IN THE HIGH COURT OF SINDH, KARACHI
CP D-7159 of 2017
and connected petitions

Date Order with signature of Judge

Present: **Munib Akhtar and Omar Sial, JJ.**

For hearing of main case

Dates of hearing: 31.10 and 01, 08,
10, 23.11 and 05, 07 and 15.12.2017

Counsel for petitioners:

Mr. Khalid Jawed Khan, Mr. Ghulam Haider Shaikh,
Mr. Asad Raza Khan, Mr. Sarmad Hani,
Mr. Sattar Pirzada, Mr. Haroon Dugal,
Mr. Rana Sakhawat Ali,
Mr. Khalid Mehmood Siddiqui,
Mr. Aqeel Ahmed Khan, Ms. Rashida Parveen,
Ms. Dilkhurrum Shaheen, Ms. Sofia Saeed,
Mr. Ejaz Ahmed, Mr. Imran Iqbal Khan
Ms. Saima Syed, Mr. Samiur Rehman,
Mr. Ali Aziz, Mr. Hussain Ali Almani,
Mr. Zain A. Jatoi, Mr. Kalesh Suthar,
Ms. Ayesha Memon, Mr. Muhammad Rashid Arfi,
Mr. Ziaul Hassan , Mr. Adnan Moton,
Mr. Muhammad Rafi Kambho, Mr. Muhammad
Khalid Hayat, Mr. Farhan Minhaj,
Mr. Madan Lal, Mr. Hayat Muhammad and
Mr. Darvesh Madhan, Advocates

Mr. Kamal Azfar, Senior Advocate

Counsel for respondents:

Mr. Salman Talibuddin, Additional
Attorney General a/w Ms. Alizay Bashir, Advocate
Mr. Asim Mansoor Khan, DAG

Mr. Kafil Ahmed Abbasi, Advocate
Ms. Masooda Siraj, Advocate

Mr. Mustafa Aftab A. Sherpao, Advocate
for Intervener

Departmental Officers:

Dr. Muhammad Tariq Masood, Member (Legal) FBR
Mr. Maqbool Jehangir, Commissioner (Inland Revenue)
Mr. Yaseen Murtaza, ADC, Port Qasim Collectorate
a/w Mr. Tariq Aziz P.A. Customs
Mr. Agha Saeed, ADC Customs
Mr. Masood Ahmed, ADC Customs
Mr. Ilyas Ahsan Khan, Principal Appraiser (Legal)

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Munib Akhtar, J.: By this judgment, we intend disposing off the petitions identified and described in para 29 below. The issue raised in these petitions is the *vires* of an amendment made by the Finance Act, 2017 in s. 18(3) of the Customs Act, 1969, in light of the seminal judgment of the Supreme Court in *Mustafa Impex and others v. Government of Pakistan and others* PLD 2016 SC 808 ("*Mustafa Impex*"). As is well known, s. 18(3) allows for the imposition of regulatory duty on goods imported or exported. Prior to the amendment, this power vested in the Federal Government. By the Finance Act, 2017, s. 18(3) was amended such that for "Federal Government" the words "Board, with approval of Federal Minister-in-charge" were substituted. (Board of course means the Federal Board of Revenue or "FBR".) This amendment was clearly a response to the judgment of the Supreme Court. The question is whether it is constitutionally valid in light of the law enunciated in *Mustafa Impex*. The immediate context in which the issue arises is that on 16.10.2017 regulatory duty was imposed by FBR, with the approval of the Federal Minister-in-charge (being the Finance Minister) by means of notification SRO 1035(I)/2017 ("SRO 1035"). The regulatory duty was imposed on a wide range of imports. The Petitioners are importers of some of those goods and hence aggrieved by the imposition. Their case is that the amendment cannot survive constitutional scrutiny when tested on the anvil of *Mustafa Impex*. The respondents of course strongly contest this claim, submitting that the amendment is *intra vires* and does not violate any constitutional provision or principle, including the law laid down in *Mustafa Impex*. During the course of the hearing a company, the Organization for Advancement and Safeguard of Industrial Sector (being an entity registered under s. 42 of the Companies Ordinance, 1984) sought permission to intervene on the side of the respondents. The intervener is a trade body whose objectives are to safeguard the interests of local industry. The intervener fully supported the imposition of the regulatory duty and pleaded in favor of the *vires* of the amendment. Learned counsel for the intervener was also heard.

2. Mr. Khalid Jawed Khan, learned counsel in CP D-7159/2017 opened the case for the petitioners. Learned counsel referred to SRO 1035 and the amendment made in s. 18(3) by the Finance Act, 2017. Learned counsel referred to subsection (5) of the same section whereby an additional duty, over and above the regulatory duty, can also be imposed drawing attention to the fact that there the previous position continued to prevail and the power was to be exercised by the Federal Government. Thus, learned counsel submitted, the statute expressly recognized the distinction between the Federal Government on the one hand and "Federal Minister-in-charge" on the other. Learned counsel submitted that it was well-settled that the Constitution recognized the trichotomy of powers. In terms of Article 90 executive authority was to be

exercised by the Federal Government comprising of the Prime Minister and Federal Ministers and learned counsel referred to Article 92 in terms whereof Federal Ministers are appointed. It was submitted that the Federal Ministers when acting together as the Cabinet were collectively responsible to Parliament, and reference was made to Article 91(6). It was submitted that a Minister, acting individually, could not take those decisions that were required to be taken by the Federal Government/Cabinet. Referring to *Mustafa Impex* learned counsel submitted that the Supreme Court had now put it beyond all doubt that the executive authority of the Federation was to be exercised by the Cabinet and not by the Prime Minister or any individual Minister. Reference was also made to Article 97. Learned counsel submitted that a combined effect of all these Articles when read in light of *Mustafa Impex* was that any matter relating to levy of the customs duty could only be taken up and decided upon by the Cabinet acting as a whole. It was submitted that every statute had necessarily to properly reflect this constitutional mandate and that, therefore, s. 18(3) could only empower the Federal Government as understood in light of *Mustafa Impex* and not otherwise. It was submitted that no entity other than the Federal Government could be empowered to levy any tax such as a customs duty in the form of regulatory duty. Learned counsel argued that the amendment made to s. 18(3) was nothing but an attempt to nullify the judgment in *Mustafa Impex* and to obviate the requirements imposed by the decision. However, the judgment could not be nullified as it explained the correct constitutional position which had to be given effect to. It was submitted that the amendment sought to alter a constitutional rule laid down by the Supreme Court and this was impermissible.

3. Learned counsel also referred to the status of the FBR, referring to the Federal Board of Revenue Act, 2007. Referring to s. 3 learned counsel submitted that the FBR was not a body corporate and it was certainly not the Federal Government. Thus the attempt to empower the FBR by means of the amendment was clearly unconstitutional. Reference was made to paras 79 to 81 of *Mustafa Impex* and to the conclusions spelt out by the Supreme Court in para 84. Reliance was placed in particular on clauses (iii) and (iv) of para 84 and learned counsel submitted that these were fully applicable to the issue at hand. Thus, learned counsel submitted, the power to levy regulatory duty could not be conferred on a body subordinate to the Federal Government, which was the position of the FBR. Referring to Article 98, learned counsel submitted that the legislative power of Parliament as spelt out therein had to be exercised within the limits of the constitutional mandate and, therefore, the FBR could not be conferred the power to impose regulatory duty even by statute. In this context learned counsel sought to draw a distinction between those functions which were constitutionally required to be performed only by

the Federal Government and those in respect of which the power could be conferred upon bodies or officers subordinate to the Federal Government. By way of example learned counsel referred to s. 219 of the Customs Act whereby the FBR is empowered to make rules for purposes of the statute. It was submitted that this last conferment was unexceptionable. However, s. 18(3) stood in a different category altogether since it related to the imposition of a tax and here, as set out by the Supreme Court, it was only the Federal Government (meaning thereby the Federal Cabinet) that could be empowered. In the context of taxation, learned counsel further submitted that the power of granting exemption, which in the case of Customs Act is contained in s. 19, could be conferred on the Board. It may be noted that earlier this section had also empowered the Federal Government but by the Finance Act, 2017 a like amendment has been made in this section as well. Learned counsel took no issue with this amendment but emphasized that the position of imposing a tax was entirely different, which was of course the issue at hand.

4. Continuing with his submissions learned counsel relied in particular on paras 63 and 65 of *Mustafa Impex*, especially in the context of Article 98 of the Constitution. Learned counsel submitted that the power to impose regulatory duty as conferred by s. 18(3) was not a mere ministerial act or function. It was, in fact, quasi-legislative power and could only be conferred on the Federal Government (meaning always the Cabinet) and not otherwise.

5. In addition to the foregoing learned counsel made an alternate submission with regard to *vires* of the amendment. The Finance Act, 2017 had been passed as a Money Bill. Learned counsel submitted that at least to the extent of the amendment made in s. 18(3) the matter did not fall within any of the clauses of Article 73(2) and, therefore, the provision could not have been amended by adopting the procedure of a Money Bill. It was, therefore, according to learned counsel, *ultra vires* the Constitution on this basis as well. Other learned counsel appearing in the various petitions adopted the submissions made by Mr. Khalid Jawed Khan.

6. Mr. Kamal Azfar, Senior Advocate, sought permission to make submissions before the Court. The learned senior advocate explained that he was not instructed as counsel in any of the petitions being heard but he was counsel in certain other petitions also pending in the High Court. Those petitions arose under the Sales Tax Act, 1990 in which parallel amendments, to the same effect as the amendment now under challenge, had been made by means of the Finance Act, 2017, and were assailed on the same basis as now before the Court. The learned Additional Attorney General graciously did not oppose the request made by Mr. Kamal Azfar and so we gave permission to

the learned senior advocate to address the Court. Learned counsel referred to Articles 90, 91, 98 and 99 of the Constitution and also to the Rules of Business of the Federal Government. With reference to Article 98, it was submitted that it had to be read and understood in light of what was set out in the Rules of Business and in this regard specific reference was made to Rules 4, 6 and 16. Referring to Rule 17(1)(c) learned counsel submitted that the relevant provisos were mandatory and a notification issued in violation thereof was a nullity. Referring to the concept of the collective responsibility of the Federal Cabinet learned counsel submitted that there had been an excessive delegation by means of the amendment brought about by the Finance Act, 2017. As regards *Mustafa Impex*, learned counsel read out several passages from the judgment, referring in particular to paras 27, 28 and 37 to 40. Learned counsel also placed reliance on para 84.

7. The case for the respondents was opened by Mr. Salman Talibuddin, the learned Additional Attorney General. It was submitted that in fact Article 90 was not at all engaged in the present dispute as the matter was not with regard to the exercise of executive authority by the Federation. Thus, according to the learned AAG, the reliance sought to be placed on *Mustafa Impex* by the petitioners was somewhat misplaced. The learned AAG submitted that Parliament was well within its legislative powers if it chose to confer the power of levying any tax or duty on an entity other than the Federal Government, being in the present case the FBR. The learned AAG referred to several statutes where, according to him, this position could be found and relied on the Pakistan Civil Aviation Authority Ordinance, 1960 (s. 16(3)), the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (NEPRA) (s. 46) and the Oil and Gas Regulatory Authority Ordinance, 2002 (OGRA) (s. 18). Thus, according to the learned AAG, if Parliament chose to empower the FBR in terms of s. 18(3) that was its business and that was all that there was to it. But, the learned AAG continued, Parliament had specifically chosen to limit the exercise of this power by the Board, subjecting it to the approval of the Minister-in-charge. As to why this has been done, the learned AAG referred to various well-known judgments with regard to the delegation of legislative power and in particular the power to impose regulatory duty through this device. Reference was made to the *Zaibtun* litigation, being the decision on this Court and, on appeal, in the Supreme Court in *Zaibtun Textile Mills Ltd. v. Central Board of Revenue and others* PLD 1983 SC 358. With reference to regulatory duty, the learned AAG referred to the leading case of *Abdul Rahim, Allah Ditta v. Federation of Pakistan and others* PLD 1988 SC 670 and read out several passages from the decision to explain both the need to delegate legislative power in this regard and also the reason why, according to him, Parliament had expressly provided

that the FBR could only impose regulatory duty with the approval of the Federal Minister-in-charge.

8. The learned AAG submitted that Articles 90 and 99 of the Constitution, which was at the forefront of consideration by the Supreme Court in *Mustafa Impex*, related to the executive authority of the Federal Government. The case of the amendment at hand was relatable to Article 98. The learned AAG, referring to this Article, submitted that the Finance Act, 2017 had been approved by the Federal Government before being presented as a Bill before the National Assembly and the Act had, therefore, been passed on the recommendation of the Federal Government as required. The Federal Government had asked the National Assembly to amend the law and this request has been acceded to. Insofar as SRO 1035 itself was concerned, the learned AAG referred to the parawise comments and other documents/material placed on record on behalf of the respondents and emphasized that when the proposals for imposition of regulatory duty had been put up by the FBR, the decision to approve the same had been taken by the Federal Minister-in-charge (i.e., the Finance Minister) himself as required by the amended provision. It was not a decision of the Federal Cabinet or taken at the behest or on the dictation thereof, or of any of its committees, including in particular the Economic Coordination Committee of the Cabinet ("ECC").

9. Referring to Article 90, the learned AAG submitted that it contemplated a certain hierarchy which, according to him, moved from the President to the Federal Government to a Federal Minister, in that order. It was submitted that a Federal Minister did have an independent existence separate and distinct from his position as a member of the Federal Cabinet. Reliance was placed on certain entries in *Black's Law Dictionary* and *King-Emperor v. Sibnath Banerji* AIR 1945 PC 156. It was submitted that a Federal Minister was very much within the meaning and scope of expression "officers or authorities subordinate to the Federal Government" and that, therefore, in terms and by reason of Article 98 the amendment made to s. 18(3) was constitutionally valid. Insofar as the alternate submission was concerned, the learned AAG submitted that it had no merit. The Finance Act, 2017, when passed and enacted as a Money Bill, was regular and constitutional in all its respects and aspects, including the amendment made to s. 18(3).

10. Mr. Kafil Ahmed Abbasi, learned counsel who appeared for the Department, referred to subsections (1) and (3) of s. 18 as well as to s. 19. Learned counsel submitted that the amendment made to s. 18(3) was well within the scope of Article 98 and hence constitutionally valid. Learned

counsel referred to various case law in support of his submissions. Referring to *Mustafa Impex* and to the concluding propositions laid down in para 84, learned counsel submitted that there had been no violation of any of the same and, therefore, the case sought to be made out on behalf of the petitioners was misconceived.

11. As noted above, Mr. Mustafa Sherpao, learned counsel for the intervener company, was also heard. The primary case put forward by learned counsel was based on Article 77 of the Constitution. Learned counsel submitted that this provision had to be broadly construed, understood and applied and it fully empowered Parliament to delegate any power on any authority, officer or body. Since the imposition of regulatory duty was legislative in nature, Parliament could so empower any body or authority and in this regard learned counsel placed strong emphasis on the words "under the authority" to be found in Article 77. Thus, according to learned counsel, Article 77, when read with s. 18(3) of the Customs Act and s. 4 of the FBR Act, fully covered the situation and there could be no cavil to the grant or the exercise of this legislative power. Learned counsel referred to certain case law in support of his case. As regards *Mustafa Impex*, learned counsel in particular referred to paras 62 to 64 as also para 66(vii) and para 72. Learned counsel submitted that in terms of Article 98, a Federal Minister could be empowered by statute as an officer subordinate to the Federal Government. Learned Counsel submitted that a Federal Minister acted in different capacities and could wear different heads being, as appropriate according to context, a Member of the Cabinet and a Minister-in-charge. Learned counsel submitted that Article 77, on which he placed strong and primary reliance, had not at all being considered in *Mustafa Impex*. Referring to Article 99(2) as originally to be found in the Constitution, and drawing attention to the latter part thereof, learned counsel submitted that that provision had expressly spoken of a "delegation" by the Federal Government to officers and authorities subordinate to it. However, the present case, where the amendment had been made by statute, was not a matter of delegation of authority by the Federal Government. Rather it was a case of express "conferment" of statutory power on FBR to act with the approval of the Federal Minister-in-charge. Referring to Article 90 in its original form and as subsequently amended from time to time, learned counsel submitted that the changes did not at all affect the position of Article 98, which fully empowered Parliament to make the change now in question. Learned counsel referred to and read out several passages from *Mustafa Impex* in support of his submissions and also to certain other case law. Insofar as the alternate submission was concerned, learned counsel submitted that the Money Bill as passed, when enacted as the Finance Act, 2017, was *intra vires* the Constitution in its entirety.

12. Dr. Muhammad Tariq Masood, the Member (Legal) FBR also sought permission to address the Court. Given the importance of the issue involved, we granted permission and he was heard accordingly. The learned Member referred in some detail, supporting his submissions by relevant case law, to the concept of, and need for, delegated legislation, with specific and particular reference to the imposition of regulatory duty. The learned Member, *inter alia*, relied on the leading case which had already been referred to by the learned AAG and read out the relevant passages from the same. With specific reference to SRO 1035, the learned Member placed before us various material and documents, setting out the position of imports in tabular form for comparative purposes. The learned Member submitted that on a year-to-year basis, imports had registered a consistent upsurge and spike in the months leading up to issuance of SRO 1035, which was unsustainable. The learned Member emphasized that the Supreme Court had recognized a large margin of discretion with regard to imposition of regulatory duty and thus, in light of alarming macroeconomic trends and figures and also the balance of payments situation, a decision was taken by the Board to propose the imposition of regulatory duty in terms of the power newly conferred upon it by the amendment made in s. 18(3). The matter was then put up before the Federal Minister-in-charge as required by statute who, barring a few adjustments (which were incorporated) accepted the proposal and it was in such circumstances that SRO 1035 came to be issued. Insofar as *Mustafa Impex* was concerned, the learned Member submitted that the focus there was on Articles 90 and 99 in relation to the Federal Government. The learned Member submitted that prior to the amendment made by the Finance Act 2017 the *de facto* position was that the power of the Federal Government was being exercised by the Finance Minister, although *de jure* the power of course vested in the former. The position was altered by Parliament in valid exercise of its legislative competence so as to align the *de facto* and the *de jure* positions. The learned Member accepted that the amendment made to s. 18(3) was a legislative response to *Mustafa Impex.* The learned Member referred to several passages from the judgment. Reference was made in particular para 63 which according to him had to be read in light of the preceding paras 58 to 62. It was submitted that para 63 could not be read alone but the observations made therein had to be understood in the context of the judgment as a whole. Reference was also made to certain case law as also the position in India.

13. Mr. Khalid Jawed Khan exercised the right of reply. Learned counsel submitted that the *ratio decidendi* of *Mustafa Impex* could be regarded and understood as having three aspects which according to him were as follows:

i) That where a power is conferred by statue on the "Federal Government" then such power can only be exercised by the Federal Cabinet and no one else.

ii) That if at all certain types of power are to be conferred on the executive by statue then some of those powers can only be conferred on the Federal Government and on no one else, not even any officer or authority subordinate to the Federal Government. Thus, according to learned counsel, what has been held in *Mustafa Impex* is that each and every type of power or function that can be conferred by statute need not to be delegated to the Federal government, but (and this was the key point for present purposes) a certain class of functions or powers necessarily have to be so conferred. The premier example of this subset according to learned counsel was the power to impose or levy a tax, and that included the levy of regulatory duty.

iii) If in respect of a function or power that could only be conferred on the Federal Government, a statue either directly or indirectly sought to confer the same on any other body, authority or officer (whether by way of direct grant or in substitution of the Federal Government), then such a statutory provision would be unconstitutional and liable to be struck down as such.

Referring to Article 98, learned counsel questioned whether a Federal Minister could at all by regarded as an authority or officer subordinate to the Federal Government within the meaning and for the purposes of the said Article. Learned counsel emphasized that this could not be so as it would, *inter alia*, run contrary to the fundamental constitutional principle of collective responsibility. Learned counsel submitted that the Privy Council decision relied upon by the learned AAG had been given in the context of the Government of India Act 1935 where the position was substantively different and other considerations prevailed.

14. Referring to s. 18(3) as amended, learned counsel submitted that the change violated the second and third aspects of the *ratio decidendi* of *Mustafa Impex*, as highlighted by him, as well as the principle of collective responsibility inasmuch as the amendment chose to supplant and replace the Federal Cabinet with a sole member thereof. It was submitted that a Federal Minister was part of a composite body and could not be divorced or separated from the same. Learned counsel contended that the key observations made by

the Supreme Court in *Mustafa Impex* would effectively have to be disregarded and ignored if the submissions made on behalf of the Respondents were to be accepted. In support of his submissions learned counsel again referred to and read out several passages from *Mustafa Impex.*

15. We have heard learned counsel as above, and considered the case law and the material and record relied upon. The entire issue revolves around a proper understanding and application of the principles enunciated in *Mustafa Impex.* As noted above, learned counsel for both the sides, as also the learned senior advocate and the learned Member read out several passages and paragraphs from the judgment. Many were read more than once and subjected to close and careful analysis and discussion. We will respectfully refrain from reproducing here the passages and paragraphs read out and relied upon, as that will serve only to lengthen this judgment. However what does need to be set out is the factual and legal matrix in which the Supreme Court gave judgment. That is stated in the following terms in the decision (pg. 819; emphasis in original):

> "These appeals with the leave of the Court entail the following facts:- the appellants are importers of cellular phones and textile goods. Earlier they enjoyed certain exemptions from sales tax granted by the Federal Government. Subsequently the exemptions were either withdrawn or the tax rates were modified vide notifications No.280(I)/2013, 460(I)/2013 (*both relating to cellular phones*) issued pursuant to Sections 3(2)(b), 3(6), 8(1)(b), 13(2)(a) and 71 of the Sales Tax Act, 1990 (the Act), and 682(I)/2013 (*relating to textile goods*) issued under Sections 4(c), 3(2)(b), 3(6), 8(1)(b) and 71 of the Act dated 4.4.2013, 30.5.2013 and 26.7.2013 respectively. Aggrieved of this withdrawal and/or modification (*in the rate*) of sales tax, the appellants challenged the same through constitution petitions before the learned Islamabad High Court on the primary ground that such notifications had not been issued by the Federal Government in accordance with Section 3 of the Act. The petitions were dismissed by the learned High Court through a consolidated judgment. The Intra-Court Appeals (ICA) initiated by the appellants also failed (*note:- some constitution petitions were decided through the impugned judgment in ICA*). Leave in these matters was granted to consider inter alia the following points:-
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> > *"Learned counsel for the petitioners while attacking the impugned judgment of the learned Division Bench of the High Court affirming the judgment of the learned single Judge-in-Chambers submits that the petitioners have no cavil to the proposition that the Federal Government does have the power, jurisdiction and authority to issue the notification, however his argument is that the notifications in question dated 4.4.2013 and 30.5.2013 challenged in the constitution petitions were not issued by the Federal Government rather by the Additional Secretary who was not competent to do so. It is also submitted that to grant the exemption is only the privileged authority of the Cabinet as per the provisions of Article 90 of the Constitution of Islamic Republic of Pakistan, 1973 and even the Secretary or Advisor to the Prime Minister has no competence to issue such notifications and grant exemption. It*

> *is also submitted that the notification dated 4.4.2013 was issued before the approval was granted by the Advisor to the Prime Minister which was done ex-post facto. This again renders the said notification as nullity in the eyes of law.""*

16. It will be seen from the foregoing that the core issue was the exercise of statutory powers conferred on the Federal Government. However, there was no issue as regards the conferment itself. It was in such context that the Supreme Court explained what was meant by the "Federal Government" in the constitutional (and hence necessarily statutory) sense, and how any power so conferred was to be exercised (i.e., by the Federal Cabinet alone). The question here relates to the conferment of statutory powers on the FBR, to be exercised with the approval of the Federal Minister-in-charge. It is perhaps for this reason that the learned AAG submitted that the issue was materially different from that which arose in *Mustafa Impex*, and respectfully questioned the relevance of the decision in the facts and circumstances at hand. With respect, we are unable to agree. The statutory powers here involved were conferred in substitution of the position earlier prevailing, when they had vested in the Federal Government. Furthermore (and if at all necessary, we so hold), the amendment was clearly a legislative response to the judgment of the Supreme Court, and must therefore be so considered. Finally, and most importantly, even if the learned AAG is correct that the core question of law in *Mustafa Impex* was as stated above when the judgment is read as a whole it is abundantly clear that the principles of law enunciated by the Court were not so limited and did not move within so narrow a locus. The Supreme Court undertook (and in our respectful view, clearly intended to undertake) a much broader examination of the constitutional position. The judgment must be so read and so operates, especially in the context of Article 189. The petitioners were quite right in placing the judgment centre stage, and we so proceed.

17. We begin by considering the submissions made by learned counsel for the intervener in respect of Article 77, on which learned counsel essentially based his entire case. Article 77 reads as follows: "No tax shall be levied for the purposes of the Federation except by or under the authority of Act of Majlis-e-Shoora (Parliament)". With respect, we are unable to accept that this Article confers a broad, open ended and virtually untrammeled power on Parliament to act in such manner it may please, as submitted by learned counsel. The reliance placed on the words "under the authority of" is wholly misconceived. It must be noted that the Article is cast in negative terms. It is concerned with a limitation, and not with conferring positively a power on the legislature. Its antecedents and roots lie deep in the past, in such disputes as the right of the Crown to impose by exercise of prerogative power the tax of "ship money" (which presaged the English Civil War), and in the political

philosophy that underpinned the later rebellion of the Thirteen Colonies (a.k.a. the American Revolution) and their famous demand that there be "no taxation without representation". Article 77 certainly embodies a constitutional principle of the first importance but, with respect, it cannot carry (nor is it intended to carry) the burden and weight of the interpretation put on it by learned counsel.

18. When *Mustafa Impex* is read as a whole with the view of resolving the issue raised in these petitions, in our opinion the matter is best approached by considering whether what has been held in the judgment can be regarded as falling in the three aspects identified by Mr. Khalid Jawed Khan while exercising the right of reply (see para 13 above). The first aspect is of course the core issue addressed in *Mustafa Impex* and in our view it was resolved in the manner as submitted by him. Quite properly, this was never seriously doubted or challenged on behalf of the respondents. The key question for present purposes is whether the second and third aspects are to be found in the judgment, as submitted by learned counsel. In order to resolve this point, it will be necessary to consider Articles 98 and 99(3) of the Constitution. The first has remained unaltered throughout the somewhat tumultuous times that the 1973 Constitution has seen and provides as follows: "On the recommendation of the Federal Government, Majlis-e-Shoora (Parliament) may by law confer functions upon officers or authorities subordinate to the Federal Government". What is now Article 99(3) has undergone changes, which (along with the changes made in the other Articles considered by it) have been fully and exhaustively considered by the Supreme Court in *Mustafa Impex* (as has Article 98). As originally promulgated, the provision was to be found as the second (of two) clauses of Article 99 and provided as follows:

> "(2) The Federal Government may regulate the allocation and transaction of its business and may for the convenient transaction of that business delegate any of its functions to officers or authorities subordinate to it."

The clause appeared (as clause (3)) in amended form in the 1985 changes that heralded the return of democracy, and took its present shape (again as clause (3)) under the amendments made by the 18th Amendment:

> "(3) The Federal Government shall also make rules for the allocation and transaction of its business."

19. The Supreme Court had the following to say with regard to Article 99 (pp. 840-41; italics in original; underlined emphasis supplied):

> "39. Reverting to Article 99, we note there are two very important alterations, which are material in the facts of the present case (*however*

learned counsel for the parties did not address any submissions in regard to the same). Article 99, as originally framed, contemplated two sets of rules: the first were intended for the authentication of orders and were thus formal in nature, as also mandatory. The second set was very important and served a dual purpose:

(i) The first purpose was in relation to the allocation and transaction of business, and

(ii) The second was to enable the convenient transaction of that business by the Federal Government by conferring on it the power to delegate any of its functions to officers or authorities.

It is important to note, however, that the word "may", connoting a discretionary element, was used in the original article.

40. The two critically important changes which have been made in the present formulation are:-

(a) the power of delegation to officers and subordinate authorities has been taken away, and

(b) the making of rules has been made mandatory. Two very significant inferences follow ineluctably from the changes.

(i) The executive power of the Federal Government has now been channelized and the exercise thereof is to be through the mandatory modality of Rules of Business. These Rules are therefore binding on the Government and a violation of the terms thereof can be fatal to the exercise of executive power. It needs emphasizing that the conscious substitution of the word "may" by "shall" speaks to the intention of Parliament to leave no doubt in the matter.

(ii) Whereas originally the Federal Government had the power to delegate any of its functions to officers or authorities i.e. it would have been possible to delegate functions pertaining to fiscal matters to the Finance Ministry; this is no longer possible.

There is no discretion left in the Executive in relation to this. Obviously, the framers of the 18th Amendment felt so strongly about this that, notwithstanding, their reluctance to retain any vestiges of the 1985 Amendments, in this matter they preferred to retain the phraseology adopted in it. There has, therefore, been a radical re-structuring of the law. We will revert to this aspect of the matter below."

20. It will be seen from the foregoing passages that as regards the clause in its original form, the Supreme Court expressly held that the Federal Government could delegate any of its functions to subordinate officers and authorities, and gave the example of fiscal functions being delegated to the "Finance Ministry". In our view, the reference to the Ministry is comprehensive enough to include the Finance Minister (i.e., the Minister-in-charge) as he is the head of the Ministry. The FBR is of course an authority subordinate to the Federal Government (although we may note in passing that subordination and taking dictation (in the legal sense) are not necessarily the same thing). Thus, in our view, the foregoing observations of the Supreme

Court are broad enough to cover a situation similar to there being, in the context of the clause in its original form, a delegation of a function such that it was to be performed by the FBR subject to the approval of the Minister-in-charge.

21. When the original clause is compared with Article 98 (which, it must be remembered, has remained unaltered throughout), the close similarity in language is striking. Both refer to "functions" and "officers or authorities subordinate" to the Federal Government. This naturally leads to the question: are these terms and expressions used in the same manner in the two provisions? As is obvious, given the conclusion arrived at above in relation to the original clause this question has direct and immediate relevance for the issue at hand. If "officers or authorities" of the Federal Government in the original clause could have included the FBR subject to the approval of the Minister-in-charge, then should this not be true of the words when used in Article 98? And if so, then would that not make the amendment made to s. 18(3) constitutionally valid? As is now clear, in our view, the proper resolution of the issue before us requires consideration of Article 98, in comparison with the clause in Article 99 in its original form. The analysis required can be regarded as falling into three questions: (a) are the words "officers or authorities subordinate" to the Federal Government used in the two in the same sense? (b) Is the term "functions" as used in the two provisions to be taken and applied in the same sense? Thus, is it of any significance that in the original clause "functions" was preceded by the word "its" whereas this word is missing in Article 98? And (c) does it make any difference that in the original clause, the term "functions" was also preceded by the word "any", which is not to be found in Article 98?

22. Insofar as the first question is concerned, we are of the view that it ought to be answered in the affirmative. It is somewhat difficult to conceive of there being two different sets of "officers or authorities" subordinate to the Federal Government, one to which Article 98 applies and the other who came within the scope of the original clause. Therefore, if, as we have indeed found, the combination of FBR with the approval of Minister-in-charge would have come within the scope of this phrase had the original clause remained in the field, we hold that it also comes within the scope of Article 98. Insofar as the second and third questions are concerned, they can be taken up together since they need to be addressed in light of the following observations of the Supreme Court in *Mustafa Impex* (pp. 856-7; italics in original; underlined emphasis supplied):

"65. We now turn to a consideration of the status of "subordinate authorities" which is a matter dealt with in Article 98. This article provides that, on the recommendation of the Federal Government, Parliament may, by law, confer functions upon officers, or authorities, subordinate to the Federal Government. It is reproduced below:-

> *"**98. Conferring of functions on subordinate authorities**. – On the recommendation of the Federal Government, [Majlis-e-Shoora (Parliament)] may by law confer functions upon officers or authorities subordinate to the Federal Government."*

66. This article, read contextually with the other relevant articles, envisages a multi-stage procedure. Each stage has to be strictly complied with. The sequence of developments is as follows:-

(i) The original concept in Article 90 (which now stands restored to its initial configuration) was that the executive authority of the Federation was to be exercised in the name of the President by the Federal Government.

(ii) The Federal Government was defined to be the Prime Minister and the Federal Ministers (i.e. the Cabinet).

(iii) The Cabinet was to act through the Prime Minister who was to be the Chief Executive.

(iv) The Prime Minister could act directly or through Federal Ministers.

(v) This hierarchical exercise of powers was stated to be subject to the constitution i.e. the exercise of governmental power was subjected to the constitutional provisions in their totality. This obviously postulates a referential base of a parliamentary democracy with the Cabinet at the heart of the Executive.

(vi) In 1985 a radical change was made in Article 90 by vesting the totality of executive authority in the President instead of the Federal Government i.e. the Cabinet. The flow of authority was then the following:

(a) The President now became the constitutional repository of all executive authority.

(b) He could exercise this authority, either directly or through officers subordinate to him (this would obviously include the exercise of power through ministers).

(c) There was no delegation of power as such. When powers were exercised by officials it was, in the eye of law, the President acting through them.

(d) The effective restraint on the President was that power was to be exercised in accordance with the constitution. This, therefore, restored the power of the Cabinet, albeit by a rather circuitous route. However, the formulation as a whole, was really a reversion to the structure of the Government of India Act, 1935 which we have already discussed above.

(vii) By the 18th Amendment the original language of Article 90 was restored, but other changes were also made. When it came to Article 99, which in its original formulation, conferred the power on the Federal Government to delegate its functions to subordinate

> officials, this power was not restored. It is, however, important to bear in mind that in the original constitution the power to delegate was purely discretionary. It could be exercised, or not exercised, at the will of the Government. In actual practice it was perhaps rarely exercised. It follows from the above that the mere taking away of a discretionary power to delegate does not make any substantial difference to the exercise of constitutional power as matters stand at present.
>
> It is important to note that designated functions can only be conferred on officers or authorities who are subordinate to the Federal Government. They cannot, for example, be conferred on private entities or companies. Official power can only be exercised through official channels. However, as is obvious, even the passing of a law to such effect would not elevate the status of officers of the Federal Government and enable them to be treated as the Federal Government itself. Furthermore, this provision very clearly does not contemplate the transfer of legislative powers of any nature whatsoever to subordinate officials. All it permits is the discharge of certain functions by designated officials. The transfer of legislative powers would be a clear cut violation of the structure of the constitution and the concept of separation of powers. We are, therefore, unable to agree with the contention of the learned Additional Attorney General in this behalf. Neither the constitutional provisions, nor the Rules of Business, confer power on a Secretary or head of a Division, to be treated as the Federal Government. Contrary to what he has submitted, the phrase "subject to the constitution" used in Article 90 was not intended to differentiate the extent of the executive authority of the Federation from that as set out in Article 99. Both articles are to be read in conjunction with each other and not in opposition thereto. There is no conflict between the two articles which requires resolution by reference to the phrase "subject to the constitution". Article 99 supplements the contents of Article 90."

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

24. It follows from the foregoing that notwithstanding our conclusion as regards the combination of FBR acting with the approval of the Minister-in-charge coming within the scope of Article 98, the function with which we are here concerned (i.e., the delegated legislative power to impose a regulatory duty) is a function that can vest only in the Federal Government itself and not elsewhere or otherwise. The amendment made to s. 18(3) by the Finance Act, 2017, being contrary to the constitutional position, must therefore necessarily fail.

25. Before proceeding further, we may note in particular one decision relied upon by learned counsel for the intervener. This is a judgment of a learned Division Bench of the Lahore High Court reported as *Federation of Pakistan and others v. Digicom Trading and others* 2017 PTD 1706. At issue was the imposition of regulatory duty under s. 18(3), by a notification issued in 2014 (as amended in 2015). One of the grounds taken was that the notification was liable to be struck down as being in violation of the law enunciated by the Supreme Court in *Mustafa Impex*. The learned Division Bench considered this argument in para 13 of its judgment (pp. 1721-24) and repelled the same. We have carefully considered the reasoning of the learned Division Bench especially in respect of its understanding of what was held and laid down in *Mustafa Impex*. With respect, we are unable to agree with the same.

26. At this juncture, it will be convenient also to consider a submission made on behalf of the respondents relating to how the proposal that eventually emerged as SRO 1035 was actually dealt with. It was submitted both, relying on material placed on the record, that the proposal to impose regulatory duty was in fact placed by the FBR "out of abundant caution, keeping in view the sensitivity of the matter" before the ECC and was duly approved by the latter (subject to certain amendments, which were accepted in full). This was done before the approval of the Federal Minister-in-charge was obtained. The ECC approved the summary moved by the FBR on or about 13.10.2017. The ECC is of course one of the most important committees of the Federal Cabinet. Now, Rule 17(1) of the Rules of Business of the Federal Government (reproduced in para 45 (pg. 844) of the judgment in *Mustafa Impex*) provides, inter alia in its clause (c), that cases referred to the Federal Cabinet can be disposed of by discussion at a meeting of a Cabinet committee. The proviso to the sub-rule provides that the decision of a committee is to be ratified by the Cabinet "unless the Cabinet has authorized otherwise". According to the material placed before us, the decision of the ECC was ratified by the Cabinet on or about 18.10.2017. Although in *Mustafa Impex* the Supreme Court struck down Rule 16(2) of the Rules of Business as being *ultra vires* the Constitution

(on the ground that it enabled the Prime Minister to bypass the Cabinet), there does not appear to be anything in the judgment as would disallow the procedure laid down in Rule 17(1)(c). Thus, the argument ran (at least as we understood it), in the facts and circumstances in which SRO 1035 came to be issued the notification had the sanction or (legal) blessing of the Federal Cabinet and hence ought to be upheld and sustained.

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

28. Insofar as the alternate submission, that the amendment made to s. 18(3) could not have been brought about by means of a Money Bill, is concerned, we are, with respect, unable to accept the same. Having considered the amendment in the context of the Finance Act, 2017 as a whole, in our view the matter came within the scope of paragraph (a) or at the very least paragraph (g) of clause (2) of Article 73. Furthermore, and additionally, it appears to be settled parliamentary practice that a fiscal statute (and obviously the Customs Act, 1969 so qualifies) is amended by a Money Bill. We can see no reason, in the facts and circumstances before us, to say anything that disturbs this position.

29. This judgment disposes off the following petitions: (a) all those petitions (“connected bunch”) that were reserved for judgment on 15.12.2017,

in terms of the order made on that date in CP D-7159/2017; and (b) all those petitions that were reserved for judgment on any date thereafter, and directed to be treated as reserved with the connected bunch. Office may take note and act accordingly.

30. In view of the foregoing, we declare and hold as follows:

a. Section 18(3) of the Customs Act, 1969 as and to the extent as amended by the Finance Act, 2017 is declared to be *ultra vires* the Constitution, and of no legal effect;

b. SRO 1035(I)/2017 dated 16.10.2017, issued in terms of, and in purported exercise of the powers conferred by, the amended s. 18(3) is declared to be *ultra vires*, of no legal effect and is hereby quashed;

c. The respondents or any authority or officer thereof are restrained from demanding any duty in terms of SRO 1035 or from enforcing the same in any manner whatsoever, whether by way of detaining or refusing release of imported goods or otherwise;

d. The security given by the petitioners under interim orders is directed to be released forthwith;

e. Any sums paid by the petitioners by way of regulatory duty under or in terms of SRO 1035 must be refunded in full. Such refund may be made by way of direct repayment or adjustment (against any tax or duty) and in one lumpsum or in installments, as the FBR may determine (but the same policy must be adopted in all cases). However, the entire amount that is refundable must in each case be settled in full not later than 31.10.2018.

31. This judgment is suspended for 30 days in order to enable any aggrieved person/party so desirous to avail the remedy of appeal. During this period the interim order dated 26.10.2017 made in CP D-7159/2017 (and also as made applicable in other petitions) shall continue to remain operative.

The petitions are disposed off in the above terms. There will be no order as to costs.

JUDGE

JUDGE