

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

2nd Appeal No.S – 10 of 2010

(M/s Seven Star Enterprises v. National Fertilizer Marketing Ltd. & others)

2nd Appeal No.S– 12 of 2010

(M/s Seven Star Enterprises v. National Fertilizer Marketing Ltd. & others)

2nd Appeal No.S – 13 of 2010

(National Fertilizer Marketing Ltd. v. M/s Seven Stars Enterprises & others)

2nd Appeal No.S – 14 of 2010

(National Fertilizer Marketing Ltd. v. M/s Seven Stars Enterprises & others)

Date of Hearings: **18.04.2022 & 25.04.2022**

Date of Decision: **30.05.2022**

Mr. Manoj Kumar Tejwani, Advocate for the Appellant in 2nd Appeals Nos. S- 10 and 12 of 2010 and for Respondents Nos.1 to 7 in 2nd Appeals Nos. S-13 and 14 of 2010

Mr. Bakhshan Khan Mahar, Advocate for the Appellant in 2nd Appeals Nos. S- 13 and 14 of 2010 and for Respondent No.1 in 2nd Appeal Nos.S-10 and 12 of 2010

Mr. Abdul Rasheed Kalwar, Advocate for the Respondent No.3 in 2nd Appeal No.S-12 of 2010

J U D G M E N T

Muhammad Junaid Ghaffar, J. – These 2nd Appeals have been filed by Seven Star Enterprises and National Fertilizer Marketing Ltd. against a common Judgment dated 31.08.2010, passed by III-Additional District Judge, Sukkur in 1st Appeal Nos.58, 59, 60 and 61 of 2002, whereby, Judgment dated 11.02.2000, passed by II-Senior Civil Judge, Sukkur in F.C Suits Nos. 263, 264, 265 and 266 of 1986, has been set aside through which two Suits filed by Seven Star Enterprises were decreed and two Suits filed by National Fertilizer Marketing Ltd., were dismissed.

2. Heard learned Counsel for the parties and perused the record.

3. It appears that Seven Star Enterprises was awarded a contract by District Council, Sukkur for collecting of export tax for a certain period of time pursuant to issuance of a Notification dated 03.06.1980 by the Government of Sindh under Local Government Ordinance, 1979 (“Ordinance”). By virtue of that Notification, the Government had delegated its various powers under Section 60(1) of the Ordinance, which required that before a tax is levied a prior sanction is to be accorded by the

Government for imposition of such a tax. It is a matter of record that on the basis of this Notification, the Zila Council, Sukkur in question imposed export tax on around 33 items including the subject item i.e. Urea. In the two Suits of Seven Star Enterprises, it was averred that though National Fertilizer Marketing Ltd. had paid export tax on urea dispatched through private trucks, but avoided the same when the urea was transported through railway wagons and trucks hired through National Logistics Cell (“NLC”). One suit was in respect of the period pertaining to 16.10.1980 to 15.6.1982 in which an amount of Rs.46,00,000/- with 14% interest was claimed as recoverable and the other Suit was in respect of remaining period from 16.06.1982 to 15.10.1983 in which an amount of Rs.24,00,000/- with 14% interest was claimed as recoverable.

4. Insofar as National Fertilizer Marketing Ltd. is concerned, they had filed two Suits subsequently, again for recovery of the amount allegedly recovered by Seven Star Enterprises without lawful authority, as according to them, even no export tax was payable on urea transported through private trucks, as the Notification dated 03.06.1980, which had delegated certain powers to the Zila Council, had been declared as ultra vires by a Judgment rendered by a Division of this Court, reported as *Kotri Association of Trade and Industry v. Government of Sindh and another* **(1982 CLC 1252)**. They had set up their claim primarily on this ground and while admitting that no export tax was paid on the export of urea through railway wagons and NLC trucks, the one that had been paid on private trucks was sought to be recovered by way of these Suits.

5. Learned Trial Court consolidated all these four Suits and settled the following Issues:

1. Whether Pak Saudi Fertilizer Factory is located within the limits of Town Committee, Mirpur Mathelo? If so its effect?
2. Whether imposition of export tax on fertilizer is illegal and ultra vires?
3. Whether the contract of collecting export tax given to M/s Seven Stars Enterprises by the District Council, Sukkur was illegal?
4. Whether exemption of Fertilizer from export tax by the Sindh Government is illegal, ultra vires and without jurisdiction?
5. Whether M/s Seven Stars Enterprises illegally charged Rs.41,82,826-53 + Rs.13,04,519/25 from M/s National Fertilizer Marketing Limited?

6. Whether M/s Pak Saudi and National Fertilizer Limited are liable to pay Rs.46,000-00 + Rs.24,000-00 total Rs.70,000-00 to M/s Seven Stars Enterprises?
7. Whether District Council Sukkur is liable to pay any amount to M/s Seven Stars Enterprises. If so how much?
8. Whether the District Council Sukkur is liable to pay any amount to M/s National Fertilizer Ltd. If so how much?
9. Whether suit No.207/83 is barred by Limitation?
10. Whether suit No.207/83 is not maintainable at law and is barred under the provision of Sindh Local Govt: Ordinance 1979?
11. Whether the Suit No.20/83 is barred by Limitation?
12. Whether Suit No.20/83 is barred under the provisions of Sindh Local Government Ordinance, 1979?
13. Whether Suit No.116/82 is not maintainable at law?
14. What should the decree be?

6. Learned trial Court after evidence and a detailed Judgment came to the conclusion that the two Suits filed by the National Fertilizer Marketing Ltd. were time barred; hence, dismissed, whereas, Suits filed by the Seven Star Enterprises were decreed. However, for exact determination of the amount recoverable from National Fertilizer Marketing Ltd., a local Commissioner was appointed in respect of export of urea through railway wagons and NLC trucks.

7. The National Fertilizer Marketing Ltd. being aggrieved with the said Judgment of the Trial Court filed separate Appeals and through impugned Judgment, learned Appellate Court has been pleased to dismiss the Appeals Nos.58 and 60 of 2002 filed by the National Fertilizer Marketing Ltd; in respect of dismissal of their Suit, whereas Appeals Nos.59 and 61 of 2002 were allowed, which were filed against the decree passed in favour of Seven Star Enterprises, whereby Suits of the Seven Star Enterprises now stand dismissed. Learned Appellate Court had settled the following Points / Issues for determination:

1. Whether the imposition of export tax on fertilizer by Government of Sindh vide notification dated 1-6-1980 was illegal or ultra vires?
2. Whether Pak Saudi Fertilizer Factory is located within the limits of Town Committee Mirpur Mathelo?
3. Whether the collection of export tax by respondent No.1 M/s Seven Stars was illegal, if so for what period?

4. Whether the exemption of fertilizer from export tax by Government of Sindh vide notification dated 15.7.81 was illegal, ultra vires or without jurisdiction?
5. Whether the appellant M/s National Fertilizer Marketing limited evaded export tax and thus liable to pay the same to the respondent No.1 M/s Seven Stars, if yes, to what extent?
6. Whether the respondent No.1 M/s Seven Stars illegally charged an amount under the garb of export tax from M/s National Fertilizer Marketing limited, which the latter is entitled to recover, if yes, to what extent?
7. Whether respondent District Council Sukkur is liable to pay any amount to respondent No.1 M/s Seven Stars, if yes, to what extent?
8. What should the Judgment / Order be?

8. Insofar as Suits filed by Seven Star Enterprises are concerned, learned Appellate Court came to a conclusion that the objection of National Fertilizer Marketing Ltd that the manufacturer i.e. Pak Saudi Fertilizer Ltd. Mirpur Mathelo / Respondent No.2 is located outside the limits of District Council, Sukkur, they had failed to prove and establish such factual assertion, as the same was premised on the fact that in some earlier round of litigation, Pak Saudi Fertilizer Ltd. had by itself being aggrieved by certain actions of Town Committee, Mirpur Mathelo had pleaded in several cases that their factory is not located within the limits of Town Committee, Mirpur Mathelo. Hence, the very genesis on which the entire objection of National Fertilizer Marketing was premised, was erroneous and contrary to the facts already on record; and therefore, this objection was discarded.

9. As to levy of export tax pursuant to a Notification dated 03.06,1980, it was held by the Appellate Court that same was issued in accordance with law including Section 60 of the Ordinance, whereas, National Fertilizer Marketing Ltd. had never challenged the vires of the said Notification; hence the issue was answered in negative. As to validity of export tax collected by Seven Star Enterprises during the period in question and even after grant of exemption w.e.f. 15.07.1981, and whether National Fertilizer Marketing Ltd was liable to pay the arrears of export tax, as claimed by Seven Star Enterprises, learned Appellate Court came to a conclusion that since exemption was granted by the Government w.e.f. 15.07.1981, therefore, any attempt to recover the said tax after this period was illegal and without lawful authority.

10. As to the claim of National Fertilizer Marketing Ltd. that the tax had been recovered without mandate of law and placing reliance on the Judgment of **Kotri Association (supra)**, learned Appellate Court came to the conclusion that though any recovery beyond 15.07.1981 was illegal, however, there was no case of set off; nor any evidence was led so as to grant any decree; hence the Appellate Court came to a conclusion that though Seven Star Enterprises and National Fertilizer Marketing Ltd. have partly established their rightful claim against each other; but are not found entitled to any relief from the Court.

11. Insofar as the validity of levy of export tax in question is concerned, it would be appropriate to refer to various Notifications as well as exemption granted in respect of levy of export tax on urea. The relevant Notifications are as under:

Notification

Karachi: the 3rd June, 1980.

No. OSD/Elect/LG/DP-27/79.-In exercise of the powers conferred by subsection (I) of section 106 of the Sind Local Government Ordinance, 1979, the Government of Sind are pleased to delegate its powers under the sections of the said Ordinance mentioned in column 1 of the table below to all the Councils in the manner and extent indicated in column 2 thereof:-

Table

Section No. and its description- 1	Extent and manner of delegation 2
.....
60(1) The power to sanction levy of taxes.	Full powers provided that- (i) it does not involve reduction in the existing rates; (ii) the abolition of an existing tax; (iii) prior approval of Government would be necessary where imposition of tax has bearing on export of agricultural inputs.

60. (1) Subject to sub-section (2) a council may with the previous sanction of Government levy, in the prescribed manner, all or any of the taxes, rates, tolls and fees mentioned in Schedule V;

Provided that where a tax, rate or toll which is levied as a cess, tax, or surcharge by Government such tax, rate or toll shall not be more than that levied by Government

(2). No taluka council shall have the power to levy any tax, toll or fee, and such council shall be financed in such manner as may be prescribed.

(3). All taxes, rates, tolls and fees levied by a council shall be notified in the prescribed manner and shall unless otherwise directed by Government, be subject to previous publication.

(4). Where a proposal for the levy or modification of a tax, rate, toll or fee is sanctioned, Government shall specify the date on and from which such tax rate, toll or fee or the modification shall come into force".

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GOVERNMENT OF SIND
**HOUSING, TOWN PLANNING, LOCAL GOVERNMENT AND RURAL
DEVELOPMENT DEPARTMENT**

Karachi, dated the 15th July, 1981.

NOTIFICATION

No.SO-II-1(35)/78. In exercise of the powers conferred by Rule 23 of the District Council Export Tax Rules, 1976, the Government of Sind are pleased to declare that fertilizer, insecticides and pesticides meant for use in agriculture shall stand exempted from the payment of Export Tax with immediate effect.

No.SO-II-1(35)/78.- In exercise of the powers conferred by Rule 23 of the District Council Export Tax Rules, 1976, the Government of Sind are pleased to exempt liability to export tax, the goods being exported outside the Province for use of consumption within Pakistan, with immediate effect.

M.SALMAN FARUQUI
Secretary to Government of Sindh".

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THE SIND COUNCILS (VALIDATION OF TAX) ORDINANCE, 1982.

Sind Ordinance No.VIII of 1982.

AN
ORDINANCE

to validate certain taxes, rates tolls or fees levied, charged, collected or realized under the Sind Local Government Ordinance, 1979 or rules thereunder,

WHEREAS it is expedient to validate certain taxes, rates, tolls or fees levied, charged, collected or realized under the Sind Local Government Ordinance, 1979 or rules thereunder, in the manner hereinafter appearing;

NOW THEREFORE, in pursuance of the Proclamation of the fifth day of July, 1977 and the Provincial Constitution Order, 1981, the Governor of Sind is pleased to make and promulgate the following Ordinance:-

1. (1) This Ordinance may be called the Sind Councils (Validation of Tax) Ordinance, 1982.

(2) It shall come into force at once.

2. Notwithstanding anything contained in the Sind Local Government Ordinance, 1979, the Sind Councils (Imposition of Taxes) Rules, 1979 or any judgment, order or decree of any Court—

(a) any tax, rate, toll or fees levied, charged, collected or realized by a Council on or after 3rd June, 1980 shall be deemed to have

been validly levied, charged or collected or realized, as the case may be; and

(b) where any such tax, rate, toll or fees has not been paid or realized before the coming into force of this Ordinance the same shall be recoverable in accordance with the Ordinance and the rules”.

Karachi.
Dated 5th July, 1982

Lieutenant General S.M.Abbasi
Governor of Sind

(SYED ALLY MADAD SHAH)
Secretary to the Government of Sind,
Law Department.

GOVERNMENT OF SIND
HOUSING TOWN PLANNING LOCAL GOVERNMENT
& RURAL DEVELOPMENT DEPARTMENT

Karachi, Dated the 15th July, 1981

NOTIFICATION

NO.SO.II-1(35)/78:- In exercise of powers conferred by Rule 23 of the District Council Export Tax Rules, 1976, the Government of Sind are pleased to declare that fertilizer, insecticides and pesticides meant for use in agriculture shall stand exempted from the payment of Export Tax with immediate effect.

M. SALMAN FARUQUI,
SECRETARY TO GOVERNMENT OF SINDH

GOVERNMENT OF SIND
HOUSING TOWN PLANNING LOCAL GOVERNMENT & RURAL
DEVELOPMENT DEPARTMENT

NOTIFICATION

NO: SO-III/7-5/76: In exercise of the powers conferred by section 60 read with item 6 of part III of Schedule V of the Sind Local Government Ordinance, 1979, and rule 7 of the West Pakistan Local Councils (Imposition of Taxes) Rules, 1961, the Government of Sind are pleased to sanction the levy of the tax by the District Council Sukkur on the export of the articles mentioned in column 2 of the Schedule at the rates mentioned against each in column 3 thereof with effect from the date of publication of this notification and upto 30-6-1980.

SCHEDULE

S.No.	Name of Articles.	Rate of the Tax.
...
21.	Urea	Rs.0.25 per bag.
22.	D.A.P.	Rs.0.25 -do-
...

(GULZAR AHMAD QURESHI)
ADDITIONAL SECRETARY TO GOVT. OF SIND
FOR SECRETARY TO GOVERNMENT OF SIND
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NO: SO-III/7-5/76,

Karachi, dated the 1st June, 1980.

OFFICE OF THE CHAIRMAN DISTRICT COUNCIL SUKKUR.
NOTIFICATION

No: GB-HC/80/461

Dated 23.6.1980.

In exercise of the powers delegated to it by Government of Sind, Housing Town Planning, Local Government and Rural Development Department vide notification No: OSD-Elect/LG/DP-27/79 dated 3.6.1980, under Section 60(1) of the Sind Local Government Ordinance 1979, read with item 6 of Part III of Schedule the District Council Sukkur are pleased to sanction extension of Levy of tax on the items mentioned in column 2 of the below appended Schedule at rates shown against each in column 3 w.e.f 1st July 1980.

SCHEDULE

S.No:	Name of Articles.	Rate of the Tax.
...
21.	Urea	Rs.0.25 per bag.
22.	D.A.P.	Rs.0.25 -do-
...

(Sardar Ghulam Muhammad Mahar)
Chairman,
District Council, Sukkur.

12. From perusal of the first Notification dated 03.06.1980, issued under powers conferred by sub-section (1) of Section 106 of the Ordinance, 1979 reflects that the Government of Sindh had delegated its powers under various sections of the said Ordinance mentioned in column-1 of the table to all the Councils in the manner and extent indicated in column-2 thereof. This was so done so as to do away with prior sanction in respect of levy of any tax, as contemplated under Section 60(1)¹ of the Ordinance. While issuing said Notification, again in column-2, there were certain restrictions and a rider by a proviso that though all powers to sanction levy of tax are delegated to respective councils, but such delegation does not involve reduction in the existing rates, the abolition of an existing tax and prior approval of Government would be necessary where imposition of tax has bearing on export of agricultural inputs. It appears that various industries including **Kotri Association** had impugned such delegation of powers as per Notification dated 03.06.1980 before a learned Division Bench of this Court on the ground that no such delegation can be made by the

¹ 60(1) Subject to sub-section (2) a council may with the previous sanction of Government levy, in prescribed manner, all or any of the taxes, rates, tolls and fees mentioned in Schedule V; Provided that where a tax, rate or toll which is levied as a cess, tax, or surcharge by Government such tax, rate, or toll shall not be more than that levied by Government.

Government as this would amount to abdicating the statutory powers conferred upon the Government to levy taxes and after a detailed discussion, the learned Division Bench of this Court finally concluded as under:

"20. We may record here our decision on the three major questions of law raised in these Constitutional petitions:-

(a) The Government under section 106 of the 1979 Ordinance could not delegate its power of sanction conferred by section 60(1) of the said Ordinance to the councils, impugned Notification dated 3-6-1980 to that extent is invalid and as a consequence all notifications issue by the councils, pursuant to the powers given by the impugned Notification, are also invalid;

(b) The Sind Councils (Imposition of Taxes) Rules, 1979 are mandatory in nature and a violation or non-compliance of these Rules renders the levy of tax invalid;

(c) Export Tax or Rawangi Mahsool is not violative of Article 151 of the 1973 Constitution.

21. There being no valid sanction as required by section 60(1) of the 1979 Ordinance and for non-compliance of rules 4 and 5 of the Sind Councils (Imposition of Taxes) Rules, 1979, we declare the taxes imposed by the councils and impugned in the following constitutional petitions to be without lawful authority and of no legal effect:-

Constitutional Petitions Nos. 125/81, 1091/80, 44/81, 1196/80, 422/81, 467/81, 470/81, 490/81, 593/81, 603/81, 646/81, 663/81, 745/81, 1011/81., 1051/81, 1137/81, 1156/81, 453/81, 279/82 and 319/82.

The taxes imposed by the councils and impugned in the following constitutional petitions are declared to be without lawful authority and of no legal effect as there was no valid sanction as required by section 60(1) of the 1979 Ordinance :-

Constitutional Petitions Nos. 1637/80, 144/81, 145/81, 146/81, 147/81, 148/81., 149/81, 150/81, 151/81, 152181, 153/81, 165/81, 594/81,641/81, 647/81, 692/81, 921/81, 1136/81, 48/82, 272/82, 286/82, 287/:82 and 318182.

In these petitions, according to our view, there has been no violation of the Sind Councils (Imposition of Taxes) Rules, 1979.

22. There are two other petitions namely Petitions Nos. 1271/80 and 1716/80, where the facts and points of law involved are different. Petition No. 1271/80 impugns the Notification No. II-DLG/79 dated 15-7-1979 of the Commissioner, Hyderabad, published about 10 months later in the Sind Government Gazette Part I-A of 10.5.1980 sanctioning the revision of the previous Octroi Schedule of the Town Committee, Matli, District Badin. It is an admitted position that the revised schedule could not have come into effect before its publication in the Gazette. Now a look at the impugned notification of Commissioner, Hyderabad Division shows that it was issued in exercise of powers vested in him under section 71 of the Sind 71 of Government Ordinance, 1972 read with rule 7 of the West Pakistan Local Councils (Imposition of Taxes) Rules, 1961 and powers delegated by the Government to the Commissioners through Government's notification dated 5-1-1977. Although the impugned Notification shows that it was made on 15-7-1979, it remained an incomplete document as it was not published in the Sind Gazette. On

25-7-1979, the 1979 Ordinance was enacted and under this Ordinance, the Commissioners no longer remained the sanctioning authorities. Under section 60(1) of the 1979 Ordinance, the Government has to accord sanction and we were not shown any notification delegating the powers to the Commissioners. As the Notification dated 15-7-1979 of Commissioner, Hyderabad Division had not come into effect before the enactment of the 1979 Ordinance, it became ineffective on 25-7-1979 and did not stand revived by section 120 of the 1979 Ordinance. Further the said Notification makes a reference to the exercise of powers under section 71 of the 1972 Ordinance. This 1972 Ordinance stood repealed by the 1979 Ordinance and after 25-7-1979 powers could not be exercised under the repealed 1972 Ordinance. As a result we declare the impugned Notification dated 15-7-1980 as published in the Sind Gazette of 10-5-1980 to be without lawful authority and of no legal effect and taxes cannot be recovered under the said Notification.

23. Petition No. D-1714/80 challenges the imposition of Octroi tax by Union Council Bau Khan Pathan, Taluka Hala, District Hyderabad, through Notification of this Council No. UC-BK/24(1)/80 published in Sind Government Gazette Part 1-A of 29-7-1982. By 29-7-1980, the 1979 Ordinance had already been enacted and the Sind Councils (Imposition of Taxes) Rules, 1979 made. It is an admitted position that the procedure prescribed and steps required to be taken by the 1979 Rules have not been followed/taken. In our view as this Octroi tax was sought to be levied after the making of the 1979 Rules, compliance thereof was mandatory. Impugned notification dated 29-7-1980 of Union Council Bau Khan is accordingly declared to be without lawful authority and of no legal effect and taxes cannot be recovered under this notification.

24. The parties to these petitions will bear their own costs. Interim relief had been granted to the petitioners in most of these petitions on their furnishing bank guarantees on depositing amounts with the Nazir of this Court. To enable the respondents to seek relief from the Supreme Court of Pakistan, in case they choose to do so, it is ordered that the Bank guarantees furnished by the petitioners shall remain in force for a period of six weeks from the date of this judgment whereafter the same shall stand discharged and cancelled. Similarly where amounts have been deposited, the same can be withdrawn by the concerned petitioners after expiry of six weeks from today. This restraint is being imposed to avoid complications in case stay of this judgment is granted by the Supreme Court of Pakistan.

Order accordingly”

13. It appears that to undo the effect of the aforesaid Judgment, the Government of Sindh introduced The Sindh Councils (Validation of Tax) Ordinance, 1982 and in section 2 it was provided that notwithstanding anything contained in the Sindh Local Government Ordinance, 1979 and the Sindh Councils (Imposition of Taxes) Rules, 1979 or any judgment, order or decree of any Cur, any tax, rate, toll or fees levied, charged, collected or realized by a Council on or after 03.06.1980 shall be deemed to have been validly levied, charged or collected or realized, as the case may be and where any such tax, rate, toll or fees has not been paid or realized before the coming into force of this Ordinance the same shall be

recoverable in accordance with the Ordinance and the rules. Learned counsel for Seven Star Enterprises has vehemently contended that any reliance on the Judgment of the learned Division Bench in the case of ***Kotri Association (supra)*** would be of no use as subsequently the Ordinance had in fact, undone the ratio of the said Judgment and its applicability. However, this contention of the Counsel for Seven Star Enterprises does not appeal to this Court and appears to be devoid of merits on two counts. The question that whether Ordinance, 1982 has in fact validly undone the effect the Judgment in the case of ***Kotri Association (supra)*** or not would be dealt with subsequently in this judgment, however, for the present purposes, even if it is so, it appears that what had escaped the attention of the two Courts below as well as learned Counsel for Seven Star Enterprises, is the fact that even while delegating the powers in terms of Section 106 of the Ordinance, in respect of the powers to sanction levy of taxes under Section 60(1) of the Ordinance, the Government of Sindh had not authorized or delegated such powers to the Zila Council in respect of imposition of taxes on export of agricultural inputs. Admittedly, the product in question is an agricultural input, and therefore for the present purposes even if the Ordinance of 1982 is valid and effective, the ratio of the Judgment in the case of ***Kotri Association (supra)*** would remain effective and in field, at least to the extent of agricultural products including Urea, which is the subject matter of these proceedings. Therefore, not only the entire amount of export tax being claimed by Seven Star Enterprises, as averred in their two Suits, could not be awarded; but in fact export tax so collected in respect of export of urea through private trucks would be liable to be termed as unlawful and invalid.

14. Without prejudice and notwithstanding the above observations, it is also a matter of fact that the Zila Council after levying the taxes pursuant to the delegated authority, by way of Notification, as above had also in terms of Rule 23 of the District Council Export Tax Rules, 1976 issued two separate Notifications granting exemption to fertilizer, insecticides and pesticides from payment of export tax; whereas, by way of another Notification under the same Rules, the Government of Sindh further exempted from liability to export tax the goods being exported outside the Province for use / consumption within the Pakistan. This was so done from 15.07.1981; therefore, on this account as well, claim of Seven Star

Enterprises could not have been decreed and the trial court has seriously erred in law to allow such claim.

15. Coming to the argument that the Ordinance of 1982 had nullified the effect of judgment delivered in the case of *Kotri Association (Supra)*, it may be observed that it is not so simple as contended. Though it is a well settled principle that effect of a judgment rendered by a competent Court of law declaring any provision of law as ultra vires or declaring levy of a tax as illegal can be undone; however, it is also well settled that it can only be done if the grounds of illegality or invalidity are capable of being removed and are in fact removed. This Court in several cases has recognized the right of the legislature to re-enact a law on the same subject, which on account of legal infirmities in its enactment process had been declared invalid by a Court of law, by removing the causes that led to its invalidity. The legislature is also competent to make the re-enacted law applicable retrospectively in order to bind even the past transactions that had been declared invalid². But at the same time it is also well settled that when a legislature intend to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively and it will not be sufficient merely to pronounce in the statute by means of a non-obstinate clause that the decision of the Court shall not bind the authority, because that will amount to reversing a judicial decision rendered in exercise of the judicial power, which is not within the domain of the Legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. The seminal judgment in this regard is of *Molasses Trading*³ wherein the issue was that to undo the effect of judgment rendered in the case of *Al-Samrez Enterprises*⁴ by the Hon'ble Supreme Court, section 31A in the Customs Act, 1969 was introduced and an attempt was made to give the amendment a retrospective effect. However, in *Molasses Trading*⁵ it was held that despite such an attempt the insertion of section 31A did not have an effect on the past and closed transactions. The pertinent observation is as under:

² PLD 2020 SC 641 Khurshid Soap & Chemical Industries Ltd v Fed of Pakistan

³ (1993 SCMR 1905) Molasses Trading & Exp Limited v Fed of Pakistan

⁴ (1986 SCMR 1917) Al Samrez Enterprises v Fed of Pakistan

⁵ By majority of 3:2

"Before considering this question it would be appropriate to make certain general observations with regard to the power of validation possessed by the legislature in the domain of taxing statute. It has been held that when a legislature intend to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non-obstinate clause that the decision of the Court shall not bind the authority, because that will amount to reversing a judicial decision rendered in exercise of the judicial power, which is not within the domain of the Legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. One of the accepted modes of achieving this object by the Legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The Legislature can even give its own meaning and interpretation of the law under which the tax was collected and by 'legislative fiat' make the new meaning binding upon Court. It is in one of these ways that the Legislature can neutralize the earlier decision of the Court. The Legislature has within the bound of the Constitutional Limitation the power to make such a law and give it retrospective effect so as to bind even past transaction. In ultimate analysis therefore a primary test of validating piece of legislation is whether the new provision removes the defect, which the Court had found in the existing law, and whether adequate provisions in the validating law for a valid imposition of tax were made."

It was further held that vested rights cannot be taken away save by express words or necessary intendment in the statute; that Legislature, which is competent to make a law, has full plenary powers within its sphere of operation to legislate retrospectively or retroactively; that vested right can be taken away by a retrospective/retroactive legislation and such legislation cannot be struck down on that ground; that Statute cannot be read in such a way as to change accrued rights, the title to which consists in transactions past and closed or any facts or events that have already occurred; that when a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction Court has to assume as if it did exist; that when a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to. It is a well-settled principle of interpretation that there is a strong presumption against the retrospectivity of a legislation which touches or destroys the vested rights of the parties. No doubt the Legislature is competent to give retrospective effect to an Act and can also take away the vested rights of the parties, but to provide for such consequences, the Legislature must use words which are clear, unambiguous and are not capable of any other interpretation or such

interpretation follows as a necessary implication from the words used in the enactment. Therefore, while construing a legislation which has been given retrospective effect and interferes with the vested rights of the parties, the words used therein must be construed strictly and no case should be allowed to fall within the letter and spirit of Act which is not covered by the plain language of the legislation⁶. In this matter, the amending Ordinance, 1982, does not in any manner fulfill the requisite conditions as laid down by the Superior Courts for undoing the effect of a judgment pronounced by a Court of law, by declaring the impugned legislation as ultra vires. At the most, it could be said that the amending Ordinance, 1982, protected the levy of export tax which had already been recovered, which in fact is the first part of the said Ordinance, *ibid*,; however, as to its second part, whereby, it has been said that any such tax, rate, toll or fees has not been paid or realized before coming into force of this Ordinance, the same shall be recoverable in accordance with the Ordinance and the rules, is concerned, the same is affecting the vested rights accrued to the tax-payer; hence, to that effect, the amending Ordinance, in view of the above discussion and law settled by the Hon'ble Supreme Court, is of no help to the case of Seven Star Enterprises. Again notwithstanding this, at the most it provided recovery of the export tax not levied in terms of the Ordinance and Rules, and it is not the case of Seven Star Enterprises, that any such steps were undertaken by them, rather a direct Suit for recovery was filed, which otherwise could not hold any ground.

16. There is also another aspect of the matter which has not been touched upon by both the Courts below. Seven Star Enterprises, was a contractor to collect the export tax, and has got nothing to do with the levy, its exemption, and any illegality while levying the tax. It had a contract for collection for a certain amount and for fixed period. Surprisingly, though the Government as well as Zila Council was joined as Defendants; however, the case against them was dropped and not pressed upon as to the claim(s) in hand. This perhaps was not a correct approach on their part as any shortfall in collection due to any illegality in the levy of tax or grant of any exemption was to looked into pursuant to the contract between them. The right to sue, if any, for Seven Star Enterprises, was against them pursuant

⁶ Muhammad Hussain v Muhammad (2000 SCMR 367)

to the contract, if permitted, and not against others in the manner they have pleaded in their suit. Nonetheless, since even otherwise, as discussed hereinabove, they had no better case on merits and the law, therefore, no further deliberation is needed on this issue.

17. As a result of the above discussions insofar as the two 2nd Appeals filed by Seven Star Enterprises are concerned, it appears that the learned Appellate Court was fully justified in allowing the said two Appeals filed by National Fertilizer Marketing against the Judgment and Decree in favour of Seven Star Enterprises; however, for the reasons so assigned in this Judgment and not entirely on the basis of reasoning recorded by the Appellate Court; hence, the two 2nd Appeals filed by Seven Star Enterprises bearing Appeal Nos.10 and 12 of 2010 are hereby **dismissed**.

18. As to the two 2nd Appeals of National Fertilizer Marketing Ltd. are concerned, though in view of the above reasoning there appears to be some justification in respect of their claim, however, as noted by learned Appellate Court and even by the Trial Court that firstly the National Fertilizer Marketing Ltd. had not been able to prove their case as to the quantum of recovery being claimed and secondly their Suits were time barred. Such concurrent findings are a matter of record and no assistance has been provided as to overcome such finding of fact and law in respect of these two points. In that case, again Appeals filed by National Fertilizer Marketing Ltd bearing Nos.13 and 14 of 2010 also warrant dismissal and it is so ordered.

19. In view of hereinabove facts and circumstances of this case, all the listed 2nd Appeals are hereby **dismissed** with no order as to costs.

Dated: 30.05.2022

J U D G E

Ahmad