

JUDGMENT SHEET
IN THE LAHORE HIGH COURT
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

W.P No.5571 of 2015

Dawn Ginning Industries & Oil Mills

Versus

Federation of Pakistan & others

JUDGMENT

Date of Hearing.	18-01-2017
PETITIONERS BY:	M/s Sh. Zafar ul Islam, Niaz Ahmad Khan, Tanveer Ahmad, Furqan Ahmad Khan, Syed Riaz ul Hassan Gillani, Ch. Zulfiqar Cheena and Ch. Muhammad Sharif Mayo, Advocates.
RESPONDENTS BY:	Mr. Muhammad Wajid Ali Bhatti, Standing Counsel. M/s Zafar Ali Thaheem, Agha Muhammad Akmal Khan, Tariq Manzoor Sial, Suleman Bhatti, Raja Abdul Razzaq and Kh. Abdul Moeed, Advocates.

Shahid Karim, J:- This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 seeks the following prayer:

"It is respectfully prayed:-

1. That application of S.R.O no.188(I) dated 05.03.2015 may kindly be declared unconstitutional being cotton seed is still exempt in terms of serial No.81 of Table 2 of the Sixth Schedule of the Sales Tax Act, 1990.
2. That retrospective application of S.R.O. No.188 (I)/2015 dated 05.03.2015 may also be declared unconstitutional.

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3. That impugned notices issued for recovery of tax with effect from 01.07.2014 may kindly be declared null and void.
4. That in the meanwhile retrospective application of the impugned S.R.O. No.188(1)/2015 dated 05.03.2015 may please be suspended till the final decision of this petition.
5. That in the meanwhile operation of the notices bearing No.E&C-08/1305 dated 30.03.2015 may please be suspended till the final decision of this petition."

2. This judgment shall also decide connected petitions which are listed in Appendix 'A' with this judgment and in which a common question of law has been raised and the relief claimed is substantially the same as in this petition. There are common grounds urged by the learned counsel for the petitioners in all of these petitions.

3. As a historical background, the learned counsel refers to SRO No.213(I) of 2013, which was the original Notification by which, in the exercise of powers conferred by section 71 of the Sales Tax Act, 1990 ("the Act"), the Sales Tax Special Procedure Rules, 2007 ("the Rules, 2007") were enacted. By the SRO 188(1) of 2015 ("the impugned notification"), Chapter XV relating to special procedure for sales tax on cotton seed

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oil expelled by Expelling Mills and Composite Units of Ginning and Expelling was amended.

4. The learned counsel for the petitioners have laid a challenge to the Notification generally on the ground primarily that the cotton seed is exempted from sales tax in terms of section 13 of the Act, read with serial No.8I of Table-I of the sixth Schedule of the Act. Also that the notification cannot override the statutory provisions contained in section 13 of the Act and the exemption granted thereby and, therefore, the notices are *ultra vires* the powers of the officers issuing them. Further that rule 58ZB introduced through the impugned notification has no nexus and continuity with the existing rules and is in contradistinction with them. In particular, the rule 58ZB is in conflict with sub-rule (I) of rule 58Y and the retrospective operation of the impugned notification also runs counter to the settled principle of law vouched by respectable authority.

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5. However, there is another issue which will impact the outcome of these petitions and the resolution of that issue may not require the determination of the other issues which will become moot for the time being. The learned counsel for the petitioners has relied upon a

judgment of the Supreme Court of Pakistan reported as Messrs Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others (PLD 2016 SC 808) to urge the proposition that the term 'Federal Government' has a distinct meaning and any power conferred by a statute on the Federal Government must be exercised in the manner prescribed and not by any of its officers in disregard of that procedure. The issue before the Supreme Court of Pakistan was clearly as regards the true connotation of the term 'Federal Government' and the procedure to be followed in enacting Notifications if the power under a law has been conferred on the Federal Government. Upon an erudite analysis of the constitutional scheme and setting in this regard, the Supreme Court of Pakistan

concluded as under:

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"84. We may now summarize our conclusions:- (i) The Rules of Business, 1973 are binding on the Government and a failure to follow them would lead to an order lacking any legal validity. (ii) The Federal Government is the collective entity described as the Cabinet constituting the Prime Minister and Federal Ministers. (iii) Neither a Secretary, nor a Minister and nor the Prime Minister are the Federal Government and the exercise, or purported exercise, of a statutory power exercisable by the Federal Government by any of them, especially, in relation to fiscal matters, is constitutionally invalid and a nullity in the eyes of the law. Similarly budgetary expenditure, or discretionary governmental expenditure can only be authorized by the Federal Government i.e. the Cabinet, and not the Prime Minister on his own. (iv) Any Act, or statutory instrument (e.g. the Telecommunication

(Reorganisation Act, 1996) purporting to describe any entity or organization other than the Cabinet as the Federal Government is ultra vires and a nullity. (v) The ordinance making power can only be exercised after a prior consideration by the Cabinet. An ordinance issued without the prior approval of the Cabinet is not valid. Similarly, no bill can be moved in Parliament on behalf of the Federal Government without having been approved in advance by the Cabinet. The Cabinet has to be given a reasonable opportunity to consider, deliberate on and take decisions in relation to all proposed legislation, including the Finance Bill or Ordinance or Act. Actions by the Prime Minister on his own, in this regard, are not valid and are declared ultra vires.

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

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

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

6. It is clear from the holding of the Supreme Court of Pakistan above that the Federal Government has a distinct meaning and that the Federal Government is the collective entity described as the Government constituting the Prime Minister and Federal ministers and, therefore, neither a secretary nor a minister nor even the prime minister are the Federal Government taken individually and the exercise of a statutory power by any of them, inter alia, in relation to fiscal matters is constitutionally invalid. On this basis, the Notifications impugned before the Supreme Court of Pakistan were

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held to be *ultra vires* and consequently struck down. There is no cavil with the proposition that the *ratio decidendi* of the Supreme Court of Pakistan clearly applies to the facts of the instant case.

7. The learned counsel for the respondents relied upon the rule that the judgment of the Supreme Court of Pakistan applies prospectively and not retrospectively. Reliance in this regard was placed on *Pir Bukhsh represented by his Legal Heirs and others v. Chairman Allotment Committee and others* (PLD 1987 SC 145). Once again, the rule expounded in the cited judgment by the learned counsel for the respondents is not a rule etched in stone. There are exceptions to this rule and it surely depends upon each precedent handed down by the Supreme Court of Pakistan to determine whether it applies prospectively or retrospectively. From a reading of the entire judgment in *Messrs Mustafa Impex, Karachi and others*, it leaves it in no manner of doubt that the judgment is meant to apply retrospectively. This is clearly evident from the fact that the judgment set aside notifications which had been issued by the Federal Government and which were prior in time. Moreover, there is nothing in the judgment of the Supreme Court

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of Pakistan which would lead to the conclusion that the judgment was meant to be applied prospectively, for, in case, the superior courts considered it necessary, an observation to this effect is generally given. Be that as it may, the tenor of the judgment in *Messrs Mustafa Impex, Karachi and others* is for the judgment to be applied retrospectively to all cases coming before the courts.

8. Be that as it may, the impugned notification was called in question before the High Court of Sindh also and a judgment was rendered by a Division Bench in CP D-8001 of 2015 and an array of connected petitions. The impugned notification has been held to be *ultra vires* and *non est* in the following words:

"As the provisions make clear, but is in any case plain on a bare reading of s. 13(1), the words "subject to such conditions as may be specified by the Federal Government" cannot be so construed and applied as to withdraw or nullify the exemption itself as contained in any entry of the Sixth Schedule. It is to be noted that the Sixth Schedule can only be amended by the legislature. Some of the entries grant exemption subject to the limitations as therein specified. Other entries however, grant the exemption without any limitation being attached. This is the position with regard to cottonseed: entry No.81 imposes no limitation on the exemption. In our view, the proper interpretation and application of s. 13(1), as read with the Sixth Schedule, is that the entries thereof determine the scope and extent of the exemption. This is set by the legislature itself and can be neither expanded nor narrowed by the Federal Government. The grant of the exemption is entirely the domain of the legislature. All that the Federal Government can do in terms of s. 13(1) is to regulate the manner in which the

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exemption granted is to be availed. It is only to this extent and for this purpose that conditions can be imposed by it. Thus, the power of the Federal Government in terms of s. 13(1) is strictly limited in particular, it cannot trespass on the area that the legislature has reserved for itself alone. In the present context, it is also pertinent to note that sub-section (1) is not even mentioned in the opening paragraph of SRO 188: it only refers to s. 13(2)(a). What rule 58X and Rule 58Y(1) however purport to do, by imposing sales tax on the supply of cottonseed, is to, in effect, nullify and withdraw the exemption granted by entry No.81. This, the Federal Government is patently not empowered to do. The grant of an exemption by a statutory provision in the parent Act, which can only be altered by the legislature itself, cannot be denied or defeated in the exercise of any subordinate rule making power. In our view therefore, the purported levy of sales tax on cottonseed is clearly contrary to entry No.81 and thus ultra vires the provisions of the 1990 Act."

"Accordingly, these petitions are disposed of in the following terms:

a) Chapter XV of the 2007 Rules, as inserted by SRO 188(1)/2015 dated 05.03.2015, is declared to be ultra vires the 1990 Act and hence without any legal consequence or effect whatsoever."

9. I have no reason to disagree with the conclusions drawn and adopt them in all respects.

10. In view of the above, these petitions are allowed.

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Date of presentation of application 27-11-17

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SHAHID KARIM
 JUDGE

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Appendix 'A'

Sr.No.	W.P.No.	Parties Name
01	9137/15	M/s Shahid Cotton Factory Vs. FOP, etc
02	8734/15	M/s Al-Mustafa Cotton Ginners Vs. FOP, etc
03	4970/15	M/s Malik Ashiq Hussain Vs. FOP, etc
04	4969/15	M/s Sadiq Cotton Industry Vs. FOP, etc
05	4894/15	M/s Zeeshan Cotton Industry Vs. FOP, etc
06	4954/15	M/s Al-Haider Cotton Industry's. FOP, etc
07	4964/15	M/s Habib Corporation Cotton Vs. FOP, etc
08	6466/15	M/s Haseeb Cotton Factory Vs. FOP, etc
09	7156/15	M/s Shahid Cotton Vs. FOP, etc
10	4637/15	M/s Global Cotton Industry Vs. FOP, etc
11	4965/15	Vicky Traders Vs. FOP, etc
12	4966/15	M/s Mehar Cotton Ginning Factory Vs. FOP, etc
13	4967/15	M/s Nasir Iqbal Cotton Industry Vs. FOP, etc
14	4957/15	M/s Al-Wasay Trading Corporation Vs. FOP, etc
15	5219/15	M/s Qaisrani Vs. FOP, etc
16	5991/15	M/s Al-Jannat Cotton Ginner Vs. FOP, etc
17	6593/15	Rana Ijaz Ahmad Vs. FOP, etc
18	4961/15	M/s Ahmad Saad Cotton Industry Vs. FOP, etc
19	4968/15	M/s Allied Cotton Industry Vs. FOP, etc
20	4962/15	M/s Khawar Munir Seed Industry Vs. FOP, etc
21	4956/15	M/s Sitara Cotton Industry Vs. FOP, etc
22	4675/15	M/s Mohib Cotton Industry Vs. FOP, etc
23	4673/15	M/s Farhat Munir Cotton Ind. Vs. FOP, etc
24	4955/15	M/s Union Cotton Factory Vs. FOP, etc
25	4963/15	M/s Al-Madina Cotton Ind. Vs. FOP, etc
26	4958/15	M/s Yasrab Cotton Ind. Vs. FOP, etc
27	5396/15	M/s Khokhar Textile Mills Vs. FOP, etc
28	5520/15	M/s Ch. Cotton Ind. Vs. FOP, etc
29	5108/15	M/s Zamindara Cotton Ind. Vs. FOP, etc
30	5218/15	M/s Insaaf Cotton Ind. Vs. FOP, etc
31	5220/15	M/s Mastoi Cotton Ginner Vs. FOP, etc
32	5506/15	M/s Tayyaba Cotton Ind. Vs. FOP, etc
33	5098/15	M/s Subhan Cotton Ind. Vs. FOP, etc
34	5518/15	M/s Rehman Traders Vs. FOP, etc
35	5102/15	M/s Abdullah Ghalib Cotton Ind. Vs. FOP, etc
36	5513/15	M/s Burhan Cotton Ind. Vs. FOP, etc
37	5097/15	M/s Kh. Fareed Cotton Ginning Vs. FOP, etc
38	5209/15	M/s Tonsa Cotton Ind. Vs. FOP, etc
39	5099/15	M/s Global Traders Vs. FOP, etc
40	4959/15	M/s Lasani Model Ind. Vs. FOP, etc
41	5679/15	M/s Haji Mehar Din Cotton Factory Vs. FOP, etc
42	5521/15	M/s Khanzada Cotton Ind. Vs. FOP, etc
43	5517/15	M/s Zubair Ayub Cotton Factory Vs. FOP, etc
44	5519/15	M/s New Data Cotton Ginner Vs. FOP, etc
45	5103/15	M/s Dareshak Cotton Ind. Vs. FOP, etc
46	5101/15	M/s Mudassar Cotton Ginner Vs. FOP, etc
47	5211/15	M/s Balouch Cotton Ind. Vs. FOP, etc
48	5213/15	M/s Kot Addu Cotton Ind. Vs. FOP, etc
49	5429/15	M/s Azam Raza Corporation Vs. FOP, etc
50	5507/15	M/s Waseem Traders Vs. FOP, etc
51	5509/15	M/s Arbi Model Cotton Ind. Vs. FOP, etc

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52	4674/15	M/s Bismillah Cotton Ind. Vs. FOP, etc
53	5105/15	M/s Hanan Model Cotton Ind. Vs. FOP, etc
54	5100/15	M/s Rehman Munir Cotton Ind. Vs. FOP, etc
55	5680/15	M/s Rehman Cotton Factory Vs. FOP, etc
56	5508/15	M/s Zubair Cotton Ind. Vs. FOP, etc
57	5106/15	M/s Ittihad Cotton Ginner Vs. FOP, etc
58	5514/15	M/s Data Cotton Ind. Vs. FOP, etc
59	5990/15	M/s Shahid Fareed Cotton Factory Vs. FOP, etc
60	5683/15	M/s Nazir Aslam Trader Vs. FOP, etc
61	5515/15	M/s Bismilah Traders Vs. FOP, etc
62	5107/15	M/s Mehfooz Mustafa Cotton Ind. Vs. FOP, etc
63	5109/15	M/s Fahad Munir Cotton Ind. Vs. FOP, etc
64	5938/15	M/s Chiragh Din Corporation Ginner Vs. FOP, etc
65	5405/15	M/s Annol Corporation Vs. FOP, etc
66	5216/15	M/s Mushtaq Brother Cotton Ind. Vs. FOP, etc
67	4960/15	M/s Ahmad Brother Cotton Ginner Vs. FOP, etc
68	5992/15	M/s Hamza Munir Cotton Ginner Vs. FOP, etc
69	5212/15	M/s Wasaib Cotton Ind. Vs. FOP, etc
70	5515/15	M/s Madani Cotton Ind. Vs. FOP, etc
71	5522/15	M/s White Gold Cotton Ind. Vs. FOP, etc
72	5682/15	M/s Ajmare Cotton Ind. Vs. FOP, etc
73	5681/15	M/s Tayyaba Imran Vs. FOP, etc
74	5995/15	M/s Rehmat Cotton Ginner Vs. FOP, etc
75	5989/15	M/s Habib Cotton Ginner Vs. FOP, etc
76	5993/15	M/s Bajwa Model Cotton Ginning Vs. FOP, etc
77	5217/15	M/s Balouch Cotton Ginner Vs. FOP, etc
78	5215/15	M/s Khan Cotton Ind. Vs. FOP, etc
79	5511/15	M/s Ali Hassan & Cotton Ginner Vs. FOP, etc
80	5867/15	M/s Abdullah Maaz Cotton Ind. Vs. FOP, etc
81	4636/15	M/s Makka Model Ind. Vs. FOP, etc
82	5430/15	M/s Shujabad Weaving Mills Ltd. Vs. FOP, etc
83	5516/15	M/s Mubarak Cotton Ginner Vs. FOP, etc
84	5996/15	M/s Atta Baid Cotton Ind. Vs. FOP, etc
85	5572/15	M/s Al-Khalid Cotton Ind. Vs. FOP, etc
86	5994/15	M/s Ahmad Trader Cotton Ginner Vs. FOP, etc
87	5104/15	M/s Ehsan Adil Cotton Ind. Vs. FOP, etc
88	5210/15	M/s Habib Cotton Factory Vs. FOP, etc
89	5510/15	M/s Sukhera Cotton Ind. Vs. FOP, etc
90	5134/15	M. Shahid Ali Chohan Vs. FOP, etc
91	4676/15	M/s Al-Jilan Cotton Ginner Vs. FOP, etc
92	5428/15	M/s Yousaf Ayub Corporation Vs. FOP, etc
93	5214/15	M/s Makka Madina Cotton Ind. Vs. FOP, etc

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