

**JUDGMENT SHEET.**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

**Writ Petition No.1618 of 2015.**

***M/s Telenor Pakistan (Pvt) Ltd., 38- Paris Plaza,  
F-11, Markaz, Islamabad.***

***Vs.***

***Federation of Pakistan & four others.***

***Petitioners by.*** ***M/s Ali Sabtain Fazli, Malik Sardar Khan, Sardar Ahmad Jamal Sukhara, Ayaz Shoukat, Imtiaz Rasheed Siddiqui and Syed Husnain Ibrahim Kazmi, Advocates in their respective petitions.***

***Respondents by.*** ***M/s Hafiz Munawar Iqbal, Babar Bilal, Muhammad Irshad Chaudhry, and Malik Waris Khokhar, Advocates. Raja Khalid Mehmood, Deputy Attorney-General and Rashid Hafeez, Additional Advocate General Punjab.***

***Date of Hearing.*** ***20.04.2017.***

***\* \* \* \* \****

**AAMER FAROOQ, J.-** This judgment shall decide the instant petition as well as Writ Petition Nos.3402, 3599, 3391, 1037, 3426, 3425, 3446, 3427, 3474 of 2013, 2246, 2281, 2309, 2585 of 2014 and 1810, 1863 of 2015 as common questions of law and facts are involved.

The petitioners in all the petitions are aggrieved of show cause notice(s) issued by the respondent department i.e. Inland Large Taxpayers Unit, Islamabad seeking to recover Federal Excise Duty in the sales tax mode.

**02.** Mr. Ali Sibtain Fazli, Advocate Supreme Court, learned counsel for the petitioner, inter alia, contended that under Section 3(1) (d) read with Entry-6 of Table-2 of the 1<sup>st</sup> Schedule to the Federal Excise Act, 2005 (*The*

**Act**), Excise Duty is charged/levied and collected on Telecommunication Services; that under Section 7 of the Act read with SRO-550 (I) 2006 the referred Excise Duty is to be recovered under the provision of Sale Tax Act, 1990 (**STA**) as well as the rules framed there under; that prior to 18<sup>th</sup> Amendment in the Constitution, Part-I of the Federal Legislative List set out in the 4<sup>th</sup> Schedule of the Constitution provided for levy of the referred duty; that after 18<sup>th</sup> Amendment to the Constitution some material changes were made in the legislative list and by virtue of Entry-49 and the power to tax services was transferred from Federation to Provinces. It was further contended that Section 3(1)(d) and Entry-6 of Table-2 of the 1<sup>st</sup> Schedule of the Act, Rule-43 of the Federal Excise Rules, 2005 as well as SRO No.550(1) of 2006 dated 05.06.2016 are ultra vires the Constitution; that 18<sup>th</sup> Amendment in the Constitution has made complete change in the legislative domain in relation to tax on services inasmuch as prior to the 18<sup>th</sup> Amendment contracts for the provision of services lay in the concurrent list which now stands repealed and the Federal Legislative has no jurisdiction for taxing the same; that Item No.49 of the Federal Legislative List excludes from the domain of Federal Legislature tax on sales of services i.e. sales tax on services; that now the sale tax of services is within the purview of the provinces and in this regard appropriate legislation has been made by them; that Article 142 of the Constitution provides for the division of legislative powers between the Federation and the Provinces and in this behalf all legislative powers which appear in the Federal Legislative List are within the exclusive domain of the Federation; that while examining the competence of the legislature to legislate the pith and the substance of the subject is to be examined; that since the Federation does not have the power to levy Excise Duty in relation to the services, therefore, the impugned show cause notice is without jurisdiction.

**03.** Mr. Imtiaz Rasheed Siddiqui, Advocate Supreme Court, appeared in Writ Petition No.3427/2013, inter alia, contended that levy of Federal Excise Duty on services under the Act has always been in essence tax on the sale of services hence sale tax on services though with the nomenclature of the Federal Excise Duty; that the referred fact is borne out from the

definition as provided in the Act. It was further contended that the above mentioned argument is further strengthened from the fact that the excise duty is recovered as sale tax under the provision of STA, Rules and Regulations made, in this behalf. It was further contended that under Article 268 (6) of the Constitution in case no adaptation is made by the legislature in light of any amendment or repeal or alteration, the Courts can construe the law with all such adaptations as are necessary to bring it into accord with the provisions of Constitution. It was further contended that the Hon'ble Sindh High Court in case reported as **2017 PTD-1** has already declared the levy of Federal Excise Duty in relation to the province of Sindh as ultra vires. It was further contended that after 18<sup>th</sup> Amendment to the Constitution the respondent department cannot raise any demand which is in the nature of tax on sales of services.

04. Sardar Ahmad Jamal Sukhara, Advocate Supreme Court, inter alia, contended that the impugned show cause notice as well as the demand raised therein is without jurisdiction. In this behalf it was contended that the demand raised is in essence. Sale Tax on services which is not maintainable under the Constitution after 18<sup>th</sup> Amendment. Learned Counsel placed reliance on case titled "Hirjina & Co. versus Islamic Republic Of Pakistan" (**1993 SCMR 1342**) to elaborate the nature of the Excise Duty. It was further contended that items in the legislative list are to be construed on the basis of pith and substance. Other learned counsels for the petitioners adopted the aforementioned arguments by the learned counsels for the petitioners.

04. Hafiz Munawar Iqbal, Muhammad Irshad Chaudhry, Babar Bilal and Malik Waris Khokhar, Advocates, appearing on behalf of the respondent department objected to the maintainability of the petitions inasmuch as no adverse order has been passed. In this behalf, it was further contended that writ petitions are not maintainable against show cause notices and alternate remedy is available to the petitioners. In support of their contentions learned counsels placed reliance on cases titled "Deputy Commissioner Of Income Tax/Wealth Tax, Faisalabad vs Punjab Beverage Company (Pvt.) Ltd" (**2008 SCMR 308**), "Al Ahram Builders (Pvt.) Ltd.

vs. Income-Tax Appellate Tribunal” (**1993 SCMR 29**). It was further contended that SRO-550 (I) 2006 applies to all types of telecommunication services. Reliance was placed on case titled “Farhan ud Din Vs. Pakistan Telecommunication Company Limited and others” (**2009 PTD L.H.C 519**). It was further contended that even after 18<sup>th</sup> Amendment, the Federal Government has the power and authority to levy excise duty and same is borne out from the Entries Nos.44 and 49 of the 4<sup>th</sup> Schedule. It was further contended that even if it is assumed that there is any change after 18<sup>th</sup> Amendment in the Constitution, the duties levied under the Act shall continue to be applicable in the light of Article 270AA of the Constitution. In this behalf, reliance was placed on case titled “Government of Punjab vs. Zia Ullah Khan and 02 others” (**1992 SCMR 602**). It was further contended that Entries in the 4<sup>th</sup> Schedule are to be liberally construed. Reliance was placed on case titled (**1993 SCMR 526**). It was further contended that under Article 270-AA(7) all taxes and fees prior to commencement of 18<sup>th</sup> Amendment Act, 2010 shall continue to be levied until they are withdrawn or abolished by an Act of the appropriate legislature. It was further contended that issues raised in the instant petition already stand decided by this Court in case titled “Pakistan Telecom Mobile Limited vs. Additional Commissioner Inland Revenue Audit Large Taxpayer Unit (**W.P. No. 1715/2010**) vide judgment dated 09.03.2011; hence in case this Court wishes to take another view in the matter, it has to be referred to the larger Bench in line with the decision of the Hon’ble Supreme Court of Pakistan reported as “Multiline Associates vs. Ardeshir Cowasjee” (**1995 PLD SC 423**). In support of their contentions, learned counsels further placed reliance on cases titled “M/s Friends Sons and Partnership Concern vs. The Deputy Collector Central Excise and Sales Tax, Lahore and 03 others” (**PLD 1989 Lahore 337**), “Hirjina and Co. vs. Islamic Republic of Pakistan and another” (**1993 SCMR 1342**) and “Federation of Pakistan and others vs. Haji Muhammad Siddiqui and others” (**PLD 2007 SC 133**).

**05.** The learned Deputy Attorney General, *inter alia*, contended that Section 3(1)(d) of the Act and Rules framed under the Act as well as SRO

550(I)/2006 are in accordance with provisions of the Constitution and not ultra vires in any manner.

06. Learned Additional Advocate General Punjab, *inter alia*, contended that sales tax on services is now being charged by the Province of Punjab hence, Federal Government has no authority to levy the same.

07. The petitioners have, *inter alia*, challenged the vires of Section 3(1)(d) of the Act as well as Entry No.6 of Table-2 of the 1<sup>st</sup> Schedule and Rule 43 of the Federal Excise Rules, 2005 along with SRO No.550 (I)2006 dated 05.06.2006. The Hon'ble Supreme Court of Pakistan in case titled "Lahore Development Authority through its D.G vs. Ms. Imrana Tiwana & others" (2015 S C M R 1739) laid down the principles regarding examining the legality of any legislative instrument. In this regard, the Apex Court propounded as follows:

***"I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;***

***II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;***

***III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;***

***IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;***

***V. The Court will not decide a larger constitutional question than is necessary for the determination of the case;***

***VI. The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;***

***VII. The Court is not concerned with the wisdom or***

***prudence of the legislation but only with its constitutionality;***

***VIII. The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution;***

***IX. Mala fides will not be attributed to the Legislature.”***

**08.** The crux of the above motioned principles is that law is to be saved rather than destroyed and every effort should be made to bring legislative instruments in harmony with the provisions of the Constitution and only when the same cannot be done the legislative instrument is to be struck down.

**09.** Under Section 3(1)(d) of the Act, there is levied and collected, in such manner as may be prescribed, duties of excise on services provided in Pakistan including the services of originated outside but rendered in Pakistan. Similarly, under Entry 6 of Table-2 in Schedule 1<sup>st</sup> of the Act, Telecommunication Services are susceptible to excise duty. Likewise, Rule 43 of the Federal Excise Rules, 2005 provide for special procedure for collection of Federal Excise duty on Telecommunication Services. In this regard, under Section 7 of the Act the services which are notified in the official gazette, the excise duty is to be paid in the Sales Tax Mode. The nature of the excise duty was elaborated by the Hon'ble Supreme Court of Pakistan in cases reported as "Hirjina & Co. versus Islamic Republic Of Pakistan" (1993 SCMR 1342) in the following manner:-

***“The expression ‘duties of excise’ has no precise content. In its narrowest sense it is used in contradistinction to the expression ‘duties of customs’ thus the levy on goods imported into the country would fall under the heading ‘duties of customs’ whereas the goods locally produced or manufactured for home consumption would fall under the heading ‘duties of excise’. In a comparatively larger sense ‘duties of excise’ would relate to levy made at any stage falling between the production or manufacture of goods and their sale to the ultimate consumer. In a still wider sense it would cover a diverse variety of indirect taxes which have no nexus with the***

***production or manufacture of goods. Similarly, the word 'excise' has no precise or definite meaning."***

Similarly, the expression 'charged' and 'levied' were duly considered by the Hon'ble Lahore High Court in case reported as "M/s Friends Sons and Partnership Concern vs. The Deputy Collector Central Excise and Sales Tax, Lahore and 03 others" (PLD 1989 Lahore 337) observed as follows:-

***"There are three distinct types of provisions generally in every fiscal enactment. The charging provisions, which relate to the levy or charge of the tax, which usually state that tax is to be levied and on what matter, or goods or income and in which manner and at what rate and matters relevant thereto. The assessment provisions, which deal with the assessment, calculation or quantification of the tax for the purposes of determining the amount of tax due and payable or which has escaped collection or has been under assessed f or assessed at a lower rate or on which excessive relief or refund has been allowed. The collection provisions, which relate to the mode and manner of receipt or collection of the tax. The charging sections have to be strictly construed and any benefit found therein has to be given to the tax-payer. However, the assessment and collection provisions are merely the machinery sections and they can be liberally construed.***

***The words "levied", "charged", "paid" and "collected" generally used in charging sections do not indicate that assessment provisions or collection provisions are included in the charging sections. These words are only used in a general sense to indicate that the duty or tax would be demanded or collected at the rate or in the manner as provided by the charging section. The procedures as regards assessment and collection are separately provided for.***

***By itself the words "levied", charged" and "collected" do not impose the charge. The charge or imposition arises by virtue of the language of the charging section itself. These words only point or give indication to the element of demand, namely, that it will be demanded, claimed or collected at the rate and/or in the manner provided in the charging section. However, apart from charging sections, the word "levy" or "levied" in other parts of fiscal enactments could indicate not only the power to impose or raise a tax or duty, but also to assess or collect the same, depending upon how, where and in what context the word is used and whether such***

***extended meaning is possible. There is no cardinal rule that wherever the word "levy" or "levied" occurs, the element of assessment or collection must be deemed included."***

10. In light of the above provisions and the case law it is evident that Section 3(1)(d) of the Act imposes duties of excise on services rendered in Pakistan which include Telecommunication Services (Entry 6 Table-2, Schedule 1<sup>st</sup> of the Act) and Rule 43 of the Federal Excise Rules, 2005 as well as SRO No.550(I)2006 provide the procedure and mechanism for the collection of the referred duty. As already stated under Section 7 of the Act, the excise duty on notified services can be recovered in the Sales Tax Mode, otherwise, under the Rules. In this behalf, SRO No.550(I)2006 dated 05.06.2006 specifically include Telecommunication Services hence, the Federal Excise Duty on Telecommunication Services can be recovered in the Sales Tax Mode and in this behalf all the relevant provisions of STA and the Rules framed under it are applicable.

11. The thrust of the arguments by the learned counsels for the petitioners was that after incorporation of 18<sup>th</sup> Amendment in the Constitution, the legislative power of the Federal Legislature has changed drastically and it does not has the power to legislate on sales tax on services. In this behalf it was contended that since in pith and substance the Federal Excise Duty on services is sales tax on services hence, the Federal Government i.e. Federal Excise Department has no authority and power to raise any demand with respect thereto after passing of 18<sup>th</sup> Amendment Act, 2010 in the Constitution. The effect of 18<sup>th</sup> Amendment is that the concurrent list has been done away and the subjects in the Federal Legislative list falls within the exclusive domain of the Federal Legislature and other subjects are within the purview/domain of the Provinces. For the purposes of the instant petitions Entries No.44 & 49 of Part-I of the Federal Legislative List provided in 4<sup>th</sup> Schedule to the Constitution are relevant. The referred entries are as follows:-

**Entry No. 44.**

***Duties of excise including duties on salt, but not including duties on alcoholic liquors, opium and other narcotics.***



**Entry No. 49.**

***Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed (except sales tax on services).***

12. The above two entries clearly show that duties of excise are separate from taxes on the sales and purchases of goods even sales tax on services. The contention of the learned counsels for the petitioners is that in essence the excise duty on services is tax on the sales of the services hence sales tax on services; the referred argument is not correct inasmuch as if such was the case the legislature would not have had two separate entries for duties on excise and taxes on the sales and purchases of goods. The fact that there are two separate entries for the referred taxes means the legislature for all the legal and practical purposes intended two levies to be separate. The fact that excise duty on telecommunication services is to be recovered through sales tax mode also does not make the levy sales tax on services. In this regard as mentioned in ***PLD 1989 Lahore 337*** supra the assessment and collection provisions are merely the machinery sections distinct from the charging provision. On the referred basis the legislature under section 7 of the Act and SRO No.550 (I) 2006 has made the machinery of sales tax applicable for collecting the Federal Excise Duty and the same is only for the referred purposes only. The tax/levy/duty so collected remains duties on excise under section 3(1) (d) of the Act.

13. It was also argued on behalf of the petitioners that under Article 268(6) of the Constitution the Court can make necessary adaptations if legislature has not made any amendment in the law. In view of the above interpretation of Entries No.44 & 49, no adaptation is required in the instant case. In this behalf while interpreting the recovery of duties of excise in the sales tax mode and incorporation of the provision of STA in the Act, this Court in its decision dated 09.03.2011 in case titled "Pakistan Telecom Mobile Limited vs. Additional Commissioner Inland Revenue Audit Large Taxpayer Unit (***W.P. No. 1715/2010***) observed as follows:-

***" 16. There is no cavil to the proposition that any law can be incorporated by way of reference and can be made part of another enactment. The legislation has every right to incorporate one act***

***into another by way of reference. The dispute in the present case is not regarding the competence to incorporate law by way of reference rather the actual controversy is regarding the effect of the incorporated law.***

**17. In judgment reported as PLD 2001 Karachi 422, it was held that**

***“when any law to which reference is made, is incorporated/made applicable to the proceedings under any special statute or the statute having reference, then all the provisions contained in the statute to which reference has been made are attracted except those which are expressly excluded.”***

**18. In judgment reported in 1985 SCMR 70, It was held that**

***“Affect of incorporation by reference to the provision of a formal act is as if new act has come into force containing all those provisions subject to such modifications and alteration, if any, as made by indicated in adopted Act.”***

**19. In judgment reported in AIR 2002 S.C.3499, it was held that**

***“When an earlier Act or certain of its provisions are incorporated by reference into a latter Act, the provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it. The incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. But this must be distinguished from a referential legislation, which merely contains a reference or the citation of the provisions of an earlier statute. In a case where a statute is incorporated, by reference into a second statute the repeal of the first statute by a third does not affect the second. The later Act alongwith the4 incorporated provisions of the earlier Act constitute an independent legislation, which is not modified or repealed by a modification or repeal of the earlier Act. However, where in later Act there is a mere reference to an earlier Act, the modification, repeal or amendment of the statute this is referred will also have an affect on the statute in which it is referred. Whether a formal statute is merely referred to or cited in a later statute or whether it is wholly or partially incorporated therein, is a question of construction. |***

**20. Keeping in view the afore mentioned judgments, it becomes clear that if provisions of one Act are incorporated into another Act then the incorporated provisions become part of Act, in which those provisions have been incorporated. The affect of the provisions are to be determined from the language of incorporated law and proper interpretation of words used.**

**21. In the present case Central Excise Act, 1944 was amended. Section 3 of said Act provides that Excise Duty shall be levied and collected in such manner as may be prescribed. By way of the impugned amendment, the prescribed manner was adopted from sales Tax Act. The contention of the learned counsel for the petitioner is that since in the amendment it was provided that excise Duty shall be levied and collected as if it were a tax payable under Section 3 of Sales Tax Act, 1990, so after the said amendment charging section is that of Sales Tax Act and not the Central Excise Act. The learned counsel for the petitioner further contended that whenever words levied and collected are used together in a fiscal statute then statue becomes a charging section. This contention of the learned counsel for the petitioner is not correct. Charging provisions relate to the levy of charge of tax, which usually state that tax is to be levied and on what matter, and in which manner and at what rate and matters relevant thereto. In the instant case the authority of levying the Excise Duty is derived from Section 3 of Central Excise Act and not from Sales Tax Act. The said provision relates to the mode and manner and receipt or collection of tax. The assessment and collection are merely the machinery sections. This too is not correct that if words levied and collected are used together in a fiscal statute then said statue would become a charging section. In fact the whole section determines as to whether the same is charging section or not. However, in the present case there can be no doubt that the charging section is Section 3 of Central Excise Act, 1944, as far as the modality of assessment and tax and collection of tax is concerned, those have been derived from Sales Tax Act, 1990. Since those provisions by referred provisions became part of Central Excise Act, 1944, therefore, legality or constitutionality of the same cannot be questioned as under Central Excise Act duty can be imposed on services rendered by a person.**

14. Moreover, the protection was afforded to all levies and taxes by the Parliament in 18<sup>th</sup> Amendment as provided in Article 270 AA (7) of the Constitution.

15. The objection raised by the respondents regarding maintainability of the petitions in light of availability of alternate remedy as well as petition under Article 199 being not maintainable against the show cause notice are without substance inasmuch as the petitioners had challenged the vires of Federal Statute as well as Rules made under the same and also raised important questions of law.

16. For what has been stated above, all the petitions mentioned hereinabove are without merit and are accordingly dismissed.

(AAJMER FAROOQ)  
JUDGE

Announced in open court this 7th day of July 2017-

JUDGE

*\*Altaf Malik\**

*Approved For Reporting*

Uploaded By :- Engr.Umer Rasheed Dar