final legal assessment or*

*collection of a duty or tax". Furthermore, even the extracts taken from the website of the WTO describe the 'typical' anti-dumping action as being the "charging [of] extra import duty on the particular product from the particular exporting country in order to bring its price closer to the "normal value" or to remove the injury to domestic industry in the importing country" (emphasis supplied). Should not then the imposition under the ADD Act be regarded also as a tax, given the manner in which it ought to be interpreted as held in *Sadia Jabbar*? In our view, in appropriate circumstances a distinction may have to be drawn in how a levy or imposition is to be regarded at international law and how it translates into the municipal system of the state giving effect to the same.....*

..... But, when considered from the internal (i.e. municipal) perspective of a federal state like Pakistan, it may not be possible (or, as we have concluded, constitutionally permissible) to impose anti-dumping measures as customs duties..... In other words, as long as the substance of the obligations is met, it matters not on the international stage how the obligation is treated or dealt with internally by the state while taking into account its constitutional and municipal position.

20. *If, as we have concluded, the anti-dumping duty that can be imposed by the ADD Act is not a tax, then what is it? It was described by learned counsel for the complainants as a regulatory charge that could be imposed for purposes of the regulatory scheme said to have been set up in terms of the ADD Act. It will be recalled that learned counsel submitted that a regulatory charge was a third type of levy, distinct from both a tax and a fee.*

21. *In our view, with respect, the reliance placed by learned counsel on the Canadian jurisprudence is misconceived. According to learned counsel, the ADD Act to be regarded as a "regulatory scheme" and the imposition of the anti-dumping duty as regulating the behavior of persons exporting to this country by proscribing, prohibiting or lending preference to a certain type of behavior (see 620*

Connought at para 20, pg.142), viz., not to sell goods to this country at a price (i.e., the “export price”) that is less than the “normal price”. These submissions cannot, with respect, be accepted. Firstly, while the ADD Act certainly sets up an elaborate mechanism that does not mean that it is necessarily a “regulatory scheme” as understood in the Canadian jurisprudence. Secondly, the fact that an anti-dumping duty is “charged” if dumping and injury are found to exist and the imposition of the duty is designed to deter such action, that does not mean it is a “charge” connected with a “regulatory scheme” within the meaning of the Canadian jurisprudence.

22. *Now, as already noted, according to the complainants a regulatory charge a third type of levy, distinct from a tax or a fee. However, and this is crucial to a proper understanding of its nature, in all three types there is always an actual levy. A tax is a levy “(1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose” (620 Connought at para 22, pg. 143).....*

Thus, it is integral to each type of levy that something is actually being charged from someone. In this sense the levy of a regulatory charge, like a tax and a fee, is self-executing, i.e., the regulatory scheme is put in place with the expectation that revenues will be generated by and from it. However, the position under the ADD Act is materially different. It does not apply automatically if there is dumping and injury is thereby caused.....

.....Thus, the ADD Act is not self-executing in the sense described above, i.e. it is not enacted with the expectation that revenues will be generated by the statute..... Indeed, even if an anti-dumping duty is imposed, it can be avoided by giving a price undertaking as provided for in Part XII of the ADD Act. The anti-dumping duty is certainly intended to deter behavior, but that is not the same thing as a self-executing charge being imposed in the sense that a regulatory charge is understood in the Canadian jurisprudence.

25. So, anti-dumping duty is neither a tax nor a regulatory charge. Then what is it? A clue as to our understanding of it has been given in para 23 above: it is a penalty imposed if there is dumping and injury within the meaning of the ADD Act. However, a penalty does not exist independently and of itself. It must be tied to something. In Constitutional terms the question, therefore, is what is the legislative competence to which anti-dumping duty is relatable as a penalty? In our view, the answer lies in ss.3 and 4 of the ADD Act. Section 3 lays down the dual requirements for anti-dumping duty to be imposed

.....
.....

26. Thus, in its essence, there is dumping if the export price of a product is less than its normal price, and this is what s.4 seeks to prevent. If an exporter or producer is in violation of this provision, and there is injury to domestic industry within the meaning of the ADD Act, then a dumping margin is determined, and based on that anti-dumping duty is imposed. As already noted both the dumping margin and the anti-dumping duty are to be determined on an individually particularized basis unless the matter comes within one of the permissible exceptions. Thus, anti-dumping duty is the penalty imposed if there is a violation of s. 4, which violation causes injury to domestic industry. The purpose is to remove the injury by, in effect, aligning the export price with the normal price by imposition of the penalty.

27. When all of the foregoing is kept in mind, in our view the essence of the subject matter of the ADD Act can be regarded from two perspectives. From one perspective, it could be regarded as the regulation of the import of goods into Pakistan, looked at from one particular aspect namely the price. From another perspective, it could be regarded as the regulation of price (i.e., price control), looked at from one particular aspect namely in relation to imported goods.....

.....If the first perspective applies, then in its pith and substance the ADD Act is relatable to the legislative

competence of “import and export across customs frontiers” and/or “trade and commerce with foreign countries. But, if the second perspective is correct, then in its pith and substance the ADD Act is relatable to the legislative competence of “price control”. The importance of the distinction lies in that the first legislative competence is exclusively within the federal domain (entry No.27), whereas the second is exclusively within the provincial domain (being, in terms of the Constitution a non-enumerated power). Now the ADD Act, as already noted, gives effect in municipal law to the AD Agreement. Entry No.3 of the Federal List relates to “external affairs” and the “implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries”. As the illustrative mentioning of “educational and cultural” agreements shows, this entry covers also those treaties in which the subject matter, when considered as a legislative competence, would in its pith and substance fall exclusively within the provincial domain. Post the 18th Amendment, which in addition to omitting the Concurrent List made several changes to the Federal List as well, there is also entry No.32, which now provides as follows: “International treaties, conventions and agreements and International arbitration.” So, it would seem that even if in its pith and substance the ADD Act were regarded as relatable to the legislative competence of “price control”, it would still come within the federal domain by reason of entry Nos.3 and 32.

28. Having considered the matter in its totality, in our view it is the first perspective that most appropriately applies to the subject matter of the ADD Act. Therefore, in its pith and substance the statute is relatable to entry No.27 of the Federal List. In its essence, it imposes a condition on the import of goods into the country, namely that they will not be brought into Pakistan at a price (i.e., the export price) lower than the normal price. If there is a violation of this condition, and the further condition of injury to domestic industry is also established, then a penalty, i.e., the anti-dumping duty, will have to be paid. It is most certainly not a tax, and in our view, it is also not a regulatory charge as understood in the

Canadian jurisprudence. But in any case, it follows from the foregoing discussion and analysis that the first ground of attack fails, and we so conclude.”

18. The examination of the judgment shows that it has been held by the Hon’ble Sindh High Court that Anti-Dumping Duty is not a tax but rather is a form of penalty imposed to ensure that the goods are not dumped into Pakistan.

19. I intend to agree with the decision of the Hon’ble Sindh High Court that Anti-Dumping Duty is not a tax, however, it may not be regarded as a penalty but it is a regulatory measure or a remedial measure to protect the local industry from unfair competition because the goods are being dumped into Pakistan. This observation finds support from the preamble to the Act as well as the scheme of law by way of examination of the above mentioned Sections of the Act and NTC Act.

20. It was also argued on behalf of the Petitioners that by imposition of the Anti-Dumping Duty same is not only in violation of Article 77 of the Constitution and / or it is a delegated power and tantamount to excessive delegation. The referred arguments are immaterial inasmuch as it is noted in the judgment of Hon’ble Sindh High Court that Anti-Dumping Duty is not a compulsory exaction; it is not generally imposed; it is only levied and imposed where there is dumping and that too by way of Anti-Dumping margin and has the slap of ceiling and floor. The referred features are not found in the tax which is general in

nature. Hence, in so far as the judgments relied by both sides are concerned, there is no cavil with the principles laid down in the same but they are not attracted in the facts and circumstances. It is not necessary that any levy has to be either a fee or a tax. It can have a different genre and as noted above Anti-Dumping Duty is a regulatory measure or otherwise a penalty but by no means tax or a fee.

21. The second limb of the attack on the proceedings by NTC was that it has stretched beyond the period prescribed for completion of investigation and / or making of Preliminary Determination. In the relevant Sections i.e. Sections 36 and 39 of the Act, no consequence is provided in case of failure on part of NTC to do the needful within the prescribed time. Even otherwise, it is mentioned in the referred Sections by way of proviso that the needful shall be done normally within the time prescribed. It is an established preposition of law that where consequence is not provided regarding doing of something within the timeframe the same is directory and not mandatory, if no consequence is provided for failure to do the same within the time prescribed. Reliance is placed on "*Ghulam Hassan Vs. Jamshaid Ali and others*" (**2001 SCMR 1001**).

22. Under the scheme of law, the importer is associated with the investigation and also gets to be involved in the process of Preliminary Determination and also has a right of appeal,

hence, his rights are not prejudiced in any way and he gets to present his case before the NTC and Appellate Tribunal.

23. It was also argued that the provisions of the Act are in violation of the fundamental right of the Petitioners as enshrined in Article 18 of the Constitution. In this behalf, it is observed that the fundamental right of freedom of trade and profession is not absolute and subject to reasonable restrictions. As noted above the measures provided in the Act are remedial to protect the local industry and this is a result of the agreement reached by the World Trade Organization and General Agreement on Trade and Tariff to which Pakistan is also a signatory. The Parliament / *Majlis-e-Shoora* is competent to enact laws which are for enforcement of the international treaties.

24. In view of the foregoing, the instant petition as well as petitions mentioned in the list attached herewith are devoid of merit and are accordingly dismissed.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 24/07/2018.

JUDGE

M. Zaheer Janjua