

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Asif Saeed Khan Khosa, CJ
Mr. Justice Qazi Faez Isa
Mr. Justice Ijaz UI Ahsan

Human Rights Case No. 18877 of 2018

*(In the matter regarding deduction of taxes
and other charges by mobile companies in
Pakistan)*

In Attendance:

Mr. Anwar Mansoor Khan, Attorney-General for Pakistan
Mr. Sajid Ilyas Bhatti, Additional Attorney-General for Pakistan
Mr. Tariq Mehmood Jehangiri, Advocate-General, Islamabad
Mr. Salman Talib-ud-Din, Advocate-General, Sindh
Mr. Abdul Latif Khan Yousafzai, Advocate-General, KPK
Mr. M. Ayaz Khan Swati, Additional Advocate-General, Balochistan
Barrister Qasim Ali Chohan, Additional Advocate-General, Punjab
Barrister Qasim Wadud, Additional Advocate-General, KPK.
Mr. Zahid Yousaf Qureshi, Additional Advocate-General, KPK.
Syed Ghulam Abbas Kazmi, Member Legal, FBR
Mr. Muhammad Qasim Raza, Chief Legal, FBR
Dr. Raheel Ahmed Siddiqui, Secretary Finance, Punjab
Mr. Javed Ahmed, Chairman, Punjab Revenue Authority
Mr. Aamir Zahoor, Deputy Secretary (Legal), Finance, Punjab
Mr. Javed Khan, Deputy Secretary, Finance, KPK
Mr. Muhammad Khurram Siddiqui, Director, PTA
Mr. Adil Umar, Director, CA, PTA
Mr. Ali Sibtain Fazli, Sr. ASC
Mr. Ali Raza, ASC
Syed Ali Zafar, ASC
Mr. Khalid Javed Khan, ASC
Mr. Munawar Iqbal Duggal, ASC
Mr. Muhammad Kassim Merjat, AOR
Syed Rifaqat Hussain Shah, AOR

Dates of Hearing: 22nd and 24th April, 2019

JUDGMENT

Qazi Faez Isa, J. This human rights case was decided on 24th
April, 2019 with the passing of the following order:

For reasons to be recorded later this Human Rights Case is
disposed of without interference in collection of public
revenues and all the interim orders passed in the matter are
also disposed of accordingly.

2. This case commenced when the Director General of the Human Rights Cell on 3rd May, 2018 submitted the following note ("**the note**") to the Chief Justice of Pakistan:

It is generally being complained in social media (copy of such a text is annexed) that unreasonably high taxes of over 40% are being charged/deducted on topping up the balance and making the calls by mobile phones. It has also been alleged that billions of rupees so collected/extorted are not even accounted for, by the government.

The referred annexed text which constituted the complaint on social media ("**the complaint**") is reproduced hereunder:

A fast CAMPAIGN;"

جناب چیف جسٹس آف پاکستان سے ایک عاجزانہ درخواست
کہ اس بات کا نوٹس لیا جائے کہ یہ موبائل کمپنیوں کا رچا یا گیا ڈھونگ ہے یا حکومت کی چال
کے لوڈ پر ٹیکس = 25 روپے 100
باقی رقم = 75 روپے تقریباً
روپے استعمال کرنے پر 19 فیصد ٹیکس کے حساب سے 15 روپے مزید بطور ٹیکس کٹ جاتے ہیں اور 75
باقی کی رقم جو بچتی ہے وہ ہے صرف اور صرف 60 روپے
مطلب ہر 100 روپے کے بدلے ہم 40 روپے بطور ٹیکس ادا کرتے رہے ہیں۔
پاکستان میں تقریباً 10 کروڑ سے زائد موبائل فون صارفین ہیں۔
اگر 5 کروڑ لوگ بھی ایک دن میں 100 روپے کا لوڈ کروائیں تو اس کا مطلب وہ 5 ارب کا لوڈ کروائیں گے۔
جس پر بطور ٹیکس کٹنے والی رقم 1.25 ارب روزانہ بنتی ہے۔
اور ایک مہینے میں اس ٹیکس کی رقم 37.5 ارب روپے بنتی ہے اسی طرح ایک سال میں یہ تقریباً 450
ارب روپے بنتے ہیں۔
انتہا پیسہ کہا جا رہا ہے کوئی سمجھ نہیں آ رہی۔
جناب چیف جسٹس آف پاکستان جہاں اتنے بڑے بڑے احسن کام انجام دے رہے ہیں وہاں اس ڈاکوراج کا بھی نوٹس لیں
یہ ان کا غریب عوام پر ایک بہت بڑا احسان ہوگا۔
پاکستانی عوام سے اپیل ہے کہ اس کو اتنا زیادہ شیر کریں کہ جناب چیف جسٹس تین دن میں اس مسئلے پر غور کرنے پر مجبور ہو
جائیں۔
جاگو عوام جاگو
کہ جو اپنے حالات بدلنے کے لئے خود جدوجہد نہیں کرتا خدا بھی ان کے حالات کبھی نہیں بدلتا۔
منجانب: پاکستان کے (20) بیس کروڑ مظلوم عوام "

The complaint was anonymous and the record does not reveal which particular social media was used.

3. On the same day, that is 3rd May, 2018, the note of the Director General was numbered as a human rights case and placed in Court, when, in the presence of the Attorney General for Pakistan ("**Attorney General**"), the following order was passed:

It is a grave complaint by the public that an unreasonable and high amount of tax/other charges are being deducted from the topping up of the balance through easy load and calling cards (besides taxing on the calls). Let the Attorney General for Pakistan explain on the next date of hearing as to how much and what amount is being deducted or taxed on a calling card/easy load of Rs.100/-; besides, notice be also issued to the Federal Board of Revenue and all the Mobile Phone Companies in Pakistan to explain the same. Re-list before a regular Bench on 8.5.2018.

4. On 8th May, 2018 the learned Attorney General explained that advance income tax was collected on prepaid cards for telephones by the Federation under section 236 of the Income Tax Ordinance, 2001 ("**the Ordinance**"), federal excise duty was recovered in the Federal Capital, provinces had imposed sales tax through their respective provincial laws and cellular telecom companies were deducting ten per cent service charges thereon. This Court after hearing the Attorney General issued notices to the Federal Government, the provincial governments, the Islamabad Capital Territory, the Federal Board of Revenue and the telecom companies. The next hearing of the case was 11th June, 2018, when the recovery of federal and provincial taxes that had been imposed on mobile phones and deduction of service charges by telecom companies was suspended with "*effect from 12 o' clock midnight on 13.06.2018*", "*subject to the final decision of this matter*".

5. When this case was fixed for hearing on 16th October, 2018, it was ordered, "Re-list after six months". After expiry of six months the case was listed on 27th March, 2019 when the issues in the case were identified and requisite information was sought from the Federal and provincial governments, as under:

1. This matter pertains to the levy/imposition of advance income tax by the Federation, Federal Excise Duty by the Federation in the Islamabad Capital Territory, sales tax on services by the Provinces and service/maintenance charges by cellular mobile operators.

2. The learned counsel representing cellular mobile operators state that they have stopped levying/imposing and collecting service / maintenance charges and do not intend to do so in the future.

3. The learned Attorney General for Pakistan ("AGP") questions whether this matter could have been taken notice of under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan ("**the Constitution**") as, according to him, it does not concern the enforcement of any Fundamental Right

enshrined in the Constitution. The learned Advocate Generals of Khyber Pakhtunkhwa and Islamabad and the learned Additional Advocate Generals of Punjab, Sindh and Balochistan ("AGs" and "AAGs") support the learned AGP in this regard.

4. The learned AGP, the AGs and AAGs also question the order of this Court dated 11th June, 2018 which restrained the collection of the said taxes. They submit that this was done without considering the applicable laws and without striking down the relevant provision of any law which authorized such levy/imposition and collection. Since the said interim order is causing massive revenue loss to the Federation and the provinces the learned law officers request that this matter may be adjudicated upon at an early date.

5. A cursory examination of the matter has raised a number of questions. The preliminary question which requires consideration is:

- (1) Whether this matter could have been taken notice of under Article 184 (3)?

And, if the answer to the aforesaid is in the affirmative, then the following questions would require consideration:

- (2) Whether advance income tax can be levied on all the customers of cellular mobile operators irrespective of whether or not they are taxpayers pursuant to section 236 read with section 147 and section 2 (66) of the Income Tax Ordinance, 2001?
- (3) Whether sales tax on cellular services provided by the cellular mobile operators can be levied / imposed on their customers by the provinces under their respective laws, that is, the Sindh Sales Tax on Services Act, 2011, the Punjab Sales Tax on Services Act 2012, the Khyber Pakhtunkhwa Finance Act, 2013 and the Balochistan Sales Tax on Services Act, 2015?
- (4) Whether excise duty can be levied / imposed by the Federation on the services provided by cellular mobile operators to their customers under the Federal Excise Act, 2005?

6. The Federation and the Provinces to submit their respective concise statements with regard to the aforesaid questions, which should be accompanied with extracts of the applicable laws. The information about the amount of the said taxes collected by the cellular mobile operators and paid to the respective revenue authorities of the Federation and the provinces for the period from 13th June, 2017 through till 13th June, 2018 shall also be provided in the concise statements. The concise statement submitted on behalf of the Federation should be signed by the Secretaries of Revenue, Law and the learned AGP, the concise statement on behalf of the Islamabad Capital Territory by the Secretaries of Revenue, Law and the learned AG of Islamabad and the concise statement on behalf of the provinces signed by the Secretaries of Finance, Law and the learned AGs; and in case of disagreement amongst any of the said secretaries and law officers separate concise statements may be filed. If the cellular mobile operators want to file concise statements they may also do so under the joint signatures of the concerned officer and their counsel.

7. Since the referred to interim order was passed by a three-member Bench it would be appropriate if this matter is heard by a Bench comprising of at least three members. Therefore, this matter should be referred to the Hon'ble Chief Justice of Pakistan for requisite orders for the constitution of the Bench and for fixing it for hearing at an early date as it pertains to the collection of public revenues.

6. The Federation, the provinces, the Federal Board of Revenue, the Sindh Revenue Board and the Punjab Revenue Authority provided the information about the amounts recovered as advance income tax, federal excise duty and provincial sales tax (collectively referred to as **"the taxes"**) for the year which preceded the suspension thereof, that is, from 13th June, 2017 till 13th June, 2018, as under:

Collected by	Tax	Amount in rupees
Federation	Income Tax	50,029,343,106
Punjab	Sales Tax	27,044,322,231
Balochistan	Sales Tax	1,717,547,367
Sindh	Sales Tax	7,081,034,039
Khyber Pakhtunkhwa	Sales Tax	4,142,000,000
Islamabad	Federal Excise Duty	2,290,762,717
Total		92,305,009,460

7. We heard the submissions of the learned Attorney General, the learned Advocate Generals of Khyber Pakhtunkhwa and Sindh, the learned Additional Advocate Generals of Punjab and Balochistan, the learned Mr. Khalid Javed Khan representing the Sindh Revenue Board and the learned Syed Ali Zafar representing the Punjab Revenue Authority. The learned Attorney General justified the imposition and collection of advance income tax and federal excise duty. And, the other learned counsel justified the levy and imposition of sales tax by the provinces and its collection. All the learned counsel submitted that the case should not have been entertained and opposed the order dated 11th June, 2018, which had suspended the recovery of the taxes, and sought its recall. The contentions of the learned counsel were as under:

- (i) The Supreme Court did not have the jurisdiction under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan (**"the Constitution"**) to determine the validity of the imposition and collection of taxes;

- (ii) The original jurisdiction of the Supreme Court under Article 184 (3) of the Constitution could only be invoked in respect of a matter of *public importance* requiring the enforcement of *any of the Fundamental Rights* however as neither of the two stipulated preconditions were attracted therefore this Court’s jurisdiction under Article 184 (3) could not be invoked;
- (iii) The taxes were imposed pursuant to statutes passed by competent legislatures which were authorized to do so under the Constitution;
- (iv) The taxes were imposed and collected under the following statutes:

Territory where imposed	Statute	Relevant provisions
Imposed throughout Pakistan	Income Tax Ordinance, 2001	Section 236 read with sections 2 (63), 2 (66), 147, 168 and Chapter XII.
Imposed in the Islamabad Capital Territory	Federal Excise Act, 2005	Section 3 read with serial number 6 of Table II of the First Schedule.
Imposed in Punjab	Punjab Sales Tax on Services Act, 2012	Sections 1 (4) and 3 read with section 2 (38) read with classification number 9812.1210 of the First Schedule.
Imposed in Sindh	Sindh Sales Tax on Services Act, 2011	Section 3, read with sections 2 (97) and 8 read with tariff heading 9812.1210 of the Second Schedule.
Imposed in Khyber Pakhtunkhwa	Khyber Pakhtunkhwa Finance Act, 2013	Section 19 read with section 2 (48) read with serial numbers 4 (5) and (9) of Schedule II.
Imposed in Balochistan	Balochistan Sales Tax on Services Act, 2015	Section 3 read with section 2 (39) read with classification number 9812.10000 of the First Schedule.

None of the abovementioned statutes (“**the six statutes**”) nor the relevant provisions whereunder the taxes were imposed had been declared by a court

competent to do so to be beyond the legislative competence of the said legislatures nor that the six statutes contravened any constitutional provision, therefore, imposition and collection of the taxes could not be suspended;

- (v) The Supreme Court in exercise of its jurisdiction under Article 184 (3) of the Constitution exercises the same powers as those exercised by the High Courts under Article 199 of the Constitution and is subject to the same conditions and limitations, including those mentioned in Article 199 (4) with regard to *assessment or collection of public revenues*. Article 199 (4) of the Constitution stipulates that: (a) *the Court shall not make an interim order unless the prescribed law officer has been given notice*, (b) *and he or any person authorized by him in that behalf has had an opportunity of being heard*, (c) the Court before passing an interim order must record *in writing* its *reasons* for doing so, and (d) the Court must be *satisfied that* the imposition *is without jurisdiction*. However, the order dated 11th June, 2018, through which the imposition and collection of the taxes was suspended, had not recorded *reasons* for doing so. There was also no determination, and ensuing declaration, that the imposition and collection of the taxes was *without jurisdiction*;
- (vi) The *original jurisdiction of Supreme Court* under Article 184 (3) of the Constitution can only be invoked by the *Supreme Court*, and not by the Director General of the Human Rights Cell. In this case the Supreme Court had never specifically invoked its jurisdiction under Article 184 (3) of the Constitution;

- (vii) Neither the note nor the complaint identified the purported complainant and also did not identify the Fundamental Rights which required *enforcement*;
- (viii) The six statutes which imposed the taxes provide the machinery to challenge an illegal imposition, however, no challenge was made thereunder. And, without availing of the remedy prescribed under the six statutes it would be inappropriate for this Court to hear and determine the matter;
- (ix) Taxing statutes are interpreted in the light of the decisions of the concerned tribunal and/or the High Court wherein issues are formulated and questions answered before a case comes to the Supreme Court in its appellate jurisdiction under Article 185 of the Constitution when the Supreme Court has the benefit of examining the determination already made, however, in its original jurisdiction under Article 184 (3) of the Constitution the Supreme Court is deprived of the benefit of such determination;
- (x) Parliament and provincial assemblies in exercise of their sovereign and basic powers respectively had enacted the six statutes which had imposed the taxes and the Supreme Court should not undermine their authority in exercise of its original jurisdiction;
- (xi) The taxes imposed and collected under each of the six statutes were spent for the benefit of the public therefore it can't be contended that the same were contrary to the public interest; the *public importance* envisaged in Article 184 (3) of the Constitution would not override the public interest; and

- (xii) A loss of close to a hundred billion rupees was suffered by the Federal and provincial governments on account of the suspension in the collection of the taxes.

8. The learned senior counsel, Mr. Ali Sibtain Fazli, and the learned Mr. Ali Raza represented the telecom companies. They stated that the cellular telecom companies had stopped the collection of the taxes pursuant to the order of this Court dated 11th June, 2018. They further stated that the telecom companies had stopped collecting/recovering their service/maintenance charges and will also not do so in the future in case the taxes are re-imposed. As regards the merits of the case they state that they will abide by whatever is decided. The learned counsel submitted that the telecom companies act as the collection agents of the Federal and provincial governments and the taxes collected by them are not retained by them. The learned counsel further submitted that the telecom companies apprehend that if the taxes are re-imposed they may be called upon to pay the taxes for the period they were suspended by this Court which will be unjust as it will not be possible to recover the same from their customers/subscribers.

9. We have heard the learned counsel and with their assistance examined the relevant provisions of the Constitution and the six statutes whereunder the taxes were imposed. To attend to the objection with regard to the jurisdiction of this Court it would be appropriate to reproduce Article 184 (3) of the Constitution:

184. Original Jurisdiction of Supreme Court.

- (3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article.

The Constitution refers to jurisdiction under Article 184 (3) of the Constitution as the *original jurisdiction* of this Court, which denotes that it is exercising jurisdiction when a case has not already been heard and decided by a tribunal and/or a High Court.

This original jurisdiction is also referred to as extraordinary jurisdiction. The Supreme Court may invoke jurisdiction under Article 184 (3) of the Constitution in respect of matters of *public importance* which require *the enforcement of any of the Fundamental Rights*. Whilst exercising this jurisdiction the Supreme Court regulates itself, therefore, it must ensure that the two stipulated preconditions are first met. Moreover, as there is no appeal against an order/judgment passed by this Court in exercise of jurisdiction under Article 184 (3) of the Constitution every precaution should be taken to strictly act within the precise parameters set by the Constitution.

10. We inquired from the learned counsel to cite precedents of this Court with regard to challenging the imposition of a tax under Article 184 (3) of the Constitution. The learned counsel cited the case of *Iqbal Zafar Jhagra v Federation of Pakistan* (2013 SCMR 1337). This was a petition filed by two parliamentarians under Article 184 (3) which had assailed a tax because it was imposed by an executive act of the government and without the prior approval of Parliament and therefore contravened Article 77 of the Constitution. Article 77 of the Constitution stipulates, that, *No tax shall be levied for the purpose of the Federation except by or under the authority of Act of Majlis-e-Shoora (Parliament)*. This Court, in the *Iqbal Zafar Jhagra* case, held (paragraph 29, page 1363), that:

In the light of the law laid down in the aforesaid judgments, it is clear that the *Majlis-e-Shoora* (Parliament) / Legislature alone and not the Government / Executive is empowered to levy tax. As far as delegation of such powers to the Government / Executive is concerned, the same is for the purpose of implementation of such laws, which is to be done by framing rules, or issuing notifications or guidelines, depending upon case to case, as we have come across some of the cases noted hereinabove. But in no case, authority to levy tax for the Federation is to be delegated to the Government / Executive.

This Court also declared (paragraph 48(v), page 1381), that:

... the Federal Government has no lawful authority to levy, impose and recover Sales Tax @ 17 % from 13-6-2013 on the value of taxable supplies made in course or furtherance of any taxable activity until passing of the Finance Bill (Money Bill) 2013-14, which has already been tabled before the *Majlis-e-Shoora*;

The case of *Iqbal Zafar Jhagra* does not constitute a precedent in respect of a challenge to a tax imposed by the legislature. In the present case advance income tax and the federal excise duty imposed by Parliament and sales tax imposed under the respective provincial laws are under consideration. Only once the taxes imposed by the six statutes are declared contrary to the Constitution and struck down could their imposition and collection from subscribers/customers of cellular telecom companies be stopped. We need to consider whether this can be done in exercise of powers under the original jurisdiction of this Court under Article 184 (3) of the Constitution.

11. In exercise of power under Article 184 (3) of the Constitution this Court may pass appropriate orders for the enforcement of Fundamental Rights. These Fundamental Rights are those conferred by Chapter 1 of Part II of the Constitution; protection from taxation is not listed as one of these Fundamental Rights. We also agree with the learned law officers that the taxes can not be presumed to be against the public interest since taxes are spent for the benefit of the public. This Court is generally slow in entertaining challenges to taxes which are imposed by the appropriate legislature in apparent conformity with the provisions of the Constitution. This however is not to say that a law imposing a tax cannot be challenged. The learned law officers had dealt with the provisions of the six statutes imposing the taxes and had pointed out various provisions of the said statutes and had maintained that the taxes imposed had the requisite statutory support, however, we are consciously not interpreting or even discussing the cited provisions as they may come up for examination and consideration while exercising our appellate jurisdiction under Article 185 of the Constitution; in respect of a case in which the law has already been interpreted and decided by a tribunal and/or a High Court.

12. The learned law officers and the learned counsel representing the Sindh Revenue Board and the Punjab Revenue Authority correctly contended that none of the six statutes, which

had imposed the taxes, have been declared by a competent Court to be beyond the legislative competence of the legislature which had imposed them nor has it been declared that they contravened any constitutional provision. Article 199 (4) and (4A) of the Constitution impose conditions and limitations with regard to *public revenues* and stipulate, that (a) *Court shall not make an interim order unless the prescribed law officer has been given notice,* (b) *and he or any person authorized by him in that behalf has had an opportunity of being heard,* (c) the Court can only pass an interim order *for reasons to be recorded in writing* and (d) if the Court is *satisfied that the imposition is without jurisdiction*. The said learned counsel are also correct to state that the order dated 11th June, 2018 did not record reasons nor did it determine that the imposition of the taxes was *without jurisdiction*. We are also not persuaded to hold that the taxes were imposed without requisite legislation or that the six statutes contravened the Constitution. The recovery of the taxes may therefore be resumed. However, the cellular telecom companies are not allowed to impose any service / maintenance charge thereon as they have elected not to impose these charges.

13. As regards the apprehension of the cellular telecom companies with regard to the recovery from them of the taxes for the period during which such recovery was suspended by this Court the learned law officers of the Federation and the provinces have not attributed any fault to the telecom companies. In any event the telecom companies had simply implemented the order of this Court. Therefore, it would be unfair and unjust to demand that the cellular telecom companies make good the loss of the said taxes.

14. These are the reasons for the order dated 24th April, 2019, which has been reproduced in paragraph one above.

Chief Justice

Judge

I have gone through the opinion of my learned brother Qazi Faez Isa, J. While agreeing with the result, I have been unable to persuade myself to agree with the narration of facts given by way of background as well as the reasoning adopted. I have therefore added my separate note recording my reasons and providing background of the case, having been part of the original Bench which extensively heard and dealt with this matter.

Judge

Bench-I
Islamabad
10th May, 2019

Approved for Reporting

IJAZ UL AHSAN, J.- I have perused the opinion of my learned brother, Qazi Faez Isa, J. Unfortunately I am unable to agree with the reasoning adopted by him to reach the conclusions and differ with him on various aspects of the matter. I am therefore appending my separate note giving my reasons for disposing of these matters. For the purpose of this dissenting note, I shall adopt the statement of facts and arguments of the learned law officers and counsel as articulated in the judgment of my learned brother (which need not be reproduced in the interest of brevity), except such as I shall need for my comment.

2. There is no cavil to the proposition that the Supreme Court of Pakistan exercises its powers under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") on its own motion or *suo motu*, as colloquially referred to. Therefore, it is not necessary that a petition be filed before it as long as information of any matter is received by the Court through any mode or manner and from any quarter. If the matter coming to the notice of this Court falls within the ambit of Article 184(3) *ibid*, in that, it involves a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter I of Part II of the Constitution, then the Constitution empowers this Court to take cognizance thereof and pass such orders as it may deem appropriate to protect, preserve and enforce such fundamental right(s) of citizens as may have been violated or threatened, being the protector, defender and guardian of the Constitution and the fundamental rights enshrined therein. Further, the framers of the Constitution, have intentionally, deliberately and by conscious design placed no restriction on the types of fundamental rights for enforcement of which powers under Article 184(3) *supra* can and cannot be exercised. Therefore, as long as the aforementioned two conditions are, in the opinion of the Court met, it is immaterial whether the violation relates to a fiscal matter, taxation, a matter involving property rights, personal freedoms or human liberties, this Court can and should exercise its powers to come to the rescue of the citizen whose rights may be at risk of being

bulldozed, destroyed or encroached upon by the State with all the might and resources available to it. The power under Article 184(3) *supra* has been conferred on the Court to protect the weak and the down trodden who may not be able to retain fancy and expensive lawyers but whose fundamental rights are as sacrosanct as those of the more privileged classes of the society who have the wherewithal and the requisite resources to approach and seek protection of their rights through Courts of law. Article 184(3) *supra* is a power designed and meant to be exercised for the protection of the proverbial "Little Man"; those who do not have the means to approach Courts of law for enforcement and protection of rights guaranteed to them by no less a document as the Constitution of the Islamic Republic of Pakistan which and each article whereof we are under oath to preserve, protect and defend. Failure or refusal to exercise this power in fit and appropriate cases is the violation of a trust and the hallmark of infidelity to the Constitution. There are countless reported and unreported cases, not being discussed here for the sake of brevity, in which this Court has exercised its *suo motu* powers under the aforesaid provision, therefore nothing turns on the fact that such powers were exercised upon an anonymous complaint as mentioned by the learned Attorney General for Pakistan.

3. The learned counsel contended, as presented in paragraph No.7(vi) of the lead judgment, that the original jurisdiction of the Supreme Court under Article 184(3) *ibid* can only be invoked by the Supreme Court and not by the Director General of the Human Rights Cell ("HRC"). This contention is totally misconceived and based upon misunderstood or not understood facts without so much as examining the record. The fact of the matter is that the HRC is a cell of this Court charged with the responsibility of sifting through hundreds of petitions, complaints, letters and other information received on a daily basis by this Court, and bringing those, that *prima facie* and on tentative assessment and examination meet the criteria of Article 184(3) *supra* to the notice of the Hon'ble Chief Justice of Pakistan, who in that capacity decides whether or not the matter can and should be

fixed in Court before a bench for appropriate orders. In this regard, it was observed by a three member bench of this Court in the judgment rendered in the matter of the *Arrest of accused of murder of Mst. Bibi Zahida's daughter Waheeda* (2014 SCMR 83) that, through the HRC of this Court, "jurisdiction is exercised under Article 184(3) of the Constitution along with all other enabling provisions of law on individual or collective requests, to ensure enforcement of fundamental rights, particularly, in public importance cases." Be that as it may, in the instant case, the matter was placed by the Director General, HRC before the Hon'ble Chief Justice of Pakistan on 03.05.2018 who after a tentative examination of the matter directed that the matter be placed before the Court. On the same day, a five member bench comprising of the Chief Justice of Pakistan and four learned Judges of this Court examined the matter in detail in the presence of the learned Attorney General for Pakistan. After considering various aspects of the matter and due application of mind, it was deemed appropriate to issue notices to the Federal Board of Revenue ("FBR") and all the mobile phone companies operating in Pakistan. It was also ordered that the matter be thereafter listed before a regular bench of this Court. Therefore, the jurisdiction of this Court was validly, properly and correctly exercised. The contention of the learned counsel that the Supreme Court had never invoked its jurisdiction under Article 184(3) *ibid* or that it was irregularly or improperly invoked or could not be invoked is *ex facie* absurd and utterly baseless.

4. It was also argued that this Court did not have jurisdiction under Article 184(3) of the Constitution to determine the validity of the imposition and collection of taxes which had been imposed pursuant to statutes passed by competent legislatures under the Constitution. At the very outset, I find this proposition to be misconceived. This Court in the judgment reported as *Engineer Iqbal Zafar Jhagra and another v Federation of Pakistan and others* (2013 SCMR 1337) cited by the learned counsel had held that sales tax imposed by the Federal Government was unlawful as it fell within the domain of Parliament. This does not however automatically mean that the

power under Article 184(3) *ibid* can only be exercised against a tax imposed by the executive and not the legislature, particularly when the Constitution itself does not draw any such distinction. The fact of the matter is that in *Iqbal Zafar Jhagra's* case *supra* this Court exercised its power under Article 184(3) *ibid* and took cognizance of a tax matter. Furthermore, a six member bench in *Abdul Wahab's* case *supra* was of the view that "the superior Court of the country has the power, of judicial review to examine and adjudge any legislative and/or administrative action of the State on the touchstone of the fundamental rights and, to pass appropriate orders for protecting such rights and enunciating the law in respect thereof." A five member Bench of this Court in *Baz Muhammad Kakar's* case *supra* observed that "The Constitution of Pakistan confers upon the superior Courts power and jurisdiction under Articles 199 and 184(3) to examine the constitutionality of the executive and the legislative actions." No distinction has been drawn in these cases between legislative action related to tax or otherwise, therefore to read into the Constitution such distinction is unwarranted and unjustified. Further, there are volumes of case law to support the proposition that executive and legislative measures on fiscal as well as tax matters are regularly challenged before the High Courts which have the jurisdiction to do so under Article 199 of the Constitution. It is also settled and I am in no manner of doubt that the powers of this Court under Article 184(3) *supra* are akin to the powers of the High Courts under Article 199 *supra* with the addition that such powers can be exercised by this Court of its own motion (*suo motu*), if information of the nature discussed above is placed before it showing that a question of public importance involving enforcement of Fundamental Rights conferred by Chapter I of Part II of the Constitution is involved. Once having passed that threshold this Court can pass any order of the nature that can be passed by the High Court under Article 199 *supra*.

5. The only requirement for the exercise of extraordinary powers by this Court under Article 184(3) *ibid* is that the matter ought to be of public importance requiring the enforcement of any

of the fundamental rights contained in Chapter I of Part II of the Constitution. Reference in this regard may be made to numerous judgments including *All Pakistan Newspapers Society and others v Federation of Pakistan and others* (PLD 2004 SC 600), *Ch. Muhammad Siddique and two others v Government of Pakistan through Secretary, Ministry of Law and Justice Division, Islamabad and others* (PLD 2005 SC 1), *Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v Federation of Pakistan through Secretary Ministry of Interior and others* (PLD 2007 SC 642), *Thal Industries Corporation Limited through Legal Manager v Government of the Punjab through Chief Secretary, Punjab and 10 others* (2007 SCMR 1620), *Jamat-e-Islami through Amir and others v Federation of Pakistan and others* (PLD 2009 SC 549), *Munir Hussain Bhatti, Advocate and others v Federation of Pakistan and another* (PLD 2011 SC 407), *Watan Party and others v Federation of Pakistan and others* (PLD 2012 SC 292), *Muhammad Azhar Siddique and others v Federation of Pakistan and others* (PLD 2012 SC 660), *Baz Muhammad Kakar and others v Federation of Pakistan through Ministry of Law and Justice and others* (PLD 2012 SC 923), *Dr. Muhammad Tahir-ul-Qadri v Federation of Pakistan through Secretary M/o Law, Islamabad and others* (PLD 2013 SC 413), *Abdul Wahab and others v HBL and others* (2013 SCMR 1383) and *Imran Ahmad Khan Niazi v Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member National Assembly, Prime Minister's House, Islamabad and 9 others (Panama Papers Scandal)* (PLD 2017 SC 265). The learned counsel made a submission recorded in paragraph No.7(ii) of the lead judgment, that the conditions for the exercise of power under Article 184(3) *ibid* were not met. However, I am in no manner of any doubt whatsoever that these conditions were amply, totally and fully met in the instant matter as shall be seen below.

6. With respect to the first condition, a nine member bench of this Court in *Watan Party's* case (2012) held, after considering the dictionary meaning of "public importance" and caselaw regarding this aspect, that the term refers to a "question, which affects and has its repercussions on the public at large and

it also includes a purpose and aim, in which the general interest of the community, particularly interest of individuals is directly or vitally concerned." With a population of over 200 million out of which the number of cellular subscribers was approximately 150 million in mid-2018¹ (note:- the complaint was taken up in May 2018), there can be no two opinions that the instant matter regarding imposition of taxes on, *inter alia*, topping up of mobile phone balance, affects and has repercussions on the public at large and is not an individual or private grievance.

7. As far as the second condition is concerned, I respectfully disagree with the observation contained in paragraph No.11 of the lead judgment that "protection from taxation is not listed as one of these Fundamental Rights [conferred by Chapter I of Part II of the Constitution]." At this juncture it would be pertinent to note Articles 23 and 24(1) contained in Chapter I of Part II of the Constitution which read as follows:-

23. Provision as to property. Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest.

24. Protection of property rights. (1) No person shall be compulsorily deprived of his property save in accordance with law.

The foregoing provisions of the Constitution have been interpreted by this Court. In the judgment reported as *PAKCOM Limited and others v Federation of Pakistan and others* (PLD 2011 SC 44), while holding that the license held by the appellant was only an incidental right attached to a substantive interest and would not be property for the purposes of Article 24 of the Constitution, a three member bench of this Court observed that:-

55. **In so far as Article 23 of the Constitution is concerned** it has got no relevancy with the controversy in hand and cannot be made applicable for the reason that **"the word 'property' used in the clause means the property in respect of which a right of proprietorship may be asserted. It includes both movable and immovable property. It includes every possible interest which a party may have in property, including abstract and**

¹ Available on the official website of Pakistan Telecommunication Authority ("PTA") at <https://www.pta.gov.pk/en/telecom-indicators/1>.

concrete rights." (Raza Kazim v. District Magistrate, Lahore PLD 1958 Lah. 706, State of Bombay v. F N Balsara AIR 1951 SC 318, Narasimha v. Dist. Magistrate AIR 1953 Mad. 476, S.M. Transports (P) Ltd., v. Sankabasmigal Mudd AIR 1963 SC 864)...In so far as Article 24 of the Constitution is concerned it recognizes as a matter of fundamental right and the sanctity of private property which is not the issue in question. Admittedly Pakcom is a licensee which in our opinion is only an incidental right attached to a substantive interest it will not be property for the purpose of Article 24...

[Emphasis supplied]

In the case of *Bank of Punjab and another v Haris Steel Industries (Pvt.) Ltd. and others* (PLD 2010 SC 1109), while exercising its extraordinary jurisdiction under Article 184(3) of the Constitution, a three member bench of this Court observed as follows:-

22. As has been mentioned above, **the matter in question relates to one of the gravest financial scams in the banking history of our country as a result of which the Bank of Punjab stood cheated of an enormous amount of around eleven billion rupees which amount of money in fact belonged to around one million innocent depositors including depositors of small amounts of money whose life-savings and property had come under serious threat casting thus an obligation on this Court to move in to protect and defend the right of property of such a large section of the population i.e. about ten lakh depositors and customers of the Bank of Punjab which right of property stood guaranteed to them by Article 24 and Article 9 of the Constitution.**

25. A perusal of the above quoted provision would demonstrate that **this Court was possessed of powers to make any order of the nature mentioned in Article 199 of the Constitution, if, in the opinion of this Court, a question of public importance relating to the enforcement of any of the Fundamental Rights was involved in the matter, As has been mentioned in the preceding parts of this order, what was at stake was not only a colossal amount of money/property belonging to at least one million depositors i.e. a large section of the public but what was reportedly at stake was also the very existence of the Bank of Punjab which could have sunk on account of the mega fraud in question and with which would have drowned not only the said one million depositors but even others dealing with the said Bank. And what had been sought from this Court was the protection and defence of the said public property. It was thus not only the right of this Court but in fact its, onerous obligation to intervene to defend the said assault on the said fundamental right to life and to property of the said public.**

[Emphasis supplied]

The issue in the instant matter is that of alleged unlawful extraction of money in the form of advance tax under Section 236 of the Income Tax Ordinance, 2001 ("Ordinance") from millions of cellular subscribers who do not fall within the relevant tax bracket for the purposes of the Ordinance. It is clear that the money being taken from cellular subscribers constitutes 'property' as envisaged

by the Constitution in light of the two aforementioned judgments and therefore, the contention of the learned counsel that the instant matter did not involve the enforcement of any fundamental rights is misconceived. Apart from the fundamental rights contained in Chapter I of Part II of the Constitution, the deduction and collection of such advance tax is also seemingly a clear contravention of Article 4(2)(a) of the Constitution which provides that "no action detrimental to the...property of any person shall be taken except in accordance with law."

8. It was argued by the learned counsel as noted in paragraph No.7(v) of the lead judgment and held in paragraph No.12 thereof, that the conditions and limitations contained in sub-Articles (4) and (4A) of Article 199 of the Constitution were not followed by this Court while passing the order dated 11.06.2018. In this regard, certain caselaw is to be noted. It was held in the case of *Pakistan Muslim League (N) supra* that:-

That the language of Article 184(3) does not admit of the interpretation that provisions of Article 199 stood incorporated in Article 184(3) of the Constitution. Therefore, this Court while dealing with a case under Article 184(3) of the Constitution is neither bound by the procedural trappings of Article 199 *ibid*, nor by the limitations mentioned in that Article for exercise of power by the High Court in a case.

This was upheld by a five member bench in the judgment reported as *Watan Party and another v Federation of Pakistan and others* (PLD 2011 SC 997). In *Abdul Wahab's case supra*, a six member bench of this Court held as follows:-

In relation to the jurisdiction of this Court under Article 184(3) though the constraints and limitations, if any of Article 199 may not be *stricto sensu* attracted, in view of the expression "without prejudice" appearing at the very opening of the Article, meaning thereby "without any detriment" (i.e. without being harmed or damaged or hurt).

In the *Panama Papers Scandal* case, it was observed by Gulzar Ahmed, J. as under:-

On reading of this very Article, **it is clear that this Court has been conferred with a power to make an order of nature mentioned in Article 199 of the Constitution and such power is without prejudice to the said Article meaning that this**

Court is not constrained with any of the technicalities or any of the conditions that may have been imposed on the High Court for exercising jurisdiction under Article 199 of the Constitution. This Court has been given free and unbridled powers to make an order of a nature, as mentioned above, if it considers that the question of public importance with reference to enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II of the Constitution is involved.

[Emphasis supplied]

According to the law laid down in the aforementioned judgments, while dealing with a matter under Article 184(3) of the Constitution, this Court is neither bound by the procedural trappings nor limitations of Article 199 thereof. Hence, the order dated 11.06.2018 was neither without jurisdiction, nor did it suffer from any legal, procedural or jurisdictional error, defect, flaw or infirmity whatsoever.

9. It is clear in light of the foregoing discussion that the two conditions contained in Article 184(3) of the Constitution were met in the instant matter, hence this Court rightly exercised its extraordinary jurisdiction thereunder. Furthermore, it is not necessary that the *vires* of the relevant statutes be specifically challenged, particularly when *prima facie* the issue is not regarding the validity of the tax but the applicability or qualifying criteria for imposition thereof. Neither the learned Attorney General for Pakistan, the respective Advocate Generals or any of the learned counsel who appeared for the cellular companies were able to justify at the relevant time how advance tax under Section 236 of the Ordinance could be recovered from persons who were not liable to pay income tax. At one stage, an offer was made to FBR by the cellular mobile companies that top up card vendors or mobile companies could be provided data regarding the taxpayer status of each sim card holder/cellular subscriber and in case he was not a taxpayer, advance tax would not be deducted from such person upon purchase or load of the top up card, respectively. Time was sought to examine the technical and financial implications of implementing such proposal but subsequently the Government resiled from its commitment to examine this issue for reasons which are quite evident. Moreover, on the very last two hearings when the matter was about to be concluded, the learned Attorney

General for Pakistan suddenly came up with the argument that Section 236 *supra* is in a Chapter which does not pertain to income tax thus it is not income tax rather special tax. The question why has it been included in the Income Tax Ordinance and why is it termed as advance tax did not receive a plausible or acceptable response.

10. My *prima facie* and tentative view on this aspect is that the advance tax imposed and collected under Section 236 *ibid* is a form of withholding tax. By providing that "Advance tax under this section shall not be collected from...a person who produces a certificate from the Commissioner that his income during the tax year is exempt from tax", sub-section (4) of Section 236 *ibid* seemingly points towards the fact that such advance tax is an income tax. Therefore, it appears that the argument of the learned Attorney General for Pakistan that the nomenclature used is not determinative of the type of tax actually loses force. Moreover, requiring a common man to obtain a certificate from the Commissioner that his income during the tax year is exempt from tax and produce the same before a top up card vendor each time he purchases a top up card, as argued by the learned Attorney General for Pakistan has appeared to me to be inherently complex and burdensome which seemingly amounts to denial of exemption from advance tax under Section 236 of the Ordinance. In view of the above, the bench was justified in forming the *prima facie* view that the Government was taking property, i.e. money, of cellular subscribers without due process, or backing, of law which was patently expropriatory and constituted undue enrichment at the cost of helpless and hapless citizens mostly belonging to the lowest income groups like plumbers, electricians, workmen, cart pushers, etc. who use mobile phones to facilitate their trade and connectivity with their customers, but who do not earn enough to make them liable to pay income tax. Collection of advance tax from them appeared to us to be an effort to recover income tax from those who were specifically exempt from paying tax by statutory provisions by devious and indirect methods without legal or

constitutional sanction. It was in this context that this Court took cognizance of the matter and granted relief.

11. Be that as it may, I am in no manner of doubt the power under Article 184(3) of the Constitution was correctly, validly and properly exercised in this matter as all conditions for invoking such powers were amply and adequately met. Further, there is no bar or impediment in the way of this Court against exercising jurisdiction in such and similar matters in the future, provided that the conditions namely it being a matter of public importance involving enforcement of fundamental rights are met. Having thus held and without commenting on the merits or otherwise of the aforementioned arguments of the learned Attorney General for Pakistan regarding the nature, vires, scope and validity of Section 236, etc of the Income Tax Ordinance, 2001 and the mode and manner in which it has been enforced, which *prima facie* involve intricate questions of law and interpretation of the Constitution and for want of adequate and proper assistance from any of the counsel who appeared before us, we are persuaded to refrain from recording any authoritative findings on the issues at this stage. We would therefore let the lower *fora* decide this matter if agitated before them. Considering the specific facts and circumstances of this case as adverted to in the preceding paragraph, we have opted (without being obliged to do so) to have the benefit of their decision(s) before finally ruling on the issue.

12. In light of the foregoing, this human rights case is disposed of.

JUDGE

Islamabad, the
24th of April, 2019
Not Approved for Reporting
ZR/*