JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.871 of 2018
Sardar Muhammad Ashraf D. Baloch
Versus
National Highway Authority and another

Petitioner by:	Mr. Babbar Ali Khan, Advocate
Respondents by:	M/s Zopash Khan and Fahad Ikram, Advocates
Date of Hearing:	**05.10.2022**

Sardar Ejaz Ishaq Khan, J:

1 BACKGROUND

1.1 The petitioner company constructs roads and bridges. The National Highway Authority (**NHA**), respondent no.1 in the petition, awarded a contract in 2017 to the petitioner to construct a substantial section of the Hakla to DI Khan Motorway including an interchange. The construction contract incorporates the 1992 FIDIC Conditions of Contract for Works of Civil Engineering Construction. The specifications and priced bill of quantities of the works to be performed under the construction contract run into hundreds of pages incorporating an end-to-end range of construction activities ranging from earth excavation to concrete pouring and supply of all goods and materials including cement, bitumen, aggregate, steel, etc. required to deliver a finished motorway section ready for use by the motorists. The contract pricing follows the unit pricing method whereby the price for each finished sub-item of the overall works is priced inclusive of the supply of goods, materials and any incidental services for the construction works.

1.2 The petitioner was aggrieved when NHA deducted 1% of the contract price from its interim payment certificates on account of Punjab sales tax on services, levied vide notification no. SO (TAX) 5–24/2016, dated 05.10.2016, issued by the Government of the Punjab, Finance

Department (the "**2016 notification**"), which, in material part, reads as follows:

GOVERNMENT OF THE PUNJAB
FINANCE DEPARTMENT

October 05, 2016

NOTIFICATION

No. SO (TAX) 5–24/2016. In exercise of the powers conferred under subsection (2) of section 10 of the Punjab Sales Tax on Services Act 2012 (XLII of 2012), Governor of the Punjab, on the recommendation of the Punjab Revenue Authority, is pleased to declare that the tax on the services specified in column (2) provided for the civil works specified in column (4) of Table 1 below, shall be charged, levied and collected at the rate specified in column (3) of the said Table subject to the conditions, limitations and restrictions specified in Table 2:

TABLE 1

Sr. No.	**Description of service**	**Tax rate**	**Applicability**
1	2	3	4
1.	…	…	…
2.	Construction services and services provided by contractors of building (including water supply, gas supply and sanitary works),roads and bridges, electrical and mechanical works (including air conditioning),horticultural works, multi-discipline works (including turn-key projects) and similar other works	1%	Government civil works including those of cantonment boards involved in the new development schemes and projects which are: i. funded under the Annual Development Plan of the Punjab Government; ii. funded through foreign loans where the negotiations have not been finalised as on 1st of July 2016; ii. funded under Public Sector Development Program of the Federal Government; or iv. funded by cantonment boards.

1.3 Vide order dated 07.05.2018, NHA was allowed to continue to make the deductions but was restrained from transmitting the deducted sums to respondent no. 2, the Punjab Revenue Authority (**PRA**).

2 COUNSELS' SUBMISSIONS AND ANALYSIS

2.1 The memo of the petition, and the petitioner's counsel's submissions at the bar, span several grounds, but the mainstay of his submissions was two-fold: *firstly*, that the 2016 notification did not apply to the construction contract in question, and, *secondly*, that the construction contract was one for 'works' and not for 'services'.

2.2 He elaborates for the first submission that the expression 'Government' is defined in section 2(25) of the Punjab Sales Tax on Services Act 2012 (the "**PST Act**") as the Government of Punjab and that, accordingly, the notification was applicable only to civil works carried out on the projects of the Government of Punjab and not on the Federal Government's projects. It is admitted that the project in this case was a Federal Government project for being a part of the national highways.

2.3 Learned counsel for the PRA responds that section 2(29) defines a 'Person' to mean both the Federal Government and the Provincial Government. However, the 2016 notification in column 4 uses the word 'Government', and not 'Person', in describing the civil works for which the Punjab sales tax (**PST**) is to be charged, levied and collected. It is a basic principle of interpretation of delegated legislation that the expressions used therein carry the meaning given in the parent legislation. It is not for this Court to read the word 'Person' in place of the word 'Government' in column 4 of Table 1 of the 2016 notification. Therefore, the word 'Government' has to be taken to mean the Punjab Government, and on this score the petitioner succeeds.

2.4 Precedents abound that the words of a notification are of paramount importance in determining the incidence of taxation.[1] The taxes on the services specified in column 2 were levied on the civil works specified in column 4 of Table 1. As the civil works in this case were not the Punjab Government's, they did not fall within the purview of column 4 of Table 1 and ceased to remain '*civil works specified in column 4*'.

2.5 The second major submission is that the construction contract was not a contract for services but for construction 'works', which is a compendious term in the construction industry to include supply of goods, materials, items, machinery, equipment, labour and other incidental activities including skilled and unskilled services for the delivery of the completed asset to the employer. Learner counsel cites in this respect the Pakistan Engineering Council's approved standard contract documents approved by the Executive Committee of National Economic Council (ECNEC) on 12.02.2008. He contends further that NHA procured the construction contract through public bidding under the Public Procurement Regulations, 2008, regulation 3 whereof stipulates that "*A procuring agency when engaged in procurement of works, shall use the standard form of bidding documents prescribed by the Pakistan Engineering Council constituted under the Pakistan Engineering Council Act, 1975."* He contends that NHA, being a specialist construction engineering and works procurement agency, knew full well that the construction contract between the petitioner and the NHA was not a contract for construction services but one for construction works, and that NHA's deduction of the PST that was applicable only to 'construction services' per column 2 of the 2016 notification, was therefore an act of wilfully contumacious extension of 2016 notification to the construction contract. Learned counsel's submission is that the contract was primarily one for supplying a 'finished product' that was to become fastened to the earth making it an

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[1] See Collector of Customs versus Marosh (2020 SCMR 579), citing Collector of Customs and others versus Ravi Spinning Mills Ltd and others (1999 SCMR 412)

immovable property of NHA, and not merely for engineering and construction services that would be meaningless on their own. Put another way, he says that the services are only incidental to the supply of the finished product, called 'works' in the construction industry. He derives strength by reference to the distinct meanings given to the words 'works' and 'services' in various legislations, including the PST Act and the Public Procurement Regulatory Authority Ordinance, 2002 (**PPRA Ordinance**).

2.6 The word 'services' is defined in section 3(38) of the PST Act as follows:

> "Service" or "services" means anything which is not goods or *providing of which is not a supply of goods* and shall include but not limited to the services listed in the first schedule;
>
> **Explanation**. – A service shall remain and continue to be treated as service regardless whether or not rendering thereof involves any use, supply or consumption of any goods either as an essential or as an incidental aspect of such rendering;" (emphasis supplied)

2.7 The PPRA Ordinance defines 'service' and 'works' as follows:

> "service" means any object of procurement other than goods or works; and
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> "works" means any construction work consisting of election, assembly, repair, renovation or demolition of a building or structure or part thereof, such as site preparation, excavation, installation of equipment or materials and decoration, finishing and includes incidental services such as drilling, mapping, satellite photography, seismic investigations and similar activities, if the value of those services does not exceed that of the works themselves."

2.8 Neither NHA nor the PRA had been able to rebut these submissions. Simply calling construction works as construction services, which both NHA by its conduct and PRA by its submissions claim, is no answer to an express recognition to the contrary in the construction industry. Nor does it justify regarding 'works' and 'services' as interchangeable concepts, given the deeply entrenched distinct meanings of these two

concepts in the construction industry, the recognition of which appears in the items of legislation aforementioned.

2.9 The Explanation to section 3(38) of the PST Act cannot be turned on its head so as to make a contract for works one for services solely because the works entail, as they invariably do, some services incidental to the performance of the works. A contract between an architect and her customer, and a contract between a builder and his employer, are not the same contracts. An architect may supply detailed drawings and building models made of plaster to its customer, but it would nonetheless remain a contract for service because the supply of the paper and plaster is merely incidental to the supply of architectural services – this scenario is the one intended to be clarified by the Explanation to section 3(38) of the PST Act. No one in their right mind would call such a contract between an architect and his customer one of 'works', and it would rightfully qualify as a contract for services. But a contract for the construction of a building with the sale and supply of materials cannot be termed a contract for services, and will remain beyond the purview of the Explanation, nay, it would squarely fall within the opening part of section 3(38).

2.10 In particular, NHA is estopped from calling the construction contract as one for services, given that the construction contract throughout refers to itself as one for works. In fact, the preamble to the construction contract reads that NHA was desirous that certain works in connection with aforesaid section of the national highways should be executed by the petitioner and that NHA "*has accepted a bid by the contractor for the execution and completion of such Works*".

2.11 PRA's counsel's submission that the description of service in column 2 of the 2016 notification as *"construction services and services provided by contractors of… roads and bridges… multidiscipline works (including turnkey projects)"* suffices to bring the construction contract in question within the ambit of services is specious logic. It is premised on the fallacious reasoning that mentioning construction services in a

notification will by some legislative magic cause the distinction between construction services and construction works to disappear altogether. He does not appreciate that construction services may nonetheless be provided on a standalone basis by contractors, because the expression 'contractors' is one of the widest amplitude and includes both contractors for services and contractors for works. Where the 2016 notification in express terms confines the chargeable activity to 'construction services', then the application of the canon of statutory construction *expressio unius est exclusio alterius* necessitates that the chargeability of the PST remain confined to 'construction services' and not be extended to 'construction works'. It is commonplace for engineers and contractors to provide construction services in relation to the construction of roads and bridges on standalone basis, such as design services, soil testing services, quantity measurement services, product testing services, topographical survey services, and many others, which would properly qualify as construction services for the purposes of the 2016 notification, but not where such services are subsumed as an incidental aspect of the supply of a finished product qua 'works' comprising tangible assets.

2.12 The "dominant intention" test provides the answer. This test received a lucid expression in the judgement of a Division Bench of the High Court of Sindh authored by his Lordship Hon'ble Mr. Justice Munib Akhtar (when at the High Court of Sindh) in CP-D-3723 of 2013 in the following words:

> In our view, if the contract or activity … is multi-dimensional … then the "dominant intention" test can usefully be resorted to in order to determine whether the nature is such that it can be regarded as the providing of "construction services". It will be recalled that in this context learned counsel for the petitioners also relied upon an American case, a decision of the Court of Appeals for the 5th Circuit. This is *Propulsion Technologies Inc. v. Attwood Corporation* 369 F.3d 896 (2004). It was there held as follows (relying on a decision of the Texas Supreme Court): "In such hybrid transactions [such as

> building contracts involving the sale of both services and materials], the question becomes whether the dominant factor or essence of the transaction is the sale of materials or of services". Reference may also be made to a decision of the Court of Appeals for the 8th *Circuit, Bonebrake v. Cox* 499 F.2d 951 (1974), where multi-dimensional contracts were referred to as "mixed contracts". It was observed that such contracts were "legion", and it was held as follows; "The test … is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved… or is a transaction of sale, with labor incidentally involved…". These formulations can usefully be applied while determining whether a multi-dimensional contract is such that it constitutes the providing of "construction services".

2.13 Applying the aforesaid test, I have no hesitation in finding the construction contract in question to be one for 'works' for the supply of the finished product – the road, the bridges and the interchange – rather than one for services alone. The construction contract was to procure a fully constructed and functional motorway segment rather than procurement of services that formed only a minute and incidental part of the total value and function of the asset.

2.14 Neither NHA nor the PRA have been able to show how the contract in question is to be bifurcated, assuming if that was at all possible in a FIDIC Construction Contract for Engineering Works. NHA has deducted 1% on the entire sum of the interim payment certificates which, given the bill of quantities, overwhelmingly comprise the goods, materials and items that go in the construction of roads, bridges and interchanges. PRA's counsel has not been able to show to this Court any provision in the PST Act empowering the Provincial Government to charge or levy the PST on the supply of goods, materials and equipment, which has in fact happened in the instant case through the agency of NHA.

2.15 NHA's stance in its reply to the memo of petition was candid in acknowledging that the application of the 2016 notification to the contract in question was a question of law to be determined by this Court. In fact, NHA has already taken the plea against the PRA right up to the Appellate Tribunal[2] that it could not be brought within the ambit of the PST. NHA fiercely contested the PRA's action against NHA for failing to make the PST deductions qua withholding agent under the Punjab Sales Tax on Services (Withholding) Rules, 2012[3], which are reiterated in its reply in the instant petition, for the reasons, inter alia, that NHA is created by an Act of Parliament, that it is performing functions in connection with the affairs of the Federation by way of construction of highways and strategic roads as provided under item 34 of Part-I of the Federal Legislative List, that it is under the control of and funded 100% by the Federal Government, that its officers and employees were civil servants, and that its accounts were auditable by the Auditor General of Pakistan. It claimed on that basis that it was an instrumentality of the Federal Government and it could not be taxed for or brought within the ambit of PST for any purpose under Provincial Legislation.

2.16 The PRA's reply, however, is that the PST on the construction contract is not on the NHA, but is levied on the petitioner providing 'construction services' to the NHA and, therefore, the NHA's Constitutional standing does not matter. But this submission does not help the PRA at all because the chargeability of PST under the 2016 notification is on 'services' and not on 'persons' – the incidence of tax arises due to the taxable activity. The taxable activity under the 2016 notification is construction services provided in connection with

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[2] NHA lost up to the Appellate Tribunal. Its reference application to the Lahore High Court was dismissed for non-prosecution. However, that litigation was limited to the question whether NHA could be made a withholding agent for the PRA, and did not extend to the question decided in this petition.

[3] Noted in PRA's order-in-original dated 13.11.2017, the Commissioner (Appeals) order dated 27.02.2018, and in NHA's grounds of appeal before the Appellate Tribunal.

"Government civil works", the 'Government' meaning the Punjab Government, and irrespective of the petitioner or any other person performing the taxable activity. Accordingly, even if it is assumed that the contract in question was one for services, which assumption is invalid anyway for the reasons stated above, it did not fall within the ambit of the 2016 notification for this reason.

2.17 Despite challenging the extension of the 2016 notification on itself, and despite being a counterparty to a contract which expressly acknowledges the contract to be one for works, NHA resorted to deduction of PST only to save itself from any coercive measures by the PRA. The petitioner ended up paying the price. It is for this reason that the petitioner does not ask this Court to judge the vires of the PST, but confines itself to the plea that NHA was not entitled to apply the 2016 notification to its construction contract.

3 PRA'S OBJECTION TO JURISDICTION

3.1 The PRA contested the jurisdiction of this Court on the ground that this Court lacked jurisdiction to adjudicate on the validity of the PST and that only the Lahore High Court had jurisdiction in the matter. This contention is not correct, as this Court is not called upon to adjudicate on the vires of the 2016 notification, but is confined to finding out whether NHA's deduction of the PST from the contract price payable under the construction contract was valid or not. It is an admitted fact that NHA's headquarters are in Islamabad, the 2016 notification was invoked by NHA in Islamabad, and the deductions pursuant to that notification were also made in Islamabad. That is to say, the impugned actions occurred in Islamabad and the cause of action accrued to the petitioner in Islamabad. The petitioner does not seek any relief against the PRA; it seeks the relief only against NHA. This Court, therefore, has jurisdiction in the matter for it affects the petitioner in Islamabad. I need do no more to make this point than reproduce the following passage from the judgment in Hassan Shahjehan versus FPSC through Chairman and others (PLD 2017 Lahore 665) authored by his Lordship

Hon'ble Mr. Justice Mansoor Ali Shah (when Chief Justice at the Lahore High Court):

> "11. Constitutional terms like "High Court for each Province" "within the territorial jurisdiction of the Court" and "all courts subordinate to it" construct a High Court, which has a provincial character. The term "within the territorial jurisdiction of the Court" ubiquitously recurs throughout Article 199 emphasizing the territorial limitation on the jurisdiction of a High Court. The term "All courts subordinate to it" repeated in Articles 201, 202 and 203 place the Provincial High Court atop a provincial pyramidical hierarchy of courts. Constitutional architecture of a Provincial High Court provides that while it enjoys judicial power to examine all laws or actions of the federal, provincial and local governments or authorities, it can only do so if the cause of action arises or the respondent government or authority is located or if the impugned act or order affects a person *within the territorial jurisdiction of this Court* i.e., within the Province. As a corollary, the relief granted or the writ issued by the High Court also remains *within the territorial jurisdiction of this Court and can only benefit or affect a person within the territorial jurisdiction of the Court*. The relief cannot go beyond the Provincial boundary and affect any other Province or Area or its people. So for example, if a federal law or federal notification is struck down by Lahore High Court, it is struck down for the Province of Punjab or in other words the federal law or the federal notification is no more applicable to the Province of Punjab but otherwise remains valid for all the other Provinces or Areas. Unless of course the Federation or the federal authority complying with the judgment of the Lahore High Court, make necessary amends or withdraw the law or the notification. Which of course would then be open to challenge by the other Provinces or Areas or their people, if they so decide. The other eventuality is that the Federation or the federal authority may or may not enforce the said law or notification in other Provinces, as a matter of administrative decision and instead challenge the judgment of the Lahore High Court before the apex Court of the country. These are the operational repercussions and effects of a judgment, setting aside a federal law or federal notification or decision. However, on a purely constitutional and legal plane, the federal law or federal notification remains in existence for the rest of the country but for the Province of Punjab. This is further fortified by the fact that in case the same federal law or federal

notification is challenged in any other Province or Area, the High Court concerned is not bound by the decision of the Lahore High Court and can declare the same federal law or federal notification to be valid law (Reference Article 201 of the Constitution). Therefore, under our Constitution, while our High Courts can judicially examine and strike down a federal law or federal notification, in fact, the said federal law or notification is made non-applicable to the extent of the Province unless the matter is finally decided by the Supreme Court of Pakistan or else if the Federation or the federal authority decide to withdraw or amend the law on their own, in compliance of the judgment.

12. What does "*Within the territorial jurisdiction of this Court*" mean? Relying on our constitutional jurisprudence developed over the years and the provincial constitutional architecture of a High Court, writ cannot be issued by High Court against any person which is located geographically outside the territorial limits of the Province, having no physical or legal presence within the Province. See: Sandalbar Enterprises (Pvt.) Ltd. v. Central Board of Revenue and others (PLD 1997 SC 334), Flying Kraft Paper Mills (Pvt.) Ltd., Charsadda v. Central Board of Revenue, Islamabad and 2 others (1997 SCMR 1874), Asghar Hussain v. The Election Commission Pakistan (PLD 1968 SC 387), Messrs Al-Iblagh Limited, Lahore v. The Copyright Board, Karachi and others (1985 SCMR 758) and Messrs Sethi and Sethi Sons through Humayun Khan v. Federation of Pakistan through Secretary, Ministry of Finance, Islamabad and others (2012 PTD 1869).

13. It is trite law that if the order or action of the Government or Authority (federal or provincial), present within the Province, affect the rights of a person within the Province, writ can be issued against the said Government or Authority (irrespective of its federal character) and relief given to the aggrieved person located within the Province."

(emphasis per the original)

3.2 This Court has jurisdiction in the matter as the NHA's impugned act of deduction of PST by virtue of the 2016 notification affects the petitioner within the territorial jurisdiction of this Court.

4 THE DECISION

4.1 Resultantly, this petition is allowed and:

(i) applying the ‘dominant intention’ test, it is declared that the construction contract is one for construction works and not for construction services;

(ii) it is declared that NHA was not and is not entitled to apply the 2016 notification for the deduction of PST from the contract price payments under the construction contract in question;

(iii) NHA is directed to reimburse the PST deducted from the interim payment certificates to the petitioner; and

(iv) NHA is directed to refrain from deducting the PST under the 2016 notification from any outstanding payments of the contract price under the construction contract in question.

(**Sardar Ejaz Ishaq Khan**)
Judge

Imran

Announced in open Court on _____.

Judge