

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE IJAZ UL AHSAN

CIVIL APPEAL NO.1509 OF 2016

(Against the judgment dated
29.3.2016 of the Islamabad High
Court Islamabad passed in S.T.R.
No.27 of 2012)

M/s Pakistan Television Corporation Ltd.

... Appellant(s)

Versus

Commissioner Inland Revenue (Legal) LTU, Islamabad etc.

... Respondent(s)

For the appellant(s): Mr. M. Makhdoom Ali Khan, Sr. ASC
Syed Rifaqat Hussain Shah, AOR

For the respondent(s): Dr. Farhat Zafar, ASC
Raja Abdul Ghafoor, AOR

Date of hearing: 23.10.2018

...

JUDGMENT

MIAN SAQIB NISAR, CJ.- The brief facts of this appeal are that a show cause notice (*SCN*) dated 23.05.2011 was issued to the appellant for the tax years 2006-2007, 2008-2009 and 2009-2010 raising four issues: (i) non-payment of Federal Exercise Duty (*FED*) on receipt of PTV license fee; (ii) non-payment of sales tax on program sales; (iii) non-payment of sales tax on sales of fixed assets; and (iv) non-payment of sales tax on sale of scrap. After receiving two replies dated 08.06.2011 and 15.06.2011, the Deputy Commissioner Inland Revenue (*DCIR*) passed an Order-in-Original (*O-in-O*) dated 04.10.2011 for recovery of the amounts mentioned in the SCN along

with default surcharge and penalty (*all under the relevant provisions of law*). The appellant preferred an appeal against the O-in-O before the Commissioner Inland Revenue, Appeals-II (*CIRA*) which, *vide* Order-in-Appeal (*O-in-A*) dated 27.02.2012, was accepted to the extent that the matter of sales tax on sale of programs was remanded and the matters of non-payment of sales tax on sale of fixed assets and of scrap were vacated, whereas the appeal was dismissed on the point of non-payment of FED on receipt of PTV license fee. Thereafter the appellant filed an appeal before the Appellate Tribunal Inland Revenue (*ATIR*) which was also dismissed *vide* order dated 04.12.2012. This order was assailed before the learned High Court through a Sales Tax Reference (*STA*) which was dismissed through the impugned judgment. Hence, the instant appeal with the leave of the Court dated 23.05.2016 which reads as under:-

“Federal Excise Duty was levied on TV license fee which is being collected through electricity bills via various distribution companies. This levy was made under the Wireless Telegraphy Act, 1993 read with the Television Receiving Apparatus (Possession and Licensing) Rules, 1970 and in the circumstances no excisable services are being provided by the petitioners as defined under Section (1)(d) of the Federal Excise Act, 2005. It is stated by the learned counsel for the petition that the view set out by the learned High Court to the contrary is not based on a proper construction/interpretation of the requisite law...”

2. We have heard the arguments of the learned counsel for the parties which are not reproduced for the sake of brevity, but shall reflect in the course of this opinion. However for ease of reference, the relevant provisions of law are reproduced as under:-

Federal Excise Act, 2005

“3. Duties specified in the First Schedule to be levied.- (1) Subject to the provisions of this Act and rules made there under, there shall be levied and collected in such manner as may be prescribed duties of excise on,-

(a)

(b)

(c)

(d) **services provided in Pakistan** including the services originated outside but rendered in Pakistan;

at the rate of fifteen per cent ad valorem except the goods and services specified in the First Schedule, which shall be charged to Federal excise duty as, and at the rates, as set-forth therein.

(2)

(3) *The Board may, by notification in the official Gazette, in lieu of levying and collecting under sub-section (1) duties of excise on goods and services, as the case may be, levy and collect duties,-*

(a)

(b) on fixed basis, as it may deem fit, on any goods or class of goods or on any services or class of services, payable by any establishment or undertaking producing or manufacturing such goods or providing or rendering such services.

(3A)

(4)

(5) *the liability to pay duty shall be-*

(a)

(b)

(c) in case of services provided or rendered in Pakistan, of the person providing or rendering such service, provided where services are rendered by the person out of Pakistan, the

recipient of such service in Pakistan shall be liable to pay
duty; and

(d)

*Explanation.- **Subject to sub-section (1), for the purpose of this section,** (goods) means the goods specified in CHAPTERS 1 TO 97 and **“services” means the services specified in CHAPTER 98 of the First Schedule to the Customs Act, 1969** (IV of 1969).*

7. *Application of the provisions of the Sales Tax Act, 1990.- (1) **In case of** goods specified in the Second Schedule or **such services as may be specified by the Board through a notification in the official Gazette the duty shall be payable in sales tax mode,** whereby-*

(a) *a registered person manufacturing or producing such goods or providing or rendering such services shall be entitled to deduct input tax paid during the tax period from the amount of duty of excise due from him on such goods or services in respect of that tax period;*

(b) *a registered person shall be entitled to deduct the amount of duty of excise paid or payable by him on such goods or services as are acquired by him during a tax period from the output tax due from him in respect of that tax period;*

(c) *a registered person supplying such goods or providing or rendering such services shall be entitled to deduct duty of excise paid or payable on such goods or services as are acquired by him during the tax period from the amount of duty of excise due from him on such goods manufactured or produced or services as are provided or rendered by him during that period; and*

(d) *a person shall be entitled to deduct duty of excise paid or payable, on such goods or services as are acquired by him during a month, from the amount of duty of excise due from him on such goods manufactured or produced or services as are provided or rendered by him, during that month. Such services as are provided or rendered by him, during that month.*

(2)

Explanation.—

First Schedule
Table II
(Excisable Services)

S.No.	Description of Goods	Heading/sub-heading Number	Rate of Duty
6.	<u>Telecommunication services</u> , excluding such services in the area of a Province where such Province has imposed Provincial sales tax and has started collecting the same through its own Board or Authority, as the case may be.	<u>98.12</u> <u>(All sub-headings)</u>	Seventeen per cent of charges

[Emphasis supplied]

Customs Act, 1969
The First Schedule
Section
Chapter 98
(SERVICES)

98.12	Telecommunication services
9812.1000	Telephone services
9812.1100	Fixed line voice telephone service
9812.1200	Wireless telephone
9812.1210	Cellular telephone
9812.1220	Wireless Local Loop telephone
9812.1300	Video telephone
9812.1400	Payphone cards
9812.1500	Pre-paid calling cards
9812.1600	Voice mail service
9812.1700	Massaging service
9812.1710	Short Message service (SMS)
9812.1720	Multimedia message service (MMS)
9812.1910	Shifting of telephone connection
9812.1920	Installation of telephone extension
9812.1930	Provision of telephone extension
9812.1940	Changing of telephone connection
9812.1950	Conversion of NWD connection to non NWD or vice versa

9812.1960	Cost of telephone set
9812.1970	Restoration of telephone connection
9812.1990	Others
9812.2000	Bandwith services1970
9812.2100	Copper line based
9812.2200	Fibre-optic based
9812.2300	Co-axial cable based
9812.2400	Microwave based
9812.2500	Satellite based
9812.2900	Others
9812.3000	Telegraph
9812.4000	Telex
9812.5000	Telefax
9812.5010	Store and forward fax services
9812.5090	Others
9812.6000	Internet services
9812.6100	Internet services including e-mail services
9812.6110	Dial-up internet services
9812.6120	Broadband services for DSL connection
9812.6121	Copper line based
9812.6122	Fibre-optic based
9812.6123	Co-axial cable based
9812.6124	Wireless based
9812.6125	Satellite based
9812.6129	Others
9812.6130	Internet/e-mail/Data/SMS/MMS services on WLL networks
9812.6140	Internet/e-mail/Data/SMS/MMS services on cellular mobile networks
9812.6190	Others
9812.6200	Data Communication Network services (DCNS)
9812.6210	Copper Line based
9812.6220	Co-axial cable based
9812.6230	Fibre-optic based
9812.6240	Wireless/Radio based
9812.6250	Satellite based
9812.6290	Others
9812.6300	Value added data services
9812.6310	Virtual private Network service (VPN)
9812.6320	Digital Signature service
9812.6390	Others
9812.9000	Audiotext services
9812.9100	Teletext services
9812.9200	Trunk radio services
9812.9300	Paging services

9812.9400	Voice paging services
9812.9410	Radio paging services
9812.9490	Vehicle tracking services
9812.9500	Burglar alarm services
9812.9090	Others

At first glance, this case is about the challenge by the appellant to the jurisdiction of the tax authorities to levy FED on TV license fee. At the heart of the case, however, is an important question, i.e. what is the correct method of interpreting the headings and sub-headings of the First Schedule to the Customs Act, 1969 (*Customs Act*) – commonly known as the Pakistan Customs Tariff (*PCT*)? However before proceeding further, we think it expedient to discuss the various orders passed by the lower *fora*.

3. The SCN issued by the DCIR to the appellant alleged that:-

*“The Federal Government has appointed you as an agent in the matter of issuing **licences to possess television receiving apparatus**, video recording apparatus or reproducing apparatus and television broadcasting receiving antenna under section 5 of the Wireless and Telegraphy Act, 1933 (XVII of 1993)...*

This fee is collected through domestic electricity bills...This revenue being receipts on account of PTV license fee is taxable under section 3 of the Federal Excise Act, 2005 being telecommunication services (PCT heading 98.12) read with SRO 550(I)/2006 dated 12.06.2006...Therefore, an amount of Rs. 1,522,614,090/- is recoverable from you under section 14 along with default surcharge under section 8 and penalty under section 19 of the Federal Excise Act, 2005.”

[Emphasis supplied]

The O-in-O passed by the DCIR basically regurgitated the allegations in the SCN without any discussion on the law or the facts. However it is worthy to

note that three things in the SCN and the O-in-O: (i) the licenses were for the possession of television receiving apparatus; (ii) the fee was levied by the Government of Pakistan; and (iii) the appellant received the TV license fee.

4. In the O-in-A the CIRA was of the view that:-

“...it is a fact that TV sets are used by the public to avail the telecast services as the federal excise is levied on the telecommunication services PCT Headings 98.12 in the First Schedule to the Customs Act, 1969...

Further the term “telecommunication services” is elaborated from the SRO issued in this regard in SRO No. 648(I)/2005 dated 1.7.2005 PCT heading 98.12 which was showing the description “services provided or rendered by persons engaged in telecommunication work in respect of telephone, telegraph, telex, telefax and alive” [sic]. This SRO was superseded by SRO No. 550(I)/2006 dated 5th June, 2006 wherein PCT heading 98.12 was described as “telecommunication service” which means that the scope of these services was broadened and services like TV telecast were brought within the scope of this term.

In view of above noted discussion the TV Telecast fall within the definition of telecommunication services accordingly the TV license fee is liable to federal excise, hence the action of the DCIR is confirmed.”

The CIRA decided the case against PTV because, in his view, FED was levied on Telecommunication Services: PCT Heading 98.12. This Heading, in his opinion, was broad enough to cover any and all kinds of ‘telecommunication services’. PTV made telecasts; these were received on television sets; this was telecommunication. The CIRA further concluded that the TV license fee too was covered by PCT Heading 98.12. In reaching these conclusions the CIRA

did not examine whether any of the sub-headings of PCT Heading 98.12 covered telecasts or television sets or TV license fee. The CIRA referred to SRO No.648(I)/2005 dated 01.07.2005 (*SRO 648*) and SRO No.550(I)/2006 dated 05.06.2006 (*SRO 550*). In SRO 648 the services under PCT Heading 98.12 were described as “*Services provided or rendered by persons engaged in telecommunication work in respect of telephone, telegraph, telex, telefax and alike*”. In SRO 550 which superseded SRO 648, the services under PCT Heading 98.12 were described as “*Telecommunication services*”. From the variation in the language regarding the description of services in the two SROs the CIRA concluded that “*the scope of these services was broadened*” under SRO 550 “*and services like TV telecast were brought within the scope of this term*”.

The finding by the CIRA that because PCT Heading 98.12 was titled ‘Telecommunication services’ and because a telecast was a telecommunication service, therefore, TV license fee was covered by this Heading and subject to FED will be examined later. It will be addressed when discussing the order of the Appellate Tribunal Inland Revenue (*ATIR*) and the judgment of the Islamabad High Court which are to similar effect. The conclusion based on SRO 550 being peculiar to the CIRA and the ATIR will be addressed immediately after the discussion on the order of the ATIR.

5. The appellant filed an appeal with the ATIR against the order of the CIRA. By order dated 04.12.2012 the ATIR dismissed the appeal in which it held as follows:-

*“The signals based television telecast services are no different to the telecommunication services falling under PCT heading 98.12 **chargeable to federal excise duty under SRO No. 550(I)/2006 dated 05.06.2006.** In our view anything which is signal based and is provided as a service is liable to excise*

duty. The only purpose of license fee is a provision of telecast service and this service is not outside the ambit of PCT 98.”

[Emphasis supplied]

The conclusion of the CIRA and the ATIR insofar as it is based on SRO 550 or the superseded SRO 648 is contrary to the Constitution of the Islamic Republic of Pakistan, 1973 (*Constitution*) and the scheme of levy of a tax as provided in fiscal statutes. A tax, under Article 77 of the Constitution, can only be levied by or under the authority of an Act of Parliament. It is levied under the charging section of such an Act. Section 3 and the First Schedule to the Federal Excise Act, 2005 (*Federal Excise Act*) as well as the First Schedule to the Customs Act including PCT Heading 98.12 are statutory provisions. These can only be amended by an Act of Parliament. Delegated legislation such as a SRO cannot amend these. Even more so when neither of the two SROs was issued under Section 3 of the FEA, the charging section. Therefore the findings of the CIRA and ATIR to this extent are incorrect and invalid.

The SROs and their effect have also been misread. The SROs do not seek to enlarge the scope of PCT Heading 98.12. Both SRO 648 and 550 were issued by the Government of Pakistan, in exercise of its powers under Section 7 of the Federal Excise Act. This section authorises collection of FED in Sales Tax mode for such services as may be specified by the Federal Board of Revenue. SRO 648 as well as SRO 550, thus, merely authorised the collection of FED on 'Telecommunication Services' in Sales Tax mode. The notifications explicitly state so. A provision providing for a mode of collection is not a charging provision. It can neither abridge nor expand the scope of a charging provision in an Act. These SROs were, therefore, not intended to and in fact had no effect on the scope of levy of FED on 'Telecommunication Services'. FED can only be levied under Section 3 of the Federal Excise Act,

on services specified thereunder or in the First Schedule thereto read with Chapter 98 of the PCT, and not under any SRO. In particular, it could not be levied under an SRO issued under Section 7 of the Federal Excise Act.

6. The decision of the ATIR was examined by the Islamabad High Court in a reference application which was decided against the appellant *vide* impugned judgment. The learned High Court discussed what in its opinion were the main elements of the TV process and the three major ways to receive TV signals. Based on this discussion the learned High Court concluded as under:-

“...that the Television set has been used for the transmission, broadcast and rebroadcast of different programmes through Television signals and the PCT Heading 98.12 refers Telecommunication services including Telephone services etc. and others vide reference No. 9812.9090.”

The learned High Court observed that *“the International Convention on the harmonized commodity description and coding system provides Rules for interpretation”*. It observed that if *“through the said interpretation rules if one can review the First Schedule to the Customs Act, 1969, Chapter 98 (Services) heading “Telecommunication Services 98.12 covers Wireless based 9812.6124, Satellite bases 9812.6125, Data Communication Network Services (DCNS) 9812.6200, Wireless/radio based 9812.6240, Satellite based 9812.6250 and others 9812.9090...”* Based on these observations the learned High Court concluded that:-

“...in view of these Pakistan Customs Tariff headings and subheadings, the TV technology main elements of its process covers the video source, audio source, transmitter, receiver etc. and through three major ways to receive TV signals it includes Broadcast TV, Satellite TV and Cable TV, hence all features are fully attracted in the First Schedule to the Customs Act,

1969, Chapter 98 (Services) heading Telecommunication Services, therefore, there is no issue suggesting that the Television provides the services which falls within the definition of word “services” defined in section 2(23) of Federal Excise Act, 2005...”

[Emphasis supplied]

The learned High Court observed that its “*net conclusion*” was further strengthened:-

“...from the bare reading of section 16 (Exemptions) of Federal Excise Act, 2005 wherein if Pakistan Television Corporation...consider itself exempted, it can apply for exemption but in the present case there is no such exemption issued by the Federal Government.”

7. It is worthy to note that none of the forums below, apart from the learned High Court, referred to Section 16 of the Federal Excise Act to support their conclusions. Before examining the provisions of the Federal Excise Act and the rules for interpretation of the PCT it may be pertinent to first address the finding regarding Section 16 *ibid*. The Customs Act, the Sales Tax Act, 1990 (*Sales Tax Act*) and the Income Tax Ordinance, 2001 (*Income Tax Ordinance*) have their respective charging sections. Tax is levied on a subject covered by the charging section. All these statutes also have provisions which exempt an assessee from the payment of the whole or a part of the leviable tax. An exemption does not take the assessee out of the scope of the charging section. The assessee remains within the tax net and the tax remains leviable. The assessee is, however, exempt from paying the whole or a part of the tax. If the exemption is withdrawn the leviable tax becomes payable. The scheme of the Federal Excise Act is different. Section 3 of the Federal Excise Act provides that services provided in Pakistan are

liable to FED at the rate of 15% ad valorem *“except the...services specified in the First Schedule, which shall be charged to Federal excise duty as, and at the rates, set forth therein.”* Section 16(1) of the Federal Excise Act provides that *“All goods imported, produced or manufactured in Pakistan and services provided or rendered except such goods and services as are specified in the First Schedule shall be exempt from whole of excise duties levied under section 3”*. In other words all services provided in Pakistan are exempt from FED unless specified in the First Schedule to the Federal Excise Act. Even an activity within the definition of “services” under Section 2(23) of the Federal Excise Act is exempt from FED unless specified in the First Schedule. An assessee, therefore, does not have to apply under Section 16 of the Federal Excise Act for exemption. The services provided by the assessee are exempt if not specified in the First Schedule to the Federal Excise Act.

8. Both the Explanation to Section 3 of the Federal Excise Act and the definition of “services” in Section 2(23) thereof make it clear that for an activity to be a service leviable to FED it must be specified in the Federal Excise Act or Table II to the First Schedule thereto read with Chapter 98 of the PCT. The First Schedule to the Federal Excise Act is not to be read in isolation, rather has to be read with Chapter 98 of the PCT. Table II of the First Schedule to the Federal Excise Act broadly identifies the services and mentions the PCT Headings. Item 6 of this Table lists PCT Heading 98.12: Telecommunication Services *(including all sub-headings)* and states the rate of duty as 17% ad valorem. Item 6 of Table II has to be read with Chapter 98 of the PCT as required by Section 2(23) of the Federal Excise Act and the Explanation to Section 3 thereof. PCT Heading 98.12: Telecommunication Services of Chapter 98 of the First Schedule to the Customs Act is a broad general category. Under it are 65 sub-headings. Like in the orders of the

DCIR, CIRA and ATIR there is no discussion in the judgment of the learned High Court on how a Heading of the PCT and its sub-headings are to be read. There is also no discussion about which sub-heading, if any, will cover TV license fee. Only at one place (*paragraph No.16*) in the judgment, the learned High Court seems to suggest that PCT Heading 9812.9090: "Others" may provide legal cover for the charge of FED on TV license fee.

9. The learned counsel for the respondent did not dispute that Section 2(23) of the Federal Excise Act and the Explanation to Section 3 thereof require that Table II to the First Schedule to the Federal Excise Act must be read with Chapter 98 of the PCT. She, however, vehemently argued that Section 2(23) *ibid* defines services and this definition read with PCT Heading 98.12: 'Telecommunication Services' would cover TV license fee. The main plank of her argument was that only PCT Heading 98.12 was relevant which covered all 'Telecommunication Services'. PTV made telecasts and telecasts were received on TV sets, and telecasts and their reception on TV sets was a 'Telecommunication Service', therefore, it was covered by PCT Heading 98.12. Since TV License Fee was received by PTV, it must, therefore, have been received by PTV for the service of telecast. It was therefore, chargeable to FED under PCT Heading 98.12. All telecommunication services irrespective of their nature and kind, according to her, were covered by PCT Heading 98.12. Even if TV license fee or telecast did not fall within any of the sub-headings of PCT 98.12, the demand survived as it was covered by the main Heading: PCT 98.12. The sub-headings, according to her, were of no consequence. If this argument was accepted to be correct, then the definition of "services" in Section 2(23) of the Federal Excise Act which requires that its First Schedule be read with Chapter 98 of the PCT has to be disregarded. The First Schedule to the Federal Excise Act, in Item 6 of Table II mentions

PCT Heading 98.12 and “all sub-headings” in parenthesis. Therefore all the sub-headings of PCT Heading 98.12 are imported into the definition through The First Schedule to the Federal Excise Act and Chapter 98 of the PCT. If the sub-headings were of no consequence, then there was no need for Parliament to provide that the First Schedule to the Federal Excise Act be read with Chapter 98 of PCT. Equally unnecessary was, the Explanation to Section 3 of the Federal Excise Act, the charging section, which provided that for the purposes of that section “services” meant the services specified in Chapter 98 of the First Schedule to the Customs Act.

10. One may explore the argument of the learned counsel for the respondent further. A number of service providers, activities and services are defined in Section 2 of the Federal Excise Act. ‘Telecommunication Services’ are not so specified. One must, therefore, proceed to examine the First Schedule to the Federal Excise Act and Chapter 98 of the PCT. Section 3 of the Federal Excise Act is the charging section which levies FED on services provided in Pakistan. The Explanation to the said section makes it clear, however, that services for the purposes of the charging section “*mean the services specified in Chapter 98 of the First Schedule to the Customs Act, 1969.*” FED cannot, therefore, be levied on a service which is not specified in Chapter 98 of the PCT. PCT Heading 98.12 has 65 sub-headings. A close examination of the various sub-headings of PCT Heading 98.12 makes it clear that all these deal with ‘Telecommunication Services’. Try as one may, one cannot find that any of these 65 sub-headings cover telecasts, TV sets or TV license fee. At this point it would be relevant to mention Rule 6 of the General Rules for the Interpretation of the First Schedule of the Customs Act, i.e. the PCT, which provides that “*For legal purposes, the classification of goods in the sub-headings of a heading except Chapter 99 shall be determined according to the terms of those sub-headings*

and any related sub-heading Notes and, mutatis mutandis, to the above Rules, on the understanding that only sub-headings at the same level are comparable.” Accordingly, not being covered by any of the sub-headings to PCT Heading 98.12 read with Item 6 of Table II of the First Schedule to the Federal Excise Act, telecasts, TV sets and TV license fee are outside the charging provisions of the Federal Excise Act. If one were to accept the argument of the learned counsel for the respondent that only the Heading of PCT 98.12 is to be applied and all its sub-heading are irrelevant, it would render the specific services listed under the 65 sub-headings of PCT Heading 98.12 redundant. If the legislative intent was for PCT Heading 98.12 to cover every conceivable ‘Telecommunication Service’ there was no need to provide 65 sub-headings, listing specific telecommunication services, under it. It would make the reference to Chapter 98 of PCT in several places by the Federal Excise Act of no consequence or relevance. If the legislature intended PCT Heading 98.12 to have as wide a meaning as ascribed to it by the counsel for the respondent, then there was no need to provide 65 specific sub-headings under this PCT Heading.

11. Even otherwise, it is not possible to accept the argument of the respondent without an unnecessarily strained construction of the Federal Excise Act. The Federal Excise Act is a fiscal statute. The principles of interpreting such statutes are well settled. Some of these principles have been recently repeated in **Messrs Pakistan Television Corporation Vs. Commissioner Inland Revenue (Legal), Islamabad and others (2017 SCMR 1136)** which are summarised as follows:-

- i. There is no intendment or equity about tax and the provisions of a taxing statute must be applied as they stand;

- ii. The provision creating a tax liability must be interpreted strictly in favour of the taxpayer and against the revenue authorities;
- iii. Any doubts arising from the interpretation of a fiscal provision must be resolved in favour of the taxpayer;
- iv. If two reasonable interpretations are possible, the one favoring the taxpayer must be adopted;
- v. When a tax is clearly imposed by a statutory provision any exemption from it must be clearly expressed in the statute or clearly implied from it;
- vi. Where the taxpayer claims the benefit of such express or implied exemption, the burden is on him to establish that his case is covered by the exemption;
- vii. The terms of the exemption ought to be reasonably construed; and
- viii. If a taxpayer is entitled to an exemption on a reasonable construction of the law it ought not to be denied to him by a strained, strict or convoluted interpretation of the law.

Applying the above principles, it is clear that telecasts, TV sets and TV license fee are not covered by the definition of services in Section 2(23) of the Federal Excise Act and Item 6 of Table II of the First Schedule to the Federal Excise Act read with Chapter 98 of the PCT. At the risk of repetition, TV license fee, telecasts and TV sets not being covered by any of the sub-headings of PCT Heading 98.12 are not subject to FED on a reasonable interpretation of the law. Being plainly outside the ambit of the charging provision they cannot be brought in by a strained construction of the law. The issue may be examined in another manner. As stated above that telecasts, TV sets and TV license fee are not within Table II of the First Schedule to the Federal Excise Act, read with Chapter 98 of the First

Schedule to the Customs Act. These are not covered by any of the sub-headings of PCT 98.12. These, are, therefore, exempt from FED under Section 16 of the Federal Excise Act. The appellant is, therefore, exempt from payment of FED on TV license fee. A reasonable interpretation of the law plainly entitles it to such an exemption. It cannot be denied to it by a strained, forced or convoluted interpretation of the law. The conclusion, therefore, remains unchanged. In any case, the demand of FED on TV license fee received by the appellant is, therefore, not legal. The above principles also make clear that the Federal Excise Act being a fiscal statute has to be construed, where possible, in favour of the assessee.

12. This submission of the counsel for the respondent also runs counter to the structure of the PCT. As observed in **Messrs Citibank NA Vs. Commissioner Inland Revenue (2014 PTD 284):-**

“This is based on and is almost identical to the Harmonized Commodity Description and Coding System ("HS System"), which has been agreed upon under an international convention and which is regulated by the World Customs Organization. The HS System is of course concerned with goods, and it comprises of 97 chapters (with one chapter, 77, being left "blank" for possible future use) wherein all manner of goods are listed and categorized. The Pakistan Customs Tariff faithfully reproduces and gives effect to this system. In addition, the HS System allows two final chapters (i.e., 98 and 99) to be used for national purposes and Pakistan has utilized Chapter 98 for "services". Even a quick glance shows that Chapter 98 replicates the system of classification adopted for goods under the HS System. Now, the chapters of the HS System are preceded by certain "General Rules for the interpretation of the Harmonized System" ("General Rules"). These rules are incorporated in the Pakistan Customs Tariff and therefore have the force of law. Although the rules are concerned with goods, in our view they

*may, subject to suitable adaptation, also be used for the purposes of Chapter 98. This is so because of the close correspondence between the classification system under the HS System and that used in Chapter 98. **Rule 6 of the General Rules has been understood to mean, inter alia, that in those headings under which sub-headings are to be found, the classification is to be on the basis and in terms of the sub-headings.***

[Emphasis Supplied]

When this Rule is applied to PCT Heading 98.12 it is absolutely clear that it is the sub-headings under PCT Heading 98.12 that are to be applied. Such an approach is in conformity with the HS System, and is, therefore, the correct approach to applying Chapter 98.

13. Another argument advanced by the learned counsel for the respondent and which found favour with the learned High Court was that even if TV license fee was not covered by any of the specific sub-headings of PCT Heading 98.12 it would be covered by PCT 9812.9090: "Others". This argument ignores the scheme of division of specific services under the various sub-headings of PCT Heading 98.12. The various types of telecommunication services are bunched together in separate groups. At the end of each bunch one finds the entry "Others". The services under the sub-headings of PCT Heading 98.12 are in 8 groups. And the sub-heading "Others", therefore, appears eight times under PCT Heading 98.12. For instance, the first group consists of various kinds of telephone services. These are listed from PCT 9812.1000 to 9812.1970. At the end is PCT 9812.1990: "Others". The last group is of sub-headings PCT 9812.9000: 'Audio text services', PCT 9812.9100: 'Teletext services', 9812.9200: 'Trunk radio services', PCT 9812.9300: 'Paging services', PCT 9812.9400: 'Voice paging services', PCT 9812.9410 'Radio paging services', PCT 9812.9490:

'Vehicle tracking services' and 9812.9500: 'Burglar alarm services', followed by PCT 9812.9090: "Others". The sub-heading "Others" is, therefore, to be read *ejusdem generis* with the preceding entries in the group. It will apply to and cover only such services which are similar to the ones specifically described before it. It cannot include every conceivable telecommunication service. Reading the sub-heading "Others" to include all kinds of telecommunication services would render all the specific sub-headings otiose. Such an interpretation being clearly flawed cannot be sustained.

14. There is yet another aspect of the matter. TV license fee is levied under the Wireless Telegraphy Act, 1933 (*Wireless Telegraphy Act*). Section 2(2) of the Wireless Telegraphy Act defines "*wireless telegraphy apparatus*" as under:-

"any apparatus, appliance, instrument or material used or capable of use in wireless communication, and includes any article determined by rule made under Section 10 to be wireless telegraphy apparatus, but does not include any such apparatus, appliance, instrument or material commonly used for other electrical purposes, unless it has been specially designed or adapted for wireless communication or forms part of some apparatus, appliance, instrument or material specially so designed or adapted, nor any article determined by rule made under Section 10 not to be wireless telegraphy apparatus."

Section 3 of the Wireless Telegraphy Act provides that "**no person shall possess** *wireless telegraphy apparatus except under and in accordance with a license issued under this Act*" [Emphasis supplied]. Section 5 thereof designates the authority "*competent to issue licenses to possess wireless telegraphy apparatus...*" [Emphasis supplied] Section 6 makes **possession** of wireless telegraphy apparatus in contravention of Section 3 *ibid* an offence.

15. The Television Receiving Apparatus (Possession & Licensing) Rules, 1970 (*Rules*) were framed under Section 10 of the Wireless Telegraphy Act. Rule 3(3) of the Rules, requires the "holder" to obtain a license "*immediately after he comes into possession of a television set*" [Emphasis supplied]. Rule 2(e) of the Rules defines a "holder" as "*any person for the time being in possession of a television receiving apparatus*" [Emphasis supplied]. Rule 2(i) of the Rules defines "Television Receiving Apparatus" as "*any apparatus...capable of being used for receiving the telecasts...and includes any apparatus which is temporarily incapable of being so used by reason of a defect...*" [Emphasis supplied]. Although now the collection of TV license fee is made through electricity bills, the Wireless Telegraphy Act and the Rules make the Parliamentary intention clear. The license fee is paid not for any service provided by the appellant but by the holder of the TV set for its possession. The taxable event is not the provision of any service by the appellant. It is the possession of a television set by the holder. The Government of Pakistan allows the fee so collected to be used by the appellant for its maintenance and operations. The State has an interest in owning and operating a television corporation. This requires money. It, therefore, decided to levy license fee, collect it and allow the appellant to receive and use it for its maintenance and operations. It is for this reason that the amount of license fee received by the appellant is disclosed in its financials. The contention of the learned counsel for the respondent that the receipt of fee by the appellant establishes that it is subject to FED is not correct. All that it establishes is that the Government of Pakistan which has levied the fee has decided to allow the appellant to receive it and to use this revenue for its maintenance and operations. For FED to be levied on this amount it must further be established that it is a "service" as defined in Section 2(23) of the Federal Excise Act and is subject to the charge levied

under Section 3 thereof which, as discussed above, is clearly not the case. TV license fee not being the product of any service provided by PTV, FED cannot be levied on it.

16. The foregoing are the detailed reasons for our short order of even date which reads as under:-

“For the reasons to be recorded later, this appeal is allowed and the impugned order is set aside.”

CHIEF JUSTICE

JUDGE

Islamabad, the
23rd of October, 2018
Not approved for reporting
M. Azhar Malik/*

JUDGE