HCJD/C-121

JUDGMENT SHEET

IN THE SLAMABAD HIGH COURT, ISLAMABAD

F.E.R.A. No.04 of 2017

M/s Mobizone Pakistan (Pvt.) Ltd.
Versus
Appellate Tribunal Inland Revenue through its Chairman, ATIR (Headquarters) and 03 others

Applicant by	:	**M/s Khalid Jawed Khan, Rashid Hafeez, and Mohammad Usman Shaukat, Advocates.**
Respondents by	:	**Mr. Adnan Haider Randhawa, AHC.**
Date of Hearing	:	**28.04.2022**

Babar Sattar, J:- The questions of law referred to us for our consideration emerge from the order passed by the learned Appellate Tribunal Inland Revenue (ATIR) dated 09.12.2016. While the applicant had framed a number of questions for our consideration, the questions that need to be adjudicated are the following:

i. Whether on the facts and in the circumstances of the case the learned Tribunal is justified in considering the Appellant's services under Heading 98.12 of second schedule to the Federal Excise Act, 2005 as telecommunication services without appreciating the fact that the Appellate is engaged in providing the value added services such as ring tones etc. and not the telecommunication services?

ii. Whether the learned Tribunal is justified in accepting the stance of respondent No.2 wherein respondent No.2 is not clear whether services of the Applicant Company falls under 9812.17, 9812.16, 9812.14 or falls under others under 9812.90?

iii. Whether the learned Tribunal is justified in considering the Appellant's services as telecommunication services by miss-reading the agreement dated 17.01.2013 between the Appellant and the service recipient?

2. Learned counsel for the applicant contended that liability had been generated against the applicant pursuant to show cause notice issued under Section 14 of the Federal Excise Act, 2005 (**"Act")** dated 19.01.2016. That in the order dated 08.02.2016 the Assistant Commissioner Inland Revenue held that the applicant was rendering telecommunication services to Pakistan Mobile Communication Limited (**"PMCL"**) and was liable for excise duty under Section 3 of the Act. He submitted that by order dated 25.05.2016 Commissioner Appeals held that the services being rendered by the applicant to PMCL included voicemail services, messaging services, short message service, wireless base services, value added services and ring tone services which were included in the category of telecommunication services and consequently upheld the assessment order. He submitted that the learned Tribunal also upheld the assessment order on the basis that the applicant had an agreement with a telecommunication cellular company to provide value added services which fell within the definition of telecommunication services under PCT heading 9812.1900 (i.e. Others) by holding that the list of telecommunication services under Serial No.6 of Table II of First Schedule of the Act was not exhaustive and there was room for including services not explicitly mentioned under the category 'Others' which is where the applicant's services fell. Learned counsel for the applicant submitted that the learned Tribunal had misconstrued the value added services agreement dated 17.01.2013 between the applicant and PMCL pursuant to which the applicant was

providing content based applications to PMCL which PMCL was making available to its telecom customers. And while value added services were defined and mentioned in the agreement, these value added services were being provided to the customers of PMCL by PMCL and the applicant's role was limited to making available to PMCL applications on the basis of which such services could be provided by PMCL to its customers. And consequently a plain reading of the agreement between the applicant and PMCL made it evident that the applicant was not in the business of telecommunication services. He submitted that to the extent that if any telecommunication services were being provided, they were being provided by PMCL to its customers and therefore any liability to collect excise duties under Section 3(1)(b) of the Act lay with PMCL and not the applicant. He submitted that the learned Tribunal did not appreciate that while the applicant had procured a Class Value Added Services (CVAS) license from Pakistan Telecommunication Authority (**"PTA"**) in the year 2007. It was not providing any licensed services to PMCL pursuant to such CVAS license and that the license had been surrendered in the year 2020. He submitted that the applicant had also sought a clarification from PTA by letter dated 04.02.2021 as to whether the services provided by the applicant to PMCL were telecommunication services that required a license. And PTA had responded and clarified by letter dated 26.02.2021 that provision of content delivery solutions by the applicant to PMCL did not require any license under the Pakistan Telecommunication (Re-organization) Act, 1996 (**"Telecom**

Act"). Learned counsel for the applicant further submitted that the services being provided by the applicant to PMCL amounted to provision of content to PMCL and could not be placed under the category 'Others' within PCT heading 9812.1990 in view of the principle of ejusdem generis as content delivery services had nothing to do with telecommunication services.

3. Learned counsel for the tax department submitted that the learned Tribunal had correctly interpreted provisions of the value added services agreement between the applicant and PMCL dated 17.01.2013 and concluded that the applicant was providing telecommunication services. And even in the event that the finding of fact rendered by the Tribunal that the application was provided telecommunication services to PMCL was incorrect, the Tribunal was the final fact-finding adjudicating forum within the scheme of taxation laws and such finding ought not to be disturbed by the High Court in its reference jurisdiction. He submitted that the definition of value added services in the value added services agreement mentioned SMS, MMS, WOP, GPRS and IVR services which fell within the scope of telecommunication services and the liability of the applicant under Section 3(1)(b) of the Act therefore did not suffer from any illegality.

4. Section 3(1)(b) of the Act levies duties of excise on various services provided in Pakistan that are specified in the First Schedule of the Act. Telecommunication services are listed at Senior No.6 of Table II of First Schedule of the Act and are included in excisable services. The only question before us is whether the services provided by the applicant to PMCL under

the value added services agreement dated 17.01.2013 can be classified as telecommunication services attracting obligations under Section 3(1)(b) of the Act. Telecommunication services are not defined under the Act but are listed under the Pakistan Customs Tariff (PCT) heading 98.12. The question thus becomes whether the applicant was providing any services to PMCL that fell within any of the sub-heads of PCT heading 98.12. We asked the learned counsel for tax department as to which sub-head was objected in the present case and he stated that voicemail messaging, SMS and MMS were all mentioned as sub-heads. The learned Tribunal however did not find that the applicant was providing voice mail, SMS or MMS services.

5. The learned Tribunal was unable to identify any of the sub-heads within PCT heading 98.12 under which the services provided by the applicant to PMCL could be classified and therefore found that the services would be placed within PCT heading 9812.1900(Others). The provision of telecommunication services in Pakistan are regulated by the Telecom Act. Section 2(v) of the Telecom Act defines telecommunication services as follows:

> *"Section.2(v) "telecommunication service" means a service consisting in the emission, conveyance, switching or reception of any intelligence within, or into, or from, Pakistan by any electrical, electro-magnetic, electronic, optical or optio-electronic system, whether or not the intelligence is subjected to re-arrangement, computation or any other process in the course of the service."*

Section 20(1) of the Telecom Act provides that "no person shall establish, maintain or operate any telecommunication system or provide any telecommunication service unless he has obtained a

license under this Act". When the definition of telecommunication service was brought to the attention of the learned counsel for the tax department, he was unable to convince us that provision of content based applications fell within such definition. The contentions of the learned counsel for the applicant on the other hand have significant force and are backed by a clarification provided by PTA-the regulator of telecommunication services under the Telecom Act-which has clarified that provision of content delivery solutions does not require a license under the Telecom Act. The clear implication of the clarification provided by PTA is that provision of content bases solutions does not amount to provision of telecommunication services that requires a telecommunication license for provision of such services.

6. We find that the learned Tribunal has misunderstood the scope of telecommunication services and also misread provisions of the value added service agreement between the applicant and PMCL. Under the said agreement the applicant is responsible for providing content based applications to PMCL. And through its telecommunication system, PMCL is making such content available to its telecom customers, for which purpose PMCL had been issued the requisite license by PTA. The applicant is not emitting any "intelligence" by any "electrical, electro-magnetic, electronic, optical or optio-electronic system" due to which its services could be classified as telecommunication services in accordance with the definition under Section 2(v) of the Telecom Act. The applicant is creating content based applications and providing them to PMCL. PMCL is

providing SMS, MMS, WAP, GPRS and IVR services to its own customers and such customers are able to access, through the telecommunication service being provided to them by PMCL, the content based applications made available by the applicant to PMCL. So while value added services is a term defined under the value added services agreement between the applicant and PMCL, such value added services are being provided by PMCL to its customers, which in turn is being enabled to do so due to provision of content based applications by the applicant to it. This is evident from a reading of clause 5 of the value added services agreement between the applicant and PMCL. The applicant and PMCL then have a revenue sharing arrangement which is contingent on the number of customers using the value added services being provided by PMCL, which value added services are enabled by the content based applications provided by the applicant to PMCL.

7. In the aforementioned scheme, there is no telecommunication service being provided by the applicant to mobile users who are availing cellular services being provided by PMCL. It appears to us that this important fact escaped the attention of the learned Tribunal. A perusal of the judgment of the learned Tribunal reflects that it was the learned Tribunal's understanding that even if a singer were to enter into a contract to sing songs live, which were available to telecom users on-demand who could dial-in to listen to the singer, such singer would be deemed to be providing telecommunication services. We are afraid that this understanding of provision of telecommunication service is incorrect. Provisions of

telecommunication services is a licensed activity regulated by the Telecom Act, the administration of which is vested in PTA as a telecom regulator. Provisions of telecommunication services without procuring the relevant license is illegal under Section 20 of the Telecom Act. It appears that the learned Tribunal did not appreciate that while the applicant had procured a CVAS license dated 21.03.2007, the services being rendered pursuant to the value added services agreement between the applicant and PMCL were not services that required a CVAS license. Merely because the license granted by PTA to the applicant is titled Data Class Value Added Services and the agreement between the applicant and PMCL is also titled Value Added Service Agreement, it cannot be automatically assumed that in view of the nomenclature the services being provided under the agreement are telecommunication services. The Telecom Act is a special law which defines telecommunication services and as the Act does not define telecommunication services, in order for liability for payment of excise duty under Section 3(1)(b) of the Act to arise, the telecommunications services in question would need to fall within the definition as provided in Section 2(v) of the Telecom Act.

8. In the present case, the services being provided by the applicant to PMCL are not telecommunication services but are services for provision of content delivery application which cannot be confused with provision of telecom services as also clarified by PTA. We therefore, find that the services being rendered by the applicant to PMCL under the value added services agreement dated 17.01.2013 were not excisable

services and the applicant had no obligation under Section 3(1)(b) of the Act read together with Serial No.6 of Table II of First Schedule to the Act in relation to such services. And that the learned Tribunal in finding otherwise fell into error. We answer the questions raised for our consideration accordingly.

9. A copy of this order is directed to be sent to the Registrar of the learne Tribunal under the seal of this Court.

(CHIEF JUSTICE) **(BABAR SATTAR)**
JUDGE

Announced in open Court on 27/06/2022.

M.A. Raza