

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

**CASE NO. : FERA NO.11-2015**  
**Commissioner Inland Revenue (Legal), LTU, Islamabad**  
**Vs.**  
**M/s WI-TRIBE, Islamabad**

**CASE NO. : FERA NO.13-2015**  
**Commissioner Inland Revenue (Legal), LTU, Islamabad**  
**Vs.**  
**M/s WI-TRIBE, Islamabad**

**Applicant by : Mr. Adnan Haider Randhawa, Advocate**  
**Respondent by : Sayyid Murtaza Ali Pirzada, Advocate**  
**Date of hearing : 22.02.2018**

**AAMER FAROOQ J.** Through this judgment, we propose to decide instant Federal Excise Reference Application No.11-2015 as well as FERA No.13-2015, as common questions of law and facts are involved.

2. The facts, leading to filing of above References, are that M/s WI-TRIBE, Islamabad, which holds the 'Wireless Local Loop License' issued by Pakistan Telecommunication Authority, was issued show cause notices for non-payment of Federal Excise Duty on account of services covered within the ambit of 'Telecommunication Services'. The referred show-case notices were issued for the period January, 2011 to December, 2012 for violating Section 7 of Federal Excise Act, 2005 read with Section 16 thereof. M/s WI-TRIBE filed reply to the said show-cause notices, however the matter was decided against the 'Registered Person' and resultantly, Order-in-Original No.7 dated 25.02.2014, was passed. The respondent filed appeal before Commissioner Inland

Revenue (Appeals) and vide Order-in-Appeal No.509 dated 16.05.2014, Order-in-Original was upheld. Second appeal was preferred by the 'Registered Person' before Appellate Tribunal Inland Revenue, Islamabad, which was decided in favour of the respondent vide order dated 10.03.2015 and it was held that since the 'internet services' are exempted from Federal Excise Duty hence 'voice content', which is run on internet, is also exempted.

3. Learned counsel for the applicant, *inter alia*, contended that under Federal Excise Act, 2005, Excise Duty is levied on *inter alia* the services rendered. In this behalf, it was contended that telecommunication services are susceptible to payment of Excise Duty being 'services'. In this behalf, it was contended that under Table-II of First Schedule to the Federal Excise Act, 2005, telecommunication services are charged with Excise Duty @ 18-1/2 % of the charges and this is mentioned at Serial No.6. It was further contended that though 'internet services' are exempted from payment of Excise Duty under Table-II of Third Schedule to 2005 Act yet the Duty, which is being demanded from the respondent/'Registered Person', is with respect to 'voice content' i.e. telephone is made through applications which are being run/rendered via internet by the 'Registered Person'. In this behalf, it was contended that when the customer through various applications i.e. whats app, Skype etc., makes telephonic communication., the same are to be charged inasmuch as on telecommunication services, Excise Duty is leviable; hence such like services, which are being run on internet, are also liable to Federal Excise Duty.

4. Learned counsel for the respondent, *inter alia*, contended that Federal Excise Duty on 'internet services' is exempted under Federal Excise Act, 2005. It was contended that even-otherwise, though certain applications, which are run on internet, do have 'voice content' i.e. telecommunication option, however, same cannot be discerned/bifurcated or segregated from internet usage by the customer. In this behalf, it was contended that under section 12 of 2005 Act, the determination of value for the purposes of the Duty on 'services', is at a rate dependent upon the charges hence the Duty is to be paid on total amount of charges for the services including the ancillary facilities or utilities. Learned counsel drew the attention of the Court towards meaning of the words 'value of supply' as provided in Sales Tax Act, 1990, means 'the consideration in money including all Federal and Provincial Duties and Taxes'. In this backdrop, it was contended that it is not possible that the value of services rendered through 'voice content' can be discerned by the data used by any customer. It was further contended that applications like Skype, Whats App etc. are used through an account created by the user and is free of cost and the internet provider, as such, has no connection with it and/or cannot monitor the actual usage inasmuch as the services of the applications provider i.e. Skype or Whats App, are used by the customer directly and the 'Registered Person' is only providing the 'internet services'. It was also contended that content between the customer and the application provider is free of cost hence determination of the charges is not possible. It was further pointed out that WI-TRIBE has 'Local Loop

Service License’ and only provides the ‘internet services’ and not the ‘telecommunication services’, for which, it can charge from the customer. The charges, which are collected from the customer by WI-TRIBE, are only for the internet use on which, either browsing and downloading is done or applications like Skype or Whats App are used. It was further submitted that where there is an ambiguity or confusion qua the taxing statutes, same are to be resolved in favour of the taxpayer. Reliance was placed on cases reported as ‘Zilla Council Jehlum through District Coordination Officer Vs. Messrs Pakistan Tobacco Company Limited and others’ (PLD 2016 SC 398), ‘Messrs Mehran Associates Limited Vs. The Commissioner of Income Tax, Karachi (1993 SCMR 274), ‘Government of Pakistan and others Vs. Messrs Hashwani Hotel Limited’ (PLD 1990 Supreme Court 68) & ‘Ihsan Yousaf Textiles Pvt. Ltd. Vs. Commissioner of Income Tax’ (2015 PTD 812).

5. Arguments advanced by learned counsels for the parties have been heard and the record perused with their able assistance.

6. The facts, leading to filing of above References, have been mentioned hereinabove.

7. This Court, after hearing preliminary arguments by learned counsel for the applicant, framed the questions of law on 30.06.2015, which are as follows: -

- i) *Whether on the fact and in the circumstances of the case learned ATIR was justified to delete the levy of Federal Excise Duty on voice content of certain applications viz-a-viz internet services whats app and skype notwithstanding the fact that the telecommunication services having voice component are clearly liable to levy of FED, under subsection (1) of*

***section 14 read with section 7 of the Federal Excise Act, 2005?***

- ii) Whether on the fact and in the circumstances of the case the assessing officer or CIR (A) in the absence of any break-up of the internet services into voice and non-voice component was justified to adopt a certain percentage relating to voice content liable to levy of FED?***

8. The question, before the Court, is primarily that certain services are liable to payment of Federal Excise Duty or not as provided under section 3 of Federal Excise Act, 2005 (the Act). In this regard, it is observed that in case of ‘services’, the liability to pay the Duty is of the ‘Registered Person’ rendering services in Pakistan. Under Section 12(2) of the Act, the determination of value for the charges on payment of Federal Excise Duty is at a rate which is dependent upon the charges imposed by the service provider on the user therefore the Duty is to be paid on total amount of charges for the ‘services’ including the ancillary facilities or utilities regardless of the fact whether such ‘services’ have been rendered or provided on payment of charges or free of charges or on any concessional basis. The telecommunication services are susceptible to payment of Federal Excise Duty under Table-II of First Schedule to the Act and finds mention at Sr. No.6 of the said Table. Certain services are exempted from payment of Federal Excise Duty and those are mentioned in Table-II of Third Schedule to the Act. In this regard, the Entry at Sr. No.2 has the following caption:-

## **2. Telecommunication Services:**

- i) Internet services whether dialup or broadband including email services, Data Communication Network Services (DCNS) and Value added data services”***

The bare perusal and comparison of the referred Entry i.e. Entry in Table-II of First Schedule to the Act and the one in Table-II of the Third Schedule to the Act, shows that telecommunication services generally are susceptible to payment of Federal Excise Duty, however, telecommunication services which are *inter alia* run through internet, are exempted from levy of Federal Excise Duty hence the argument by learned counsel for the applicant that telecommunication services, which are provided through applications run on internet, are liable to payment of Federal Excise Duty, is erroneous.

9. Even-otherwise, the liability to pay Excise Duty is dependent upon the charges. In this regard, the respondent charges its customer either on the basis of package or on actual usage of 'internet data', which is measured in Bytes. Even when, telephonic call is made on application by the user/customer of the respondent company, he is using Bytes and there is no mechanism for the respondent company to decipher or segregate its usage as compared to when, he is using internet while browsing or downloading. The content for using telecommunication services through applications run on internet is directly between the customer and the said service provider and the respondent company has no role whatsoever in the same.

10. The Department has not devised rules, regulations or system to decipher the 'voice content' to ensure that, the certain percentage of the services provided by the respondent company, are telecommunication services. The Commissioner Inland Revenue (Appeals) devised a

mechanism by holding that 30% earnings of the respondent company are out of telecommunication services which is totally arbitrary and whimsical and was rightly rejected by the learned Appellate Tribunal Inland Revenue.

11. It is an established principle that where a tax statute provides certain concession or exemption and an ambiguity exists with respect thereto, the interpretation which is beneficial to the taxpayer is made. In this regard, support is drawn from the case reported as 'Zilla Council Jehlum through District Coordination Officer Vs. Messrs Pakistan Tobacco Company Limited and others' (PLD 2016 SC 398). In the referred judgment, the Hon'ble Supreme Court held that charging section of a fiscal statute was the key and pivotal provision which imposed a fiscal liability upon a taxpayer/person, thus it should be strictly construed and applied. It was further observed that provisions of statute should not be read in a way that would lead to obliteration of rights and liabilities that had accrued as a result of past and closed transaction. In a case reported as 'Star Textile Limited and 5-others Vs. Government of Sindh through Secretary, Excise & Taxation Department, Sindh Secretariat, Karachi and 3-others' (2002 SCMR 356), the august Apex Court observed that while interpreting tax law, there is no scope of implication; where fiscal law is unequivocal and unambiguous then it has to be looked into what clearly is stated therein and intendment and equity are not to be included. It was further observed that the general rule is that tax and equity are strangers to each other. Likewise, in case reported as 'Messrs Mehran Associates Limited

Vs. The Commissioner of Income Tax, Karachi' (1993 SCMR 274), the Hon'ble Supreme Court observed that the cardinal principles of interpretation of a fiscal statute seem to be that all charges upon the subject are to be imposed by clear and unambiguous words. There is no room for any intendment nor there is any equity or presumption as to a tax. A fiscal provision of a statute is to be construed liberally in favour of the taxpayer and in case of any substantial doubt the same is to be resolved in favour of the citizen. The above case law also makes it clear as to what has been discussed above that the 'telecommunication services' which are run on internet are exempted from levy of Federal Excise Duty and exception to the same cannot be granted by the Department when the exemption is clear and unambiguous.

12. For what has been stated above, it is clear that since the respondent is offering services exclusively run on internet therefore it is not liable to pay Federal Excise Duty to the Department in light of the exemption provided at Sr. No.2(i) of Table-II in Third Schedule to the Act.

13. Moreover, since there is no criteria for discerning the 'voice content' used on the basis of applications which are run on internet hence no arbitrary assessment can be made with respect thereto by bifurcating the internet use into 'voice and non-voice content'

14. In light of the above conclusion, answer to Question No.1 is in the **'affirmative'** and Question No.2 in the **'negative'**. The above mentioned questions are answered accordingly and the References are disposed off.



15. The copy of this judgment shall be sent to the learned Appellate Tribunal Inland Revenue under the Seal of this Court as required under the law.

**(MOHSIN AKHTAR KAYANI)**  
**JUDGE**

**(AAMER FAROOQ)**  
**JUDGE**

Announced in Open Court on \_\_\_\_\_

**JUDGE**

**JUDGE**

Approved for reporting

Zawar

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