

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

WRIT PETITION NO.3562/2020

MOL Pakistan Oil and Gas Company
Vs.
The Islamabad Capital Territory Administration, etc.

Petitioner by : Mr. Muhammad Hamzah, Advocate.

Respondents by : Rana Imran Farooq, AAG.
Barrister Syeda Jugnoo Kazim, State Counsel.
Mr. Asif Jehangir Khan, Inspector Excise & Taxation Office.

Date of hearing : 15.02.2022.

SAMAN RAFAT IMTIAZ, J. Through the instant writ petition, the Petitioner (MOL Pakistan Oil & Gas Company) has assailed the challan dated 10.08.2020 issued by the Respondent No.4 for the demand of professional tax in the amount of Rs.90,000/- (“**Impugned Challan**”) in relation to the registration of three vehicles imported by the Petitioner.

2. According to the Memo of Petition, the Petitioner is a non-resident Netherlands based company engaged in the business of exploration and production of petroleum in Pakistan through its branch office since 26.05.1999. Further, that the Petitioner imported three vehicles and applied to the Respondent No.4 for registration and in this connection made payment of registration charges in the amount of Rs.1,448,144/-. Notwithstanding such payment, Respondent No.4 has issued the Impugned Challan and directed the Petitioner to submit professional tax certificate, which according to the Petitioner is neither required for registration of vehicles nor applicable upon a branch office of a foreign company and even otherwise cannot be recovered in the absence of rules providing for the mode and manner of its collection, hence the instant petition.

3. The learned counsel for the Petitioner submitted that the power to impose professional tax vests only in a Provincial Assembly under Article 163 of the Constitution of the Islamic Republic of Pakistan, 1973 (“**Constitution**”) and that too by an Act albeit within limits fixed by the Parliament. He submitted that the

erstwhile Provincial Assembly of the Province of West Pakistan enacted the West Pakistan Finance Act, 1964 whereby professional tax at the uniform rate of thirty rupees per annum was levied upon stipulated persons vide Section 11. Whereas, the same has been increased vide the Finance Act, 2019. He argued that since the Parliament is not empowered to impose such a tax under the said article of the Constitution, therefore, the Parliament could not have amended/alterd the West Pakistan Finance Act, 1964 vide the Finance Act, 2019 in respect of the professional/ tax. He further argued that in any event the provision of Section 11 of the West Pakistan Finance Act, 1964 as amended by the Finance Act, 2019 cannot be implemented without framing rules to provide for the mode and manner of the collection of the professional tax.

4. That the learned counsel further submitted that even otherwise the Petitioner is a branch office of a foreign company in Pakistan, as such has no business capital which may be seen from its audited accounts filed with the instant petition. Therefore, according to him, the demand of professional tax pursuant to serial No. 1(e) contained in the 7th Schedule as substituted by Section 4(b) of the Finance Act, 2019 is illegal and unlawful as the same applies to companies whose capital exceeds Rs.200 million. Per legal counsel, at best, the Petitioner being an employer of 151 employees would fall under serial No.1(h) contained in the 7th Schedule as substituted by Section 4 of the Finance Act, 2019 which is the category of persons with employees exceeding 25. Learned counsel for the Petitioner has relied on the judgment in the case titled *Al-karam CNG Vs. Federation of Pakistan*, 2011 PTD 1 and *Lone Cold Storage, Lahore Vs. Revenue Officers, Lahore Electric Power Company*, 2010 PTD 2502.

5. On the other hand, the learned counsel for Respondent No.1 and the learned AAG opposed the submissions of the learned counsel for the Petitioner and stated first and foremost that the instant petition is not maintainable in view of the alternate remedy of appeal available under Section 36 of the Motor Vehicle Ordinance, 1965; that disputed questions of facts cannot be resolved by this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973; that the branch office of a foreign company is regulated under the Companies Act, 2017 and as such the Petitioner cannot avoid payment of professional tax; that subsection (2) of Section 11 of the West Pakistan Finance Act, 1964 provides that the Government may by notification in the official Gazette exempt any persons from payment of professional tax but that the Petitioner has no such exemption; and that

no rules are in place specifically for the levy and collection of professional tax however procedure for collection of taxes has been prescribed by the tax collection authority i.e. ETO according to their own rules.

6. That according to the comments filed by the Respondents No. 2 to 4 the rate of professional tax has been increased by amendment in West Pakistan Finance Act, 1964 and the companies having capital exceeding PKR 200 million are liable to pay Rs.90,000/- per annum; that the Respondents No. 2, 3, and 4 being subordinate institutions of the Government are bound to collect the professional tax; the Petitioner was asked time and again to provide certificate issued by the Security and Exchange Commission of Pakistan (“SECP”) declaring the capital value of the company but the same was not provided. When asked as to how the Respondents No. 2, 3, and 4 have determined that the Petitioner has capital in excess of PKR 200 million, the Officer in attendance on behalf of the Respondents No. 2 to 4 candidly admitted that the maximum rate under the law was applied to the Petitioner as their capital could not otherwise be ascertained.

7. Arguments advanced on behalf of learned counsel for the parties have been heard and record perused with their able assistance.

Maintainability

8. On the issue of maintainability, the argument raised by the learned counsel for Respondent No.1 was that an alternate remedy was available to the Petitioner in form of Section 36 of the Motor Vehicle Ordinance, 1965 which has not been exhausted by the Petitioner before invoking the writ jurisdiction of this Court. In order to evaluate whether such appeal constitutes an adequate and efficacious remedy, Section 36 of the Motor Vehicle Ordinance, 1965 is reproduced hereunder:

“36. Appeals.—(1) Any owner of a motor vehicle aggrieved by an order of refusal to register a motor vehicle made under section 28 or to issue a certificate of fitness made under sub-section (1) of section 39 or by an order of suspension or cancellation of registration made under section 34 or 35 or by an order of cancellation of the fitness certificate made under sub-section (3) of section 39 may, within thirty days of the date on which he has received notice of such order, appeal against the order in the prescribed manner to the prescribed authority.

(2) The appellate authority shall give notice of the appeal to the original authority, and after giving opportunity to the original authority and the appellant to be heard either personally or by pleader in the appeal, pass such orders as it thinks fit.”

9. It may be seen from the above quoted provision that it allows the owner of a motor vehicle to file an appeal if he is aggrieved by any order as mentioned in sub-section 1 of Section 36 of the Motor Vehicle Ordinance, 1965. In the instant case, however, the Petitioner has not been issued any order as mentioned in the said provision of law.

10. Even otherwise, the Petitioner has impugned the challan demanding payment of professional tax on the grounds that the Parliament is not empowered to amend/alter the West Pakistan Finance Act, 1964 vide the Finance Act 2019 in view of Article 163 of the Constitution whereby only a Provincial assembly can impose taxes on trades, professions, callings and employments and that such taxes cannot be levied and collected without framing of rules. Since the question involves interpretation of Constitutional provision, therefore, the remedy of appeal provided in section 36 of the Motor Vehicle Ordinance, 1965 is neither adequate nor efficacious. As such, the present petition is maintainable.

Legislative History

11. In order to decide the controversy on merits, it is important to understand the history of professional tax. In this respect we rely upon the case of *Province of Punjab Vs. Sargodha Textile Mills Limited*, PLD 2005 SC 988, wherein the Honorable Supreme Court traced the legislative history as follows:

“10. ...The subject-matter of professional tax has a chequered legislative history. The Government of India Act, 1915, by section 111, as also the Government of India Act, 1935, by Item No.46, List II (Provincial Legislative List) of the Seventh Schedule, empowered the Provincial Legislatures of India to levy the Professional Taxes...

11. The Constitution of Islamic Republic of Pakistan, 1956, by Item No.86 (Provincial Legislative List), Fifth Schedule, empowered the provincial legislature to levy professional tax but subject to a maximum of Rs.50 per annum as fixed by Article 117. Subsequently, a departure was made by Article 141 of 1962 Constitution, Article 164 of Interim Constitution of 1972 read with its Item No.43, List II (Provincial Legislative List) Fourth Schedule and Article 163 of the Constitution of Islamic Republic of Pakistan, 1973, which provided that a professional tax imposed by a provincial law would not exceed such limits as might be fixed from time to time, by an Act of Parliament/Central Legislature. Article 163 of 1973 Constitution reads as under:--

“A Provincial Assembly may by Act impose taxes, not exceeding such limits as may from time to time be fixed by Act of Parliament, on persons engaged in professions, trades, callings or employments, and no such Act of the Assembly shall be regarded as imposing a tax on income.”

It is now left to the Parliament to fix, by law, the total amount of professional taxes that can be levied and collected by or under an Act of the Provincial Assembly.

12. As mentioned above, the Central Legislature also enacted a law called the

Professions Tax Limitation Act No. XX of 1941. Section 2 thereof laid down that notwithstanding the provisions of any law for the time being in force, the professional taxes payable would cease to be levied to the extent they exceeded Rs.50 per annum. The Act of 1941 continues to be in force as an existing law and is also protected by virtue of Articles 268 and 279 of the Constitution of Islamic Republic of Pakistan, 1973. It was amended by the Federal Laws (Revision and Declaration) Ordinance No. XXVII of 1981. The Parliament enacted the Finance Act No. VI of 1999 on 30-6-1999, whereby the pre-existing maximum limit of Rs.50 of the professional tax, was enhanced to Rs. 1,00,000 per annum.

13. The erstwhile Provincial Assembly of West Pakistan enacted the West Pakistan Finance Act No. XXXIV of 1964. By section 11 thereof, a professional tax at the uniform rate of thirty rupees per annum was levied, and collected from persons including companies (i) who were assessed to income tax under the Income Tax Act, 1922, in respect of earnings or income from any profession etc. (ii) or to agriculture income tax or had paid revenue in excess of Rs.250 (iii) legal practitioners (iv) income tax practitioners (v) clearing agents (vi) contractors supplying goods and commodities and providing services to the Central or Provincial Governments or any local authority and (vii) holders of a license under the Import and Export (Control) Act, 1950. The professional tax was in addition to any other tax or fee that might be payable under any other law. It would be seen that the imposition of professional tax of Rs.30 for a financial year was within the maximum limit of 50 rupees per annum permitted by the Central Act of 1941.”

12. For our purposes, it is important to note that the Central Legislature enacted the Professions Tax Limitation Act, 1941, where under the maximum rate of professional tax was fixed at Rs. 50 per annum. At this juncture, it is important to recall that in the year 1962, the Constitution of Islamic Republic of Pakistan was enacted wherein it was stated that the territories of Pakistan shall comprise of:

- “(i) Province of East Pakistan;
- (ii) Province of West Pakistan;
- (iii) Such States and territories as are or may become included Pakistan whether by accession or otherwise”

13. Accordingly, the Provincial Assembly of West Pakistan enacted the West Pakistan Finance Act, 1964, whereby professional tax was fixed at the uniform rate of thirty rupees per annum on stipulated persons including companies under Section 11. This rate was within the limit set by the Professions Tax Limitation Act, 1941. The rate of professional tax was lastly increased to Rs.100,000/- vide Finance Act, 2006.

14. The Province of West Pakistan was dissolved through the Province of West Pakistan (Dissolution) Order, 1970 and in its place four new provinces and centrally administered areas including the Islamabad Capital Territory (“ICT”) were constituted vide Section 2 thereof.

15. In the year 1973, the Constitution was enacted including Articles 268 and 279 of the Constitution, which provide protection to existing laws until they are

altered or repealed or amended by the appropriate Legislature and to taxes until they are varied or abolished by Act of the appropriate Legislature.

16. Thereafter, Section 11 along with the Seventh Schedule of the W.P. West Pakistan Finance Act, 1964 as in force in the ICT were substituted vide Section 4 of the Finance Act, 2019 as follows:

4. **Amendment of West Pakistan Finance Act, 1964 (W.P. Act No. XXXIV of 1964).**- In the West Pakistan Finance Act, 1964 (W.P. Act No. XXXIV of 1964), as in force in the Islamabad Capital Territory,-
- (a) for section 11, the following shall be substituted, namely:-
11. **Tax on trades, professions, callings and employments.**– There shall be levied and collected from the persons and companies of the categories specified in column (2) of the Seventh Schedule per annum, a professional tax at the rate as specified in column (3) of that Schedule in the prescribed manner”; and
- (b) for the Seventh Schedule, the following shall be substituted, namely;-

Seventh Schedule		
[See section 11]		
S. No.	Categories	Rates of tax per annum in ICT in Rupees
(1)	(2)	(3)
1.	Companies registered under the Companies Act 2017 having;	
a.	Capital Upto PKR 5 million but not exceeding PKR 10 million	7,000
b.	Capital exceeding PKR 10 million but not exceeding PKR 50 million	18,000
c.	Capital exceeding PR 50 million but not exceeding PKR100 million	35,000
d.	Capital exceeding PR 100 million but not exceeding PKR200 million	80,000
e.	Capital exceeding PKR200 million	90,000
f.	Employees not exceeding 10	1000
g.	Employees exceeding 10 but not exceeding 25	2,000
h.	Employees exceeding 25	5,000
2.	Lawyers	1,000
3.	Members of Stock Exchanges	5,000
4.	Money Changer	3,000
5.	Motorcycle Dealers	5,000
6.	Motor Car Dealers and Real Estate Agents	10,000
7.	Health Clubs, Gymnasiums and Others	5,000
8.	Recruiting Agents	10,000
9.	Jewellers, Departmental Stores, Electronic Goods Stores, Cable Operators, Printing Presses and Pesticide Dealers	1,000
10.	Tobacco Vendors - Wholesalers	2,000
11.	Medical consultants or specialists anddental surgeons	5,000
12.	Registered medical practitioners	2,000
13.	others	1,000.”

Power of Parliament to amend West Pakistan Finance Act, 1964

17. I will first take up the Petitioner’s argument that the Parliament could not have amended the West Pakistan Finance Act, 1964 vide the Finance Act, 2019 as the Parliament is not empowered to impose professional/trade tax under Article 163 of the Constitution. The said argument is fallacious in view of Article 142(d) of the Constitution, which recognizes the exclusive domain of the Federal Legislature to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province.

18. Article 1(2) of the Constitution describes the territories of Pakistan as follows:

“The territories of Pakistan shall comprise:

- a) the Provinces of Baluchistan, the Khyber Pakhtunkhwa, the Punjab and Sindh;
- (b) the Islamabad Capital Territory, hereinafter referred to as the Federal Capital; and
- (c) such States and territories as are or may be included in Pakistan, whether by accession or otherwise.”

It may be seen that the ICT has been placed as a separate territory from the provinces under Article 1(2) of the Constitution, thereby clearly distinguishing the area of ICT from the territory of the Provinces.

19. Given that the ICT does not fall within the area of any province under Article 1(2), only the Federal Legislature is empowered with the exclusive domain to legislate in areas not included in any province as per Article 142(d). In this regard I have relied upon a recent pronouncement of the august Supreme Court in the case of *Federal Government Employees Housing Foundation Vs. Malik Ghulam Mustafa*, 2021 SCMR 201. Therefore, the powers exercisable by a Provincial Assembly under Article 163 of the Constitution would be within the domain of the Parliament in respect of ICT. In view of the foregoing, the Parliament was indeed empowered to amend the West Pakistan Finance Act, 1964 vide the Finance Act, 2019 to the extent of ICT.

Professional Tax on Branch Office of a Foreign Company

20. Next we shall see whether the professional tax demanded vide the Impugned Challan from the Petitioner, being a branch office is valid under Section 11 of the

West Pakistan Finance Act, 1964 and the Seventh Schedule as amended vide the Finance Act, 2019 in the ICT.

21. A branch office is basically a place of business established in Pakistan by a foreign company under Part XII of the Companies Act, 2017 (“**Companies Act**”). A branch office of a foreign company is not an independent legal entity separate from the foreign company itself.

22. The terms “company” and “foreign company” have been defined under the Companies Act in sub-sections (17) and (35) of Section 2 as follows:

“company means a company formed and registered under this Act or the company law”

“foreign company means any company or body corporate incorporated outside Pakistan, which-

(a) has a place of business or liaison office in Pakistan whether by itself or through an agent, physically or through electronic mode; or

(b) conducts any business activity in Pakistan in any other manner as may be specified”

23. The above referred definitions make it abundantly clear that a foreign company is not a company registered under the Companies Act. Foreign companies with place of business established in Pakistan are indeed regulated and are required to deliver certain documentation pursuant to Sections 434 to 450 of the Companies Act but that by no means equates them to the status of companies formed and registered under the Companies Act as foreign companies are incorporated outside Pakistan and registered under the applicable law of the country of their incorporation.

24. On the other hand, professional tax as per Section 11 of the West Pakistan Finance Act, 1964 as amended vide the Finance Act, 2019 for the ICT is levied and collected only from the persons and companies of the categories specified in column (2) of the Seventh Schedule. Serial No. 1 of the Seventh Schedule as substituted by Section 4(b) of the Finance Act, 2019 pertains to “*Companies registered under the Companies Act, 2017*” and lists sub-categories of such companies from (a) to (e) whose capital falls within the different brackets as stipulated therein and from (f) to (h) whose employees are of the stipulated number. Therefore, in light of the definitions of “company” and “foreign company” under the Companies Act as reproduced herein above, none of the sub-categories under serial No. 1 contained in the Seventh Schedule to Section 11 of

the West Pakistan Finance Act, 1964 as substituted vide Section 4 of the Finance Act, 2019 apply to a place of business/branch office established by a foreign company in Pakistan as they are only applicable to companies registered under the Companies Act.

25. For all the foregoing reasons, issuance of the Impugned Challan in the amount of Rs.90,000/- (which is applicable upon a company registered under the Companies Act, 2017 having capital exceeding PKR 200 million) to the Petitioner, being a branch office of a foreign company is *ultra vires* the West Pakistan Finance Act, 1964 as amended vide Section 4 of the Finance Act, 2019.

26. For what has been discussed above, the petition is **allowed** to the extent that the Impugned Challan dated 10-08-2020 in the amount of Rs.90,000/- issued to the Petitioner, being branch office of a foreign company is set aside as *ultra vires* the West Pakistan Finance Act, 1964 as amended vide Section 4 of the Finance Act, 2019.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court on _____.

JUDGE

JUNAID

Approved for Reporting
Blue Slip added.