

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

**MR. JUSTICE MUSHIR ALAM**

**MR. JUSTICE DOST MUHAMMAD KHAN**

**MR. JUSTICE QAZI FAEZ ISA**

**CIVIL APPEAL NO. 493 OF 2011**

*(On appeal from the judgment dated  
30.07.2008 in W.P. No. 8532/2008 passed  
by the Lahore High Court, Lahore.)*

M/s. X.E.N. Shahpur Division (LJC) Quarry Sub-Division, Sargodha

.... Appellant

Versus

The Collector Sales Tax (Appeals) Collectorate of Customs Federal Excise & Sales Tax  
Faisalabad and others

.... Respondents

For the Appellant:

Mr. Mudassar Khalid Abbasi,  
Assistant Advocate General, Punjab

For Respondent Nos. 1 & 2:

Syed Arshad Hussain Shah, ASC  
Raja Abdul Ghafoor, AOR

On Court Notice:

Mr. Muhammad Waqar Rana,  
Additional Attorney General

Date of Hearing:

29<sup>th</sup> January 2016

**JUDGMENT**

**QAZI FAEZ ISA, J.-** This appeal assails the judgment dated 30<sup>th</sup> July 2008 of a learned Single Judge of the Lahore High Court, Lahore, whereby he had partly modified the orders of the Customs, Excise & Sales Tax Appellate Tribunal by holding that, “*the charge created in principle is held to be as lawful while the period of the same is reduced to the extend [sic] of the period fixed by law [Sales Tax Act, 1990] u/s 36(2)*”.

2. Mr. Mudassar Khalid Abbasi, the learned Assistant Advocate General, Punjab (“**AAG**”), stated that the respondents could not levy sales tax under the Constitution of the Islamic Republic of Pakistan (“**the Constitution**”) on the appellant, an XEN (Executive Engineer) of the Government of Punjab who performs duties for and on behalf of the Government. He referred to the appellant’s petition filed before the High

Court and the specific plea taken in this regard, which according to him went to the root of the matter but had not been properly considered. The said objection is reproduced hereunder:

“The levy of sales tax upon the petitioner is against the constitutional provisions i.e. Article 164, 165 & Article 2A, thus levy of such tax is unlawful. The petitioner is not carrying on any business or trade for any income or profit. Thus is immune from levy of sales tax.”

The learned AAG further stated that the learned Judge of the High Court placed reliance upon Article 165A of the Constitution (inserted in the year 1985) and wrongly assumed that after the insertion of Article 165A taxes could be imposed. He contended that the Executive Engineer was an integral component of the Government of Punjab and the relevant provision was Article 165 of the Constitution and Article 165A of the Constitution, on which the learned Judge of the High Court relied, was not applicable to the case. The learned AAG restricted his arguments on the unconstitutionality of the imposition of sales tax, stating that it could not be levied on the *property* of a provincial government as it was exempted under Article 165 of the Constitution, and stones or spawl (fragments of broken stones) were not excluded there from. Reference was also made to the definition of *property* contained in Article 260 of the Constitution and reliance was placed upon the case of Central Board of Revenue v. S. I. T. E. (PLD 1985 Supreme Court 97) and the Rules of Business, 2011 enacted by the Government of Punjab.

3. Syed Arshad Hussain Shah, the learned counsel for the respondents, stated that the appellant was a registered sales tax payer and had been paying sales tax, therefore, is now estopped from assailing the same. He further stated that the appellant availed of the remedies provided under the Sales Tax Act, 1990 (“**Sales Tax Act**”) and could not subsequently take cover under Article 165 of the Constitution, which in any event was not applicable to “taxable activity” or “taxable supply” as respectively defined in subsections (35) and (41) of section 2 of the Sales Tax Act.

4. Since the case entailed the interpretation of the Constitution, notice was issued to the learned Attorney General for Pakistan and Mr. Waqar Rana, the learned Additional

Attorney General, assiduously assisted us. He endorsed the submissions of the learned counsel for the respondents, asserted that the appellant was not the Government of Punjab and relied on the following cases: (1) Union Council v Associated Cement (Pvt.) Ltd. (1993 SCMR 468), (2) Zila Council Jhang v Daewoo Corporation (2001 SCMR 1012), (3) Collector of Sales Tax and Central Excise v WAPDA (2007 SCMR 1736), (4) WAPDA v Administrator District Council (2005 SCMR 487), (5) Province of NWFP v Pakistan Telecommunication Corporation (PLD 2005 Supreme Court 670) and (6) Karachi Development Authority v Central Board of Revenue (2005 PTD 2131). The learned Additional Attorney General also referred to the Constitution of India and the judgments of the Supreme Court of India which had upheld such type of levy whilst interpreting similar provisions in the Indian Constitution and cited the cases of: Jaswant Sugar Mills v Lakshmi Chand (AIR 1963 Supreme Court 677), In re Sea Customs Act, S.20 (2) (AIR 1963 Supreme Court 1760) and State of Madras v Swastik Tobacco Factory (AIR 1966 Supreme Court 1000).

5. Certain facts as narrated in the writ petition filed by the appellant, which have not been disputed by the respondents, are reproduced hereunder so that the respective contentions of the parties can be understood in context:

“2. The brief facts of the case are that petitioner is a registered person in Irrigation Department, Government of the Punjab, Pakistan. The petitioner is procuring and issuing stone to internal divisions of Irrigation in Punjab. The petitioner was collecting & depositing Sales Tax with the Sales Tax Department. The petitioner was issuing / supplying stones to the internal divisions and was not selling to external markets thus was not a commercial concern. The petitioner’s division is the only irrigation quarry which prepares pitching stones and spawl conforming to required specification which are prepared as per quarrying method approved by Mineral Department. Sizeable quantity of stones is prepared in order to meet with the requirements of development works, Flood protection works and other works of the irrigation department in the Punjab. The main purposes of the petitioner’s sub-division is to supply prepared stones to the internal irrigation department of the Punjab to have an effective control over flood damages to works / life & property of the people living near river banks. The petitioner is not working on commercial basis, rather is working on no profit no loss basis and in the public interest at large.”

6. The appellant was registered with the Sales Tax Department, filed requisite returns and paid sales tax. In the year 2006 an audit of the appellant was carried out by

the Sales Tax Department when certain discrepancies were noted. The appellant was therefore issued a show cause notice dated 15<sup>th</sup> June 2006 which mentioned the amount that had not been paid and called upon the appellant to pay it together with the applicable default charges. The appellant's reply was not accepted and the Additional Collector Sales Tax, Faisalabad vide Order-in-Original dated 30<sup>th</sup> November 2006 directed the appellant *to pay Rs.11,245,039/- as sales tax along with default surcharge under section 34 of the Sales Tax Act, 1990.*" The said order was upheld by the Collector Appeals vide judgment dated 24<sup>th</sup> January 2007, and appeal against it was dismissed by the Sales Tax Appellate Tribunal on 27<sup>th</sup> December 2007.

7. To appreciate the contentions of the learned counsel Articles 165, 165A and the definition of 'property' in Article 260 of the Constitution are reproduced hereunder:

**"165.** (1) The Federal Government shall not, in respect of its property or income, be liable to taxation under any Act of Provincial Assembly and, subject to clause (2), **a Provincial Government shall not, in respect of its property or income, be liable to taxation under Act of Majlis-e-Shoora (Parliament)** or under Act of the Provincial Assembly of any other Province. [emphasis has been added]

(2) If a trade or business of any kind is carried on by or on behalf of the Government of a Province outside that Province, that Government may, in respect of any property used in connection with that trade or business or any income arising from that trade or business, be taxed under Act of Majlis-e-Shoora (Parliament) or under Act of the Provincial Assembly of the Province in which that trade or business is carried on.

(3) Nothing in this Article shall prevent the imposition of fees for services rendered."

**"165A.** (1) For the removal of doubt, it is hereby declared that Majlis-e-Shoora (Parliament) has, and shall be deemed always to have had, the power to make a law to provide for the levy and recovery of a tax on the income of a corporation, company or other body or institution established by or under a Federal law or a Provincial law or an existing law or a corporation, company or other body or institution owned or controlled, either directly or indirectly, by the Federal Government or a Provincial Government, regardless of the ultimate destination of such income.

(2) All orders made, proceedings taken and acts done by any authority or person, which were made, taken or done, or purported to have been made, taken or done, before the commencement of the Constitution (Amendment) Order 1985, in exercise of the powers derived from any law referred to in clause (1), or in execution of any orders made by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court or tribunal, including the Supreme

Court and a High Court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court, including the Supreme Court and a High Court, on any ground whatsoever.

(3) Every judgment or order of any court or tribunal, including the Supreme Court and a High Court, which is repugnant to the provisions of clause (1) or clause (2) shall be, and shall be deemed always to have been, void and of no effect whatsoever.”

**260.** “ ‘Property’ includes any right, title or interest in property, movable or immovable, and any means and instruments of production.”

8. The liability to pay sales tax imposed under the Sales Tax Act (promulgated by Parliament) has been assailed by the appellant because, “*a Provincial Government shall not, in respect of its property or income, be liable to taxation under Act of Majlis-e-Shoora (Parliament)*” (as stipulated in clause (1) of Article 165 of the Constitution). Therefore, the questions that require to be answered are, firstly, whether the Executive Engineer of the Government of Punjab is a part of the Provincial Government? And, secondly, whether stones / spawl constitute *property*?

9. The Executive Engineer is a civil servant and carries out the functions and duties of his office for and on behalf of the Provincial Government. Admittedly, the Executive Engineer neither was nor is in business for himself nor was he selling or supplying the quarried stones / spawl to private parties. The quarried stones / spawl are utilized by the appellant or supplied by the appellant to other departments of the Punjab Government for use in public works. The Punjab Government has enacted the Punjab Government Rules of Business, 2011 (“**the Rules**”) pursuant to Article 139 (3) of the Constitution “*for the allocation and transaction of its business*”. Under the Rules the ‘Irrigation Department’ has the responsibility to construct and maintain “(a) barrages, rivers, (b) canals, (c) tube-wells, (d) drainage schemes, (e) storage of water and construction of reservoirs, (f) flood control and flood protection schemes”. The Punjab Government carries out its business some of which it does through the appellant, therefore, the appellant in respect thereof cannot be viewed separately from the Government and would come squarely within the terms of Article 165 (1) of the Constitution.

10. The next question that requires consideration is whether stones / spawl come with the term *property* as used in Article 165 (1) of the Constitution. Though the said provision does not elaborate further, however, Article 260 of the Constitution defines *property* in wide terms, to include “*any right, title or interest in property, movable or immovable, and any means and instruments of production*”. We do not see any reason to exclude stones / spawl from the term *property*, nor were given any to do so. We may also refer to clause (c) of Article 142 of the Constitution which stipulates that the provincial assemblies have the power to make laws in respect of all matters not mentioned in the Federal Legislative List. The Federal Legislative List in the Fourth Schedule (in item No. 51) restricts the legislative power of the Federation to, “*mineral oil, natural gas and minerals for use in generation of nuclear energy*”, consequently, the power to legislate in respect of other minerals, including stones / spawl, falls within the domain of the provincial assemblies. Article 172 of the Constitution is another provision which mentions *property* (“ownerless property”) and demarcates between what vests in the Federal Government and what vests in the Governments of the Provinces. The property that vests in the Federal Government lies, “*within the continental shelf or underlying the ocean beyond the territorial waters of Pakistan.*” From an examination of these provisions of the Constitution it can be concluded that the subject *property* (stones / spawl) within the territory of the Province of Punjab is owned by the Government of Punjab, in respect whereof laws can only be made by the Punjab Provincial Assembly and the same are exempted from Federal taxation as laid down in Article 165 (1) of the Constitution.

11. The only question that remains to be considered is, whether the appellant having earlier paid sales tax is estopped from seeking the exemption stipulated in Article 165 (1) of the Constitution. If a person, albeit an officer of the Provincial Government, despite being exempted under the Constitution mistakenly pays sales tax, he can not be compelled to continue doing so. The exemption contained in the Constitution will prevail over any statute and it would be inconsequential that the tax was earlier paid. ‘There is no estoppel against the Constitution’ is also a well established principle. As far back as

the year 1963, in the case of Fazlul Quader Chowdhry v Mr. Muhammad Abdul Haque (PLD 1963 SC 486), this Court had held (at page 542), “*In any event, on questions relating to the constitutionality of actions the ground of laches cannot prevail, for there, can be no estoppel against the Constitution and an act which is unconstitutional cannot become constitutional by lapse of time, nor can it vest anyone with any kind of legal right to benefit from such an unconstitutional act.*” In Asad Ali v Federation of Pakistan (PLD 1998 SC 161) it was held, by ten Hon’ble Members of this Court, that, “*There, of course can be no estoppel against the law much less against the Constitution...*” (at page 328). In the case of Muhammad Mubeen-us-Salam v Federation of Pakistan (PLD 2006 Supreme Court 602, at page 670), nine Hon’ble Members of this Court reiterated the principle that there can be no estoppel against the Constitution as had been held 43 years earlier in the case of Fazlul Qadeer Chowdhry. It was further held (at page 671) that, “*This court cannot be refrained from examining the constitutionality of a law because of lapse of time, therefore, notwithstanding an objection, if the constitutionality of a law is under challenge, its vires can be examined despite the fact that it had remained on the statute book for a considerable time*”.

12. The Constitution determines the rights, duties and obligations of the provinces with the Federation. Article 165 (1) of the Constitution stipulates that Parliament can not tax the property or income of a provincial government. The respondents however did just that. It was contended that the Sales Tax Act mentions ‘taxable activity’ and ‘taxable supply’ (respectively subsections (35) and (41) of Section 2 of the Sales Tax Act) which does not constitute *property* or *income* as mentioned in Article 165 (1). If this argument is accepted it would mean that a statute can circumvent the exemption contained in Article 165 (1) of the Constitution; such a proposition is therefore untenable. The property of the Government of Punjab can not be taxed because the Constitution prohibits it. The Constitution is the primary document of the Republic and obedience thereto is an inviolable obligation (Article 5 of the Constitution). We are all bound by the Constitution and have to give effect to its provisions. The Federal Government and its functionaries can only exercise power within the constraints of the Constitution.

13. In the case of Central Board of Revenue v S. I. T. E. (above), which was decided before the insertion in the Constitution of Article 165A (in the year 1985), this Court considered the ambit of Article 165 of the Constitution and held (at page 103) that, “*the property of Provincial Government its income from trade or business has been exempt from Federal Taxation provided it is within the concerned Province.*” In the same case the doctrine of Immunity of Instrumentalities as developed in the United States of America was considered but discarded, and whilst considering the Indian Constitution and its interpretation by the Supreme Court of India it was observed that the provisions in the Indian Constitution were different therefore the judgments of the Indian Supreme Court were not relevant. In this regard it will be useful to reproduce the following extract from the said judgment (at page 102):

“Article 289 of Indian Constitution sub-Article (2) whereof takes away in practical terms the immunity conferred by sub-Article (1) and its sub-Article (3) regarding business or trade ‘incidental’ to ‘the ordinary functions of Government’ having no parallel in our provision, it has no bearing on the present discussion. Therefore except for the statement of certain basic doctrines the Indian cases are of not much help.”

14. The Pakistani cases cited by the learned counsel for the respondents and the learned Additional Attorney General (mentioned in paragraph 5 above) pertain to Article 165A of the Constitution which provision attends to “*tax on the income of a corporation, company or other body or institution established by or under a Federal law or a Provincial law or an existing law or a corporation, company or other body or institution owned or controlled, either directly or indirectly, by the Federal Government or a Provincial Government*”. However, the present case pertains to a provincial government, namely, the Government of Punjab, and whether its property can be taxed, therefore, the said cited cases are not relevant to decide the present controversy. In the case of Union Council v Associated Cement (Pvt.) Limited (1) the respondent company’s shares were fully owned by the Federal Government but the company was still liable to pay the octroi tax imposed by the Union Council. It was held that the exemption under Article 165 (1) of the Constitution was only available to a government and Article 165A of the Constitution, which had been enacted “*for the removal of doubt*” specifically excluded companies. In



Zila Council Jhang v Daewoo Corporation (2) the District Council, Jhang had imposed tax on the material transported by Daewoo Corporation through its territorial limits during the construction of the Lahore-Islamabad Motorway. It was claimed that the foreign corporation had been engaged by the Federal Government to construct the Motorway therefore it was exempt from the payment of the said tax, but this contention was repelled because Daewoo Corporation was not a part of the Federal Government. In the case of Collector of Sales Tax and Central Excise v WAPDA (3) the question arose whether WAPDA was liable to sales tax or was it exempt under Article 165 (1) of the Constitution. WAPDA was created by a statute (Pakistan Water and Power Development Authority Act, 1958) and since it was not a government it was therefore held that the exemption under Article 165 (1) of the Constitution was not available to it. In WAPDA v Administrator District Council (4) the question, whether a contractor hired by WAPDA was exempt from the payment of export tax and educational cess, was considered. This Court held that the contractor could not be equated with the Federal Government and as such it was not exempt under Article 165 (1) of the Constitution. In Province of NWFP v Pakistan Telecommunication Company Limited (5) it was held that since the respondent was a distinct legal entity, even though its majority shareholding was owned by the Federal Government, it was liable to pay octroi as the exemption under Article 165 of the Constitution extended only to governments. In the case of Karachi Development Authority v Central Board of Revenue (6) the Karachi Development Authority which was a separate *juristic personality* as it was established under the Karachi Development Authority Order, 1957 therefore it could not be equated with *government* in terms of Article 165 (1) of the Constitution. In the case of Pakistan Television Corporation Limited v Capital Development Authority (2011 SCMR 1117) (which was not cited by any counsel) Pakistan Television Corporation Limited was held not entitled to claim exemption from payment of property tax under Article 165 of the Constitution because it was not “*owned by the Federal Government or the Provincial Government within the meaning of such Article*” (at page 1127C) and as it was a public limited company. An order of this Court with regard to the interpretation of Article 165 of the Constitution was reported as Province of Punjab v Federation of Pakistan (1998 SCMR 1342). We therefore sent for

the file of the said case but it transpired that the petition was “*disposed of as infructuous*” because the Provincial Government had approached the Federal Government “*for sorting out this matter*”. None of the aforesaid cases therefore assist the case of the respondents.

15. The learned Judge of the High Court failed to appreciate that sales tax had been imposed on a provincial government, namely the Government of Punjab, and not on a *corporation, company, body or institution*, therefore, Article 165A of the Constitution, on which the learned judge had focused his attention, was not applicable. The learned judge also did not properly consider the provisions of Article 165 of the Constitution as he peremptorily held that the exemption contained in Article 165A had “*brought [it] to an end*”, that is the exemption from taxation contained in Article 165 (1), which was not a correct understanding of the said provision. Much reliance was also placed by the learned judge on the conduct of the appellant’s “*own action to submit returns regularly along with Tax*”, however, as stated above, this was unimportant in the light of the said Constitutional provision. As discussed above Article 165 (1) of the Constitution clearly stipulates that a Provincial government shall not in respect of its property or income be liable to taxation under a Federal Law, which in the present case was the Sales Tax Act. Therefore, the judgment of the High Court is not sustainable and is set-aside and the appeal is allowed with costs.

Judge

Judge

Judge

Announced in Open Court  
At Islamabad

On 1<sup>st</sup> March 2016

By Justice Qazi Faez Isa

**APPROVED FOR REPORTING**  
(Zulfiqar)