

Form No: HCJD/C-121

JUDGMENT SHEET.

**IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.**

Sales Tax Reference No.06 of 2012

Commissioner Inland Revenue (Zone-II), Islamabad.

Versus

M/s Wise Communication System, Islamabad.

Sales Tax Reference No.07 of 2012

M/s Telenor Pakistan (Pvt.) Ltd.

Versus

Appellate Tribunal Inland Revenue and 02 others.

Sales Tax Reference No.08 of 2012

M/s Telenor Pakistan (Pvt.) Ltd.

Versus

Appellate Tribunal Inland Revenue and 02 others.

Sales Tax Reference No.09 of 2012

M/s Telenor Pakistan (Pvt.) Ltd.

Versus

Appellate Tribunal Inland Revenue and 02 others.

Sales Tax Reference No.10 of 2012

M/s Telenor Pakistan (Pvt.) Ltd.

Versus

Appellate Tribunal Inland Revenue and 02 others.

Sales Tax Reference No.11 of 2012

M/s Telenor Pakistan (Pvt.) Ltd.

Versus

Appellate Tribunal Inland Revenue and 02 others.

Applicant's by : Hafiz Munawar Iqbal, Advocate in (STR No.06 of 2012).

Barrister Ali Sibtain Fazli, Advocate in (STRs No.7/2012 to 11/2012)

**Respondent's by : Barrister Afzal Hussain and Mr. Arslan Binyamin Bhatti, Advocates in (STR No.06 of 2012).
Hafiz Munawar Iqbal, Advocate in (STRs No.07/2012 to 11/2012).**

Date of decision : 07.03.2019

AAMER FAROOQ, J. - This judgment shall decide the instant Sales Tax Reference as well as Sales Tax Reference No.7 of 2012, Sales Tax Reference No.8 of 2012, Sales Tax Reference No.9 of 2012, Sales Tax Reference No.10 of 2012 and Sales Tax Reference No.11 of 2012 as common questions of law and facts are involved.

2. In S.T.R No.06 of 2012, the applicant namely Commissioner Inland Revenue feels aggrieved of the order dated 22.06.2011 passed by Appellate Tribunal Inland Revenue, whereby, the appeal filed by M/s Wise Communication System (Pvt.) Limited was allowed and it was held that the concept of apportionment as provided in Rule 25 of the Sales Tax Rules, 2006 is not applicable to the Excise Duty on services.

3. The facts, in brief, in STR No.7 of 2012 to STR No.11 of 2012, are that the applicant was issued a show cause notice dated 26.02.2008 for the tax period December, 2005, October, 2005, August, 2005, January, 2005 and July, 2005 respectively, wherein it was alleged that the applicant has claimed inadmissible input tax on exempt supplies, the same being inadmissible under section 8(2) of the Sales Tax Act, 1990 (the Act), the said amount of input tax thus was recovered from admissible input tax claim of the applicant; the applicant filed the reply to the show cause notice, however, respondent No.3 rejected the reply filed by the applicant and passed the Impugned Order in Original dated 19.08.2008; being aggrieved, the applicant preferred an appeal before respondent No.2, however, the appeal of the applicant before the said respondent met the same fate through order dated 14.01.2009 and 15.01.2009, whereby respondent No.2 upheld the order passed by respondent No.3; being aggrieved the applicant preferred an appeal before respondent No.1. Respondent No.1 through the impugned order dated 20.09.2011 upheld the order passed by the authorities below on account of apportionment of input tax, however, decided the issue of input tax on imports, value additional tax and input tax on domestic purchases in favour of the applicant.

4. In STR No.6 of 2012 on 16.11.2015, this Court was pleased to frame the following questions of law:-

- i. Whether on the facts and in the circumstances of the case the learned ATIR was justified in setting aside the order in original and order in appeal?***
- ii. Whether on the facts and in the circumstances of the case the learned ATIR was justified to declare the "Services" as non-taxable or exempt supplies as "Taxable supplies" means "taxable goods" which includes "services"?***
- iii. Whether on the facts and in the circumstances of the case the learned ATIR was justified to set aside the order in original while the same Bench of ATIR has passed a judgment contradictory to this judgment in the case of M/s Telenor Pakistan (Pvt.) Ltd.?***

Subsequently, since similar questions were raised in other above mentioned tax references, hence, the questions framed in the instant case were held to be applicable to them as well.

5. Learned counsel for the applicant, in STR No.06 of 2012, *inter-alia*, contended that the Excise Duty is recovered, under section 7 of the Federal Excise Act, 2005 in the sales tax mode and in this behalf first time the notification was issued bearing SRO No.648(I) of 2005, dated 01.07.2005, wherein it was held that the Federal Excise Duty on services shall be levied and recovered in the sales tax mode as provided in the Sales Tax Act,

1990 and the rules framed thereunder, hence all the relevant rules which are applicable to the recovery of the sales tax are also applicable in the case of Federal Excise Duty on services. In this behalf, it was submitted that the concept of apportionment is provided in Rules 24 and 25 of the Sales Tax Rules, 2006, hence, by virtue of the notification mentioned above, the same are also applicable in the case of Excise Duty on services. It was submitted that since the assessee i.e. M/s Wise Communication System (Pvt.) Limited as well as M/s Telenor (Pvt.) Limited did not apportion the exempted excisable services from the excisable services otherwise, hence the input allowed is wrong and they are liable to refund the amount.

6. Learned counsel for the applicant, in the cases of STRs No.7 to 11 of 2012, *inter-alia*, contended that Section 7 in its present form was introduced in the year 2007, whereas the instant cases are with respect to the period December, October, August, January and July, 2005. It was contended that Section 7 at the relevant time i.e. in the year 2005 did not provide for recovery of the Excise Duty in the sales tax mode; that SRO No.648(I)/2005 came into existence on 01.07.2005 at which time under the Sales Tax Act there was no provision that held with the apportionment of input tax claim on services. It was submitted that a notification cannot be made applicable to affect the vested rights of the parties. Reliance was placed on cases reported as "*Sardar Sher Bahadur Khan Vs. Election Commission of Pakistan*"

(PLD 2018 SC 97), *"WAPDA Vs. Irtiq Hashmi"* **(1987 SCMR 359)**, *"Fazal Din & Sons (Pvt.) Ltd. Vs. Federal Board of Revenue"* **(2009 SCMR 978)**. It was submitted that Rules 24 and 25 of the Sales Tax Rules, 2006 deals with the apportionment regarding the input tax paid on raw material and not on services; that the tribunal has erred in holding that the assessee has violated Section 8(2) of the Sales Tax Act, 1990 read with Rules 24 and 25 inasmuch as the word services was inserted in Section 8(2) ibid with effect from 01.07.2008, whereas the relevant time period for the purposes of present controversy is 2005. It was further submitted that Order-in-Original was supposed to be decided by the concerned officer within a period of 120 days which was not done and the said period is mandatory in light of the recent pronouncement of the Hon'ble Supreme Court of Pakistan reported as *"Super Asia Vs. Federation of Pakistan."* **(2017 PTD 1756)**.

7. Arguments advanced by the learned counsels for the parties have been heard and the documents placed on record examined with their able assistance.

8. The crux of the controversy between the parties and the core question of law raised in the instant Tax References is that whether M/s Telenor (Pvt.) Limited and M/s Wise Communication System (Pvt.) Limited providing services in telecommunication were obliged to apportion excisable services from non-excisable while claiming refund of input tax.

9. Section 3 of the Federal Excise Act, 2005 provides for levying the Federal Excise Duty on services provided in the schedule to the Act. Telecommunication services are susceptible to Federal Excise Duty. Originally Section 7 of the Federal Excise Act, 2005 provided for adjustment of the input excisable duty. As noted above, the controversy in hand relates to the period 2005 and at the relevant time Section 7 *ibid* read as follows:-

“7. Application of the provisions of the Sales Tax Act, 1990.- *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,*

(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.

Explanation.— *For the purposes of this section, the expressions —input tax, —output tax and —tax period shall have the same meanings as are assigned to them in the Sales Tax Act, 1990 provided that the date for payment of duty under this Act shall be the date specified under sub-section (1) of section 4. ”*

10. The bare reading of the Section shows that it did not provide for recovery of the Federal Excise Duty in the sales tax mode and applicability of Sales Tax Act, 1990 and Rules framed thereunder. However, despite the said fact, a notification was issued S.R.O No.648(I) of 2005 dated 01.07.2005, which provided that the Federal Excise Duty shall be levied and charged in the sales tax mode as provided under the Sales Tax Act, 1990 and the rules thereunder with the modifications as are necessary. Probably realizing that the notification is without lawful authority inasmuch as it did not take into account the substantive law/ amendment was made in Section 7 of the Federal Excise Duty and it was specifically provided therein that the duty shall be payable in the sales tax mode. The amendment made in 2007 in Section 7 of the Federal Excise Act, 2005 regarding the recovery of the Excise Duty in the sales tax mode can be regarded as a procedural amendment. It is trite law that any amendment made in the statute, which is of the procedural in nature operates retrospectively provided it does not effect an already accrued right. Reliance is placed on "*AFTABUDDIN QURESHI and another*

Vs. Mst. RACHEL JOSEPH and another” (PLD 2001 Supreme Court 482). M/s Telenor Pakistan (Pvt.) Limited and Wise Communication System (Pvt.) Limited applied for refund pertaining to the year 2005 and at the relevant time Section 7 in its present form did not exist but only S.R.O No.648 (I) of 2005 was in existence. In so far as, the period January, 2005 is concerned. The referred notification is not applicable to it. With respect to the period from first July, 2005 onwards notification S.R.O No.648 (I) of 2005 ibid shall be applicable. Rules 24 and 25 of the Sales Tax Rules, 2006 provide for apportionment. The referred rules came into existence, vide notification bearing S.R.O No.555(I) of 2006 dated 05.06.2006, hence, at the relevant time the concept of apportionment as it exists today and is being made applicable to the above entities did not exist.

11. The department issued show cause notices to the companies in 2008 for the period 2005. Even, if the aforementioned laws i.e. Section 7 of the Federal Excise Act, 2005 and Sales Tax Rules 2006 as well as S.R.O No.648(I) of 2005 are regarded as procedural notifications the provisions mentioned above cannot be made to operate retrospectively inasmuch as they have conferred rights in favour of the above entities. The said question was examined in detail by this Court with respect to amendment made in Section 122(9) read with Section 122(5A) of the Income Tax Ordinance, 2001 in case titled "*M/s Bestway Cement Limited*

*Vs. Additional Commissioner Inland Revenue and others.” (Writ
Petition No.67 of 2016).* This Court observed as follows:-

5. *The sole question for determination before this Court is whether the amendment made in said section in 2012 through Finance Act, 2012 regarding making of inquiries shall operate prospectively or retrospectively. The amendment incorporated in Section 122(5A) ibid is procedural in nature as it provides power to the Competent Authority to make inquiries as it deems necessary, however, it affects the substantive rights of the assessee regarding the modification or change in the assessment order. In such like cases where any amendment impacts the substantive rights it is an established principle that the amendment/ law operates prospectively. The Hon'ble Lahore high court in case reported as “The Commissioner Inland Revenue v. Maj.Gen (R) Dr. C.M. Anwar etc ” (PTCL 2014 CL. 608) held that it is a trite law that even procedural law cannot take away vested rights by applying it retrospectively unless such intention of legislature is expressed in unequivocal terms; similarly the Hon'ble Sindh High Court in case titled as “ Messrs Allied Engineering Services Ltd v. Commissioner of Income tax ” (2015 PTD 2562) while examining the operation/ applicability of section 122(5A) ibid, held that the same operates prospectively and not retrospectively. In case reported as “The Commissioner of Income tax v. M/s Eli Lilly Pakistan (Pvt.) Ltd “ (2009 SCMR 1279), it was held that section 122 operates prospectively, while reaching the conclusion the august Apex Court relied upon passage from Maxwell on Interpretation of Statutes 10th edition 1953, in which it was provided that where rights and procedure are dealt with together; the intention of the legislature may well be that old rights are to be determined by the old procedure and that only new rights under the constituted section are to be dealt with by the*

new procedure. Similarly in case reported as “Zakaria H.A. Sattar Bilwani v. I.A.C of Wealth Tax, Karachi (2003) 87 Tax 113 (S.C Pak) it was observed that where any statute effects substantive rights it would operate prospectively unless by expressed enactment or necessary intendment retrospective operation has been given. Similar view was expressed in cases reported as “ Board of Revenue, Islamabad v. New Ammur Industries, Lahore” (2010) 101 Tax 193 (S.C Pak), “Caltex Oil (Pak) Ltd v. Commissioner of Income Tax, Companies-II Karachi” (2007) 95 Tax 41 (H.C Kar.). Reliance is also placed on case reported as “Monnoo Industries Ltd v. Commissioner of Income Tax, Lahore” (2001) 84 Tax 86 (H.C Lah.). In case reported as “Dr. Habib ur Rehman v. Quaid-e-Azam University” (2012 CLC 533), it was observed as follows:-

“In fact, the regulations operate retrospectively unless there is specific bar against it. The only exception to the retrospective operation of a procedural law is that if by giving it a retrospective operation, the vested right of a partly is impaired then to that extent it operates prospectively. It has repeatedly been held that the courts while interpreting a law do not legislate or create a new law or amend the existing law. The Courts through interpretation only declare the two meanings of law which already existed”.

6. Similar view was expressed by the Division Bench of Hon’ble Sindh in case reported as “Niaz Muhammad v. Federation of Pakistan” (2008 PTD 1517) and it was observed that in certain cases if procedural law affects vested right it operates prospectively and not retrospectively. In case reported as “Hakim Ali Zardari v. The State” (PLD 1998 SC 1) the august apex Court observed that procedural statute operates retrospectively unless the same affects an existing right on the date of promulgation or causes prejudice to a substantive right. It was also observed that a vested right is to be protected in all situations. The Hon’ble Supreme Court of Pakistan

in case reported as “*Adnan Afzal v. Capt. Sher Afzal*”
(PLD 1969 SC 187) observed as follows:-

“The general principle with regard to the interpretation of statutes as laid down in the well known case of the Colonial Sugar Refining Company Limited v. Irving 1901 A C 369 is that "if the matter in question be a matter of procedure only", the provisions would be retrospective. "On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act", then "in accordance with a long line of authorities extending from the time of Lord Coke to the present day", the legislation would not operate retrospectively, unless the Legislature had either "by express enactment or by necessary intendment" given the legislation retroactive effect. To the same effect are the observations of Jessel, Master of the Rolls, in the case of In re : Joseph Suche & Co. Limited (1875) 1 Ch. D. 48 where it was observed that as "a general rule when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that, these enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights." The next question, therefore, that arises for consideration is as to what are matters of procedure. It is obvious that matters relating to the remedy, the mode of trial, the manner of taking evidence and forms of action are all matters relating to procedure. Crawford too takes the view that questions relating to jurisdiction over a cause of action, venue, parties, pleadings and rules of evidence also pertain to procedure, provided the burden of proof is not shifted. Thus a statute purporting to transfer jurisdiction over certain causes of action may operate retroactively. This is what is meant by saying that a change of forum by a law is retrospective being a matter of procedure only. Nevertheless, it must be pointed out that if in this process any existing rights are affected or the giving of retroactive operation cause inconvenience or injustice, then the Courts will not even in the case of a procedural statute, favour an interpretation giving retrospective effect to the statute. On the other hand, if the new procedural statute is of such a character that its retroactive application will tend to promote

justice without any consequential embarrassment or detriment to any of the parties concerned, the Courts would favorably incline towards giving effect to such procedural statutes retroactively”.

7. *In view of the above case law it is clear that any amendment even though procedural in nature which affects the vested rights of any person operates prospectively and not retrospectively. The amendment made in section 122(5A) ibid provides power to the Commissioner to make inquiries as he deems fit. The consequence of these inquiries is that assessment order can be revised/modified which is a substantive right of an assessee. Prior to amendment in 2012 the assessment could only be revised only if the same appeared to be erroneous or prejudicial to the revenue and no information could be sought to determine the same. The new procedure which allows Commissioner to make inquiries directly affects the existing right of an assessee regarding modification or revision in assessment, hence it shall operate prospectively.”*

12. In view of the discussion above in the said case any procedural amendment which affects the vested rights operates prospectively. Likewise, the amendments made in the Sales Tax Rules, 2006 and Section 7 even if regarded as a procedural, since adversely effects the refund already taken by M/s Telenor Pakistan (Pvt.) Limited and Wise Communication System (Pvt.) Limited cannot be held to be made applicable retrospectively and shall apply prospectively.

13. In view of the above position of law and facts, the answers to questions No.1 to 3 are in negative. Since the

questions have been answered, the instant references are disposed of accordingly.

14. The copy of the instant judgment be sent to the Appellate Tribunal Inland Revenue under the seal of the Court as prescribed under the law.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

M. Zaheer Janjua