

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.2221 of 2018

Pakistan Telecommunication Authority

Versus

Additional Commissioner and others

Sr. No. of order / Proceedings	Date of Order /Proceedings	Order with signature of Judge and that of parties or counsel where necessary
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09.07.2020	Mr. Muhammad Umar Khan Vardag, Advocate for the petitioner, Syed Ishfaq Hussain Naqvi, Advocate for the respondents, Mr. Naeem Hassan, Commissioner (IR) and Mr. Israr Ahmed Cheema, Deputy Commissioner, (IR) Zone-IV, LTU, Islamabad.
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For the reasons recorded in the order of even date passed in W.P. No.1462/2020, the instant petition is also allowed. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

*Sultan**

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.1462 of 2020
M/s Pakistan Telecommunication Authority
Versus
Federation of Pakistan and others

Date of Hearing:	09.07.2020
Petitioner by:	Mr. Muhammad Mohsin Nazir, Advocate for the petitioner in writ petition No.1462 of 2020 and Mr. Muhammad Umar Khan Vardag, Advocate for the petitioner in writ petition Nos.2218/2018, 2219/2018, 2220/2018 and 2221/2018.
Respondents by:	Syed Ishfaq Hussain Naqvi, Advocate, Mr. Naeem Hassan, Commissioner (IR) and Mr. Israr Ahmed Cheema, Deputy Commissioner, (IR) Zone-IV, LTU, Islamabad.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, I propose to decide writ petition Nos.1462/2020, 2218/2018, 2219/2018, 2220/2018 and 2221/2018 since they entail common questions of law and facts.

2. Through writ petition No.1462/2020, the petitioner, M/s Pakistan Telecommunication Authority, impugns the notice dated 20.05.2020 issued by the Deputy Commissioner (Inland Revenue), Islamabad calling upon the petitioner to explain why its turnover for the September quarter of the year 2019 may not be taken as Rs.88,993,800,000/- and installment of advance tax be paid thereon. The said amount was calculated on the basis of the amounts received by the petitioner for renewal of the spectrum license fee from Cellular Mobile Operators.

3. Through writ petition No.2218/2018, the petitioner, Pakistan Telecommunication Authority, impugns the show cause notice dated 06.06.2017 issued under Section 129(9) read with Section 122(5A) of the Income Tax Ordinance, 2001 (“the 2001 Ordinance”) with respect to **tax year 2015**.

4. Through writ petition No.2219/2018, the petitioner, Pakistan Telecommunication Authority, impugns the show cause notice dated

11.05.2017 issued under Section 129(9) read with Section 122(5A) of the 2001 Ordinance with respect to tax year 2017.

5. Through writ petition No.2220/2018, the petitioner, Pakistan Telecommunication Authority, impugns the show cause notice dated 06.06.2017 issued under Section 129(9) read with Section 122(5A) of the 2001 Ordinance with respect to tax year 2014.

6. Through writ petition No.2221/2018, the petitioner, Pakistan Telecommunication Authority, impugns the show cause notice dated 03.05.2017 issued under Section 129(9) read with Section 122(5A) of the 2001 Ordinance with respect to tax year 2016.

7. Learned counsel for the petitioner drew the attention of the Court to the *proviso* to Section 49(4) of the 2001 Ordinance (which was inserted through the Finance Act, 2014), and submitted that all amounts received by the petitioner as spectrum license fees and renewal fees for such licenses after 01.03.2014 are to be collected on behalf of the Federal Government and treated as income of the Federal Government and not that of the petitioner.

8. Learned counsel for the petitioner further submitted that for the September quarter of the year 2019, a total amount of Rs.72 Billion was received by the petitioner as renewal of spectrum license fees; that the said payments were made on 02.09.2019, 03.09.2019 and 22.09.2019; that the amount received in its entirety was paid into the Federal Consolidated Fund and the relevant receipts have been made a part of the record in this petition; and that since the petitioner is only the collecting agency on behalf of the Federal Government, it is not liable to pay any income tax on such payments by virtue of the amendment to the Section 49 of the 2001 Ordinance.

9. Furthermore, it was submitted that the show cause notices are with respect to the amounts paid by the successful bidders for the sale of spectrum licenses; that the intention of the respondents is to impose tax on the amount paid by the successful bidders for the spectrum licenses; that under Section 49 of the 2001 Ordinance, the income of the Federal Government is not taxable; that under Article 165A of the Constitution, the Parliament has been declared to have the power to make a law to provide for the levy and recovery for tax on the income of a corporation etc. regardless of the ultimate destination of such income; that the said Article does not in any manner restrict the Parliament from

passing a law for the exemption of the applicability of the 2001 Ordinance on any person; that the Finance Act, 2014 is a valid piece of legislation which cannot be ignored by the respondents; that the said Act does not in any manner come in conflict with the provisions of the Constitution; that even though the petitioner submitted a reply to the impugned show cause notices, but the respondents are bent upon ignoring the mandate of the Finance Act, 2014; and that the impugned show cause notices are wholly without jurisdiction.

10. On the other hand, learned counsel for the respondents submitted that a writ petition is not maintainable against the issuance of a show cause notice; that the petitioner has already submitted replies to the show cause notices; that the petitioner has failed to point out any unlawful act or omission on the part of the respondents which violated the petitioner's fundamental rights; that the writ petitions are premature since till date no orders have been passed pursuant to the impugned show cause notices; that the writ petitions have been filed with a *malafide* intention; and that the petitioner has not filed any resolution or authorization for the filing of the writ petitions.

11. Learned counsel for the respondents further submitted that the petitioner has to pay income tax notwithstanding the ultimate destination of its income; that the petitioner's income cannot be treated as income of the Government of Pakistan, and hence is not exempt under Article 165A of the Constitution; that the proceedings under Section 147 of the 2001 Ordinance for the tax year 2020 were initiated due to the petitioner's default in paying advance tax in quarterly installments as required by law; that the estimate submitted by the petitioner for the quarter ending on September 2019, December 2019 and March 2020 shows that it had failed to take into account the amounts deposited by the Cellular Mobile Operators for the renewal of their licenses; that the petitioner's bank statements show that it had concealed the said amounts; that the petitioner was under a statutory obligation to declare the turnover in the estimate and then calculate the tax liability on the taxable income for the quarter; and that through the impugned notice dated 20.05.2020, the petitioner was simply asked to explain the said anomaly but instead of providing an explanation, the petitioner filed a writ petition before this Court.

12. Furthermore, it was submitted that Section 49(1) and (2) of the 2001 Ordinance only exempts the income of the Federal, Provincial and Local Governments from the payment of income tax; that the petitioner is not exempt from the payment of income tax under Section 49(4) of the 2001 Ordinance; that the *proviso* to Section 49(4) of the 2001 Ordinance shows that the income from the sale of the spectrum licenses and renewal thereof issued after 01.03.2014 is to be treated as income of the Federal Government whereas the exemption being claimed by the petitioner is for the renewal of the license which was issued prior to 01.03.2014; and that an amount paid to the petitioner for the renewal (after 01.03.2014) of a license issued prior to 01.03.2014 would not be treated as income of the Federal Government. Learned counsel for the respondents prayed for the writ petitions to be dismissed.

13. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

14. Under Section 49(1) of the 2001 Ordinance, the income of the Federal Government is exempt from tax under the said Ordinance. Under Section 49(2) of the said Ordinance, the income of a Provincial Government or a Local Government in Pakistan is exempt from tax under the said Ordinance other than the income chargeable under the head "*Income from Business*" derived by a Provincial Government or a Local Government from a business carried on outside its jurisdictional area. Section 49(3) provides that subject to Section 49(2), any payment received by the Federal Government, a Provincial Government or a Local Government shall not be liable to any collection or deduction of advance tax. Section 49(4) of the 2001 Ordinance provides an exception to the exemption under Section 49(1). The said sub-section (4) is reproduced herein below:-

"Exemption under this section shall not be available in the case of corporation, company, a regulatory authority, a development authority, other body or institution established by or under a Federal law or a Provincial law or an existing law or a corporation, company, a regulatory authority, a development authority or other body or institution set up, owned and controlled, either directly or indirectly, by the Federal Government or a Provincial Government, regardless of the ultimate destination of such income as laid down in Article 165A of the Constitution of the Islamic Republic of Pakistan."

15. By virtue of the Finance Act, 2014, a *proviso* to Section 49(4) of the 2001 Ordinance was inserted. The said proviso is reproduced herein below:-

Provided that the income from sale of spectrum licenses by Pakistan Telecommunication Authority on behalf of the Federal Government after the first day of March 2014 shall be treated as income of the Federal Government and not of the Pakistan Telecommunication Authority."

16. Through the Finance Supplementary (Second Amendment) Act, 2019 (enacted on 10.03.2019), the words "*and renewal thereof*" were inserted in the proviso to Section 49(4) of the 2001 Ordinance after the words, "spectrum licenses". The amended proviso read as follows:-

Provided that the income from sale of spectrum licenses [and renewal thereof] by Pakistan Telecommunication Authority on behalf of the Federal Government after the first day of March 2014 shall be treated as income of the Federal Government and not of the Pakistan Telecommunication Authority."

17. Through the impugned show cause notices, the respondents required the petitioner to amend its assessment for the tax years 2014, 2015, 2016 and 2017 so as to offer for taxation the entire amount received from the Cellular Mobile Operators as spectrum license fees or the renewal fees of such licenses. The position taken by the respondents in the said show cause notices was that the tax exemption being claimed by the petitioner was "*prejudicial to the interest of revenue,*" and that Article 165A of the Constitution had an overriding effect on the *proviso* to Section 49(4) of the 2001 Ordinance.

18. Vide letter dated 20.05.2020, the petitioner was required to pay advance tax under Section 147 of the 2001 Ordinance by including the amounts credited to the petitioner's account as renewal fee of the spectrum licenses.

19. The position taken by the petitioner before the respondents was *inter alia* that the amount received by the P.T.A. from the Cellular Mobile Operators had been deposited in its entirety in the Federal Consolidated Fund. This deposit had been made after the Finance Division requested the petitioner to surrender the funds received from the Cellular Mobile Operators on account of renewal of spectrum licenses.

20. It is not disputed that the amount received from the Cellular Mobile Operators as renewal fees of the spectrum licenses has been deposited in its entirety by the petitioner in the Federal Consolidated Fund. It is not the respondents' case that the petitioner has retained or withheld any of

the amount received as renewal fee of the spectrum licenses from the Cellular Mobile Operators.

21. Since Section 49(1) of the 2001 Ordinance provides that the income of the Federal Government shall be exempt from tax under the 2001 Ordinance, and since the proviso to Section 49(4) of the said Ordinance clearly provides that the income from the sale of the spectrum licenses and renewal thereof by the petitioner on behalf of the Federal Government after 01.03.2014 shall be treated as income of the Federal Government and not that of the petitioner, it is my view that the respondents could not call upon the petitioner to pay income tax on the amounts received by the petitioner from the Cellular Mobile Operators for the sale of the spectrum licenses or their renewal after 01.03.2014. Such a demand would be in absolute contradiction to the mandate of the law set out in the proviso to Section 49(4) of the 2001 Ordinance.

22. Learned counsel for the respondents had also submitted that the exemption from the payment of tax claimed by the petitioner would not apply to the renewal fee which was deposited for those spectrum licenses which were granted prior to 01.03.2014. He had also submitted that since the amounts deposited as renewal fees of the spectrum licenses were by those Cellular Mobile Operators who had initially been granted spectrum licenses prior to 01.03.2014, the proviso to Section 49(4) of the 2001 Ordinance was not applicable to such renewal fees received by the petitioner.

23. I do not find any merit in the said contention of the learned counsel for the respondents since the same is not in accord with the language employed by the legislature in the *proviso* to Section 49(4) of the 2001 Ordinance. Had it been the intention of the legislature to exclude the renewal fees received by the petitioner for the renewal of the spectrum licenses that had been granted prior to 01.03.2014, it would have been explicitly so provided in the proviso to Section 49(4) of the said Ordinance. After a careful read of the said *proviso*, I am of the view that any amount paid to the petitioner for the sale of the spectrum licenses after 01.03.2014 or their renewal after 10.03.2019 is to be treated as income of the Federal Government, and therefore not taxable.

24. Another crucial feature of this case is that the petitioner has not retained with itself any amount received from the Cellular Mobile Operators as a fee for the sale of the spectrum licenses or their renewal

fees after 01.03.2014. This amount has admittedly been deposited in the Federal Consolidated Fund. The petitioner simply acts as an agency for the Federal Government for conducting the competitive process for the award of spectrum licenses to the Cellular Mobile Operators. The rationale behind the insertion of the *proviso* to Section 49(4) of the 2001 Ordinance is that the petitioner should not be taxed for receiving an amount for and on behalf of the Federal Government, which amount is then deposited in its entirety in the Federal Consolidated Fund. It is not disputed that the owner of the spectrum is the Federal Government, whereas the petitioner is simply a regulator and is responsible for conducting the auction of the spectrum on behalf of the Federal Government.

25. As mentioned above, the *proviso* to Section 49(4) of the 2001 Ordinance was amended through the Finance Supplementary (Second Amendment) Act, 2019 (enacted on 10.03.2019). The effect of this amendment was that the amount received by the petitioner from the Cellular Mobile Operators for the renewal of the spectrum licenses was also to be treated as income of the Federal Government. It is an admitted position that the petitioner had received Rs.35,396,960,000/- from Pakistan Mobile Communication Company Limited (Jazz) and Rs.35,121,825,000/- from Telenor after 10.03.2019. Therefore, these payments are to be treated as income of the Federal Government.

26. In the show cause notices impugned in the writ petitions, the respondents have relied on Article 165A of the Constitution in not giving any credence to the *proviso* to Section 49(4) of the 2001 Ordinance. The said Article provides *inter alia* that the Parliament has, and shall be deemed always to have had, the power to make a law to provide for the levy and recovery of a tax on the income of a corporation, company or other body or institution established by or under a Federal law or a Provincial law or an existing law or a corporation, company or other body or institution owned or controlled, either directly or indirectly, by the Federal Government or a Provincial Government, regardless of the ultimate destination of such income. Indeed the Parliament does have the power to make a law to provide for the levy and recovery of tax on the income of an entity like the Pakistan Telecommunication Authority, which was established under the provisions of the Pakistan Telecommunication (Re-Organization) Act, 1996, and has admittedly

been entrusted by the Federal Government with the responsibility to carry out the auction for the sale of the spectrum licenses. The respondents appear to have lost sight of the fact that it is none other but the Parliament that has inserted the *proviso* to Section 49(4) of the 2001 Ordinance by virtue of which the amount received by the petitioner for the sale or the renewal of the spectrum licenses, which would have otherwise been taxable, has been treated as income of the Federal Government. The said *proviso* is neither repugnant to the provision of Article 165A or any other provision of Constitution. Therefore, as long as the said *proviso* remains on the statute book, it is incumbent on the respondents to give it due regard and effect.

27. It is well settled that ordinarily the High Court, in exercise of jurisdiction under Article 199 of the Constitution, ought not to entertain a challenge to a show cause notice. It is only when proceedings pursuant to a show cause notice culminate in an order that the person aggrieved by such an order may challenge it in writ jurisdiction provided there is no alternative remedy provided by law. However, there are certain exceptions where the High Court can entertain a challenge to the legality of a show cause notice in its Constitutional jurisdiction. This Court, in the judgment reported as Pakistan Oilfields Limited Vs. Federation of Pakistan (2020 PTD 110), after referring to a catena of case law, has enumerated the exceptions where a writ petition against a show cause notice is maintainable. These exceptions are as follows:-

- “(A) Where the impugned notice is without jurisdiction/lawful authority;*
- (B) Where the impugned notice is non est in the eye of law;*
- (C) Where the impugned notice is patently illegal;*
- (D) Where the impugned notice is issued with premeditation or without application of mind for extraneous reasons;*
- (E) Where the aggrieved person does not have adequate and efficacious remedy;*
- (F) Where the issuance of a show cause notice violate any fundamental rights of the aggrieved person;*
- (G) Where there is an important question of law that requires interpretation of any fiscal law or any other substantive law.”*

28. The impugned show cause notices as well as the demand by the respondents for the deposit of advance tax with respect to the amounts received by the petitioner from the Cellular Mobile Operators for the sale and renewal of the spectrum licenses do not take into account the import of the *proviso* to Section 49(4) of the 2001 Ordinance and therefore are patently illegal, and liable to be declared as such.

29. In view of the above, it is declared that the amounts received by the petitioner from the Cellular Mobile Operators for the sale of the spectrum licenses after 01.03.2014 and the renewal of the spectrum licenses after 10.03.2019 are to be treated as income of the Federal Government in terms of the *proviso* to Section 49(4) of the 2001 Ordinance, and therefore exempt from tax under Section 49(1) of the said Ordinance. Consequently, the instant petition as well as writ petition Nos.2218/2018, 2219/2018, 2220/2018 and 2221/2018 are allowed; and the impugned show cause notices dated 06.06.2017, 11.05.2017, 06.06.2017, 03.05.2017 and the impugned letter dated 20.05.2020 are set aside. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

*Sultan**

APPROVED FOR REPORTING

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