

IN THE HIGH COURT OF SINDH AT KARACHI

CP D 190 of 2011	:	Pakistan Mobile Communications Limited (Mobilink) vs. The Province of Sindh & Another
CP D 191 of 2011	:	Pak Telecom Mobile Limited (Ufone) vs. The Province of Sindh & Another
CP D 192 of 2011	:	Warid Telecom (Pvt.) Ltd (Warid) vs. The Province of Sindh & Another
CP D 193 of 2011	:	CMPak Limited (Zong) vs. The Province of Sindh & Another
CP D 194 of 2011	:	Telenor Pakistan (Telenor) vs. The Province of Sindh & Another
For the Petitioners	:	Barrister Makhdoom Ali Khan
For the Respondents	:	Mr. Saifullah Assistant Advocate General
		Mr. Ghulam Abbas Naich Chief Inspector of Stamps, Board of Revenue, Sindh
Dates of hearing	:	13.10.2020, 27.10.2020 & 18.11.2020
Date of announcement	:	22.12.2020

JUDGMENT

Agha Faisal, J. The petitioners are cellular companies operating in Pakistan under license granted by the Pakistan Telecommunication Authority (“PTA”). The customers of the petitioners executed Cellular Services Agreement Forms (“Forms”) to receive telecommunication services. The respondents have subjected the Forms to stamp duty, however, recoverable from the petitioners. The present petitions were instituted in 2011 assailing the recovery of stamp duty. Since the subject matter is common inter se and these petitions were heard and reserved conjunctively, therefore, determination hereof shall be endeavored vide this common judgment.

2. The facts pertaining to CP D 190 of 2011 are representative of the facts pertaining to the rest of the petitions, listed supra, therefore, it may suffice to confine the factual discussion to the controversy as presented in the aforementioned petition.

Briefly stated, the petitioners had maintained that the stamp duty on Forms cannot be levied / recovered there from, hence, made an application dated 15.06.2010 to the Chief Inspector, Stamps for clarification as well as refund of stamp duties paid. The Chief Inspector of Stamps, respondent No.2, rendered a reply / opinion (“Opinion”) in such regard, dated 16.08.2010 and it is considered illustrative to reproduce the contents herein below:

“Please refer to your application dated 15.06.2010 and 31.07.2010 on the subject noted above.

2. It is clarified that the stamp duty on Agreement under Article 3(e) of the Schedule to the Stamp Act, 1899, but not Section 5(d) of *ibid*.

3. It is further clarified that No.3(e) of Section 29 of the Stamp Act, which reads as under:

29. “In the absence of any agreement to the contrary, the expense of providing the proper stamp shall be borne in the case of any instrument described in any of the following Articles of Schedule namely”.

No.3 (Agreement Memorandum of an Agreement (a) and (b) by the purchaser(s) by the person(s) in whose favour the reconveyance is executed (d) by the partner(s); and € by the executants(s)”.

In view of the above, duty is to be paid by the executant (s), therefore, it is for the executant(s) to decide who shall be paid the duty or share the burden of duty amongst themselves.”

(Underline added for emphasis).

It was contended that notwithstanding the aforementioned Opinion, the respondents have continued to levy and collect stamp duty from the petitioners, hence, the present petitions.

3. Learned counsel for the petitioners submitted that the levy and collection of stamp duty in respect of the Forms upon the petitioners is contrary to the law, *inter alia*, on the grounds that the stamp duty is not to be levied in respect of subjects within the federal legislature list¹; no liability in respect of stamp duty on the Forms can be imposed upon the petitioners per section 29 of the Stamps Act, 1899 (“Act”)²; the Forms do not fall within the ambit of Article 3 of the Schedule to the Act if the rule of interpretation of *ejusdem generis* is applied³; a public officer, as defined under section 2(22B) of the Act is not in itself liable for payment of stamp duty; and that in any event even if the petitioners were to be considered as liable to stamp duty the same could only be held valid within province of Sindh, however, the relevant enabling law in such regard was not promulgated until 2020.

¹ *Sindh Revenue Board vs. Civil Aviation* reported as 2017 SCMR 1344

² *Muhammad Hussain vs. Emperor* reported as AIR 1940 Lahore 315; *Board of Revenue vs. Appalarasimhulu* reported as AIR 1957 Andhra Pradesh 237; *P. Appa Rao vs. Additional District Magistrate & Others* reported as AIR 1975 Ori 209; *Kunwarpal Sharma vs. State of UP* reported as AIR 2003 All 7; *Ashfaq Ahmed vs. Additional Commissioner* reported as 2014 SCC Online All 5374; *Bharat Sanchar Nigam Ltd vs. State of UP* reported as 2015 SCC Online All 7020; *Chintamani Realty vs. State of Maharashtra* reported as 2019 SCC Online 8187; *Murad vs. Manzoor Hussain* reported as 1991 CLC 512; *Re: Zeenat Textile Mills Limited vs* reported as 1995 CLC 813; *Lahore Cables and Engineering Pvt. Ltd vs. Govt of Punjab* reported as PLD 2000 Lahore 433; *Muhammad Asif vs. Farkhanda Anwar* reported as 2003 CLC 394; *District Officer (Revenue) Lahore vs. Raja Muhammad Yousaf* reported as 2016 SCMR 203; *Province of Punjab vs. Muhammad Zafar Bukhari* reported as PLD 1997 SC 351; *Gulsnan Ara vs. State* reported as 2010 SCMR 1162; *Star Textile vs. Sindh* reported as 2002 SCMR 356; *Collector of Sles Tax vs. Mega Tech (Pvt.) Ltd* reported as 2005 SCMR 1166; *Pakistan Television Corporation Ltd vs. Commissioner Inland Revenue* reported as 2019 SCMR 235; and *Pakistan Petroleum Ltd vs. Commissioner of Income Tax* reported as 2009 PTD 662.

³ *Don Basco High School vs. Assistant Director EOBI* reported as PLD 1989 SC 128; *Suleman Habiv vs. Habib Bank Limited* reported as 2003 CLD 1797; *Muhammad Mubeen-us-Salam vs. Pakistan* reported as PLD 2006 SC 602; and *Punjab Cooperative Board of Liquidation vs. Muhammad Ilyas* reported as PD 2014 SC 471.

4. Learned Additional Advocate General Sindh, at the very onset, submitted that the respondents had no cavil to the Opinion and the same remains in field, however, stamp duty upon the Forms has been rightfully levied / recovered from the petitioners in accordance with law. Learned counsel submitted that per section 17 of the Act, stamp duty is payable before or at the time of execution by the petitioners and such a legal obligation cannot be permitted to be abjured. It was articulated that the petitioners qualify within the definition of *public officer*, within the meaning of the Act, hence recovery there from is duly mandated. It was further averred⁴ that section 10 of the Electronic Transmission Ordinance, 2002 (“Ordinance”) is an encroachment upon the field of provincial legislation, hence, ultra vires of the Constitution in any event. Learned counsel relied upon *Shirazi Trading*⁵ in order to augment his arguments and concluded that the present petitions are devoid of merit.

5. We have appreciated the arguments of respective learned counsel and have also considered the law to which our surveillance was solicited. The Opinion has been placed before us, not controverted by the respondents, hence, the scope of this determination is abridged⁶ to consider whether in the light of the said Opinion the levy / recovery of stamp duty, on the Forms, from the petitioners was merited, notwithstanding the Opinion, within the confines of law.

Stamp duty on Forms

6. Section 3⁷ of the Act delineates instruments that are chargeable with stamp duty. The term *instrument* was defined⁸ to include every document by which any right or liability is, or purports to be, created, transferred, limited,

⁴ Even though this ground had not been argued by the learned AAG, however, it was belatedly sought to be invoked vide inclusion in a written synopsis filed post the matter having been reserved for judgment.

⁵ Per *Muneeb Akhtar, J.* in judgment dated 05.04.2013 in *Shirazi Trading Co. (Pvt.) Limited vs. Province of Sindh & Others* (CP D 2725 of 2009).

⁶ Per *Saqib Nisar J* as he then was) in *LDA & Others vs. Imrana Tiwana & Others* reported as 2015 SCMR 1739 – “Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds; Court should not decide a larger Constitutional question than was necessary for the determination of the case”.

⁷ 3. Instruments chargeable with duty. Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively, that is to say (a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in Pakistan on or after the first day of July, 1899; (b) every bill of exchange payable otherwise than on demand or promissory note drawn or made out of Pakistan on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in Pakistan; and (c) every instrument (other than a bill of exchange or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of Pakistan on or after that day, relates to any property situate, or to any matter or thing done or to be done, in Pakistan and is received in Pakistan: Provided that no duty shall be chargeable in respect of (1) any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument; (2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894 or under Act XIX of 1838, or the Registration of Ships Act, 1841, as amended by subsequent Acts.

⁸ Prior to substitution vide the Stamp (Sindh Amendment) Act 2020; relevant herein.

extended, extinguished or recorded. Section 29⁹ of the Act determines the obligation to pay stamp duty and *inter alia* specifies that in the absence of an agreement to the contrary, the expense of providing the proper stamp duty shall be borne by the executant of the instrument. The term *executed*¹⁰ has been defined in the Act, with reference to instruments, to mean signed. The respective learned counsel relied upon the provisions of the Act cited supra to argue their respective briefs, thus, the Form shall be construed in the said context.

7. Our attention was sought to the terms and conditions appended to each Form wherein it was explicitly stated that *Taxes, Duties and Levies which are or may become leviable in accordance with laws, rules and regulations* form a constituent of the charges payable by the customer. The veracity of the text of the Form has not been controverted by the respondents and in the paragraph wise comments. The respondents specifically admit¹¹ that there is an agreement between the petitioners and their customers whereby all customers have expressly agreed to the relevant terms and conditions, thereby, liable to pay stamp duty.

8. The primary constituent of section 29 of the Act states *in the absence of an agreement to the contrary*; however, it is manifest that in the present facts and circumstances there exists a *prima facie* agreement between the parties to befall the burden of taxes, duties and levies upon the customer.

Respondents' counsel had sought to invoke section 17¹² of the Act to justify the chargeability of stamp duty; however, the said provision has to be read in conjunction with section 29 of the Act to determine the *person* upon whom such an obligation has been placed.

9. The residual constituent of Section 29 stipulates that *in the absence of an agreement to the contrary* the pertinent duty is to be borne by the executant of the instrument. We will consider the aspect of the executant while discussing the implication of *Shirazi Trading* subsequently; however, for purposes of the present discussion it suffices to observe that the residual constituent does not come into effect since admittedly there exists *an agreement to the contrary*.

⁹ 29. Duties by whom payable. In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne... by the person drawing, making or executing such instrument...

¹⁰ 2(12) "executed" and "execution", used with reference to instruments, mean "signed" and "signature".

¹¹ Paragraph 8 of the paragraph wise comments filed by the respondents.

¹² 17. Instruments executed in Pakistan. All instruments chargeable with duty and executed by any person in Pakistan shall be stamped before or at the time of execution.

10. The respective learned counsel were specifically queried as to whether the petitioners were saddled with the obligation of being collection agents on behalf of the respondents, to recover stamp duty even if it was encumbered upon the customers. Both learned counsel responded to our query in the negative; therefore, no further deliberation is warranted in such regard.

11. Since the verbiage of Section 29 of the Act confers primacy upon an agreement, delineating the person whereupon the burden to pay stamp duty shall lie, therefore, in the manifest admitted presence of such an agreement¹³ requiring the customer to bear such liability, and in the admitted absence of any responsibility upon the petitioners to act as collection agents, no case is made out before us to consider the petitioners liable in such regard in derogation of the statutory provisions.

Issue of public office

12. The respondents had articulated that since the petitioners fall within the definition of *public office*¹⁴, hence, stamp duty was being rightly levied / recovered therefrom.

Section 33¹⁵ of the Act empowers a public officer to impound an insufficiently stamped instrument. Section 38¹⁶ permits for an impounded instrument to be sent to the collector. Section 40¹⁷ allows the collector to assess stamp duty and / or penalty in respect of an impounded instrument.

¹³ Reference is made to the constituent of the terms and conditions appended to the Form, wherein taxes, duties and levies are to be paid by the customer.

¹⁴ "Public Office" includes a Government Office, a People's Local Council, a Local Authority, a Statutory Corporation or a similar body set up by the Central or Provincial Government, commercial or industrial concern whether singly owned or run through partnership having more than twenty employees, a body registered under the Companies Act, 1913, and a Cooperative Society; "Public Officer" includes an Officer-in-charge of a Public Office.

¹⁵ 33. Examination and impounding of instruments. (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same. (2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in 5[Pakistan] when such instrument was executed or first executed: Provided that (a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898; (b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf. (3) For the purposes of this section, in cases of doubt, (a) the Provincial Government may determine what offices shall be deemed to be public offices; and (b) the Provincial Government may determine who shall be deemed to be persons in charge of public offices.

¹⁶ 38. Instruments impounded how dealt with. (1) When the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 35 or of duty as provided by section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf. (2) In every other case, the person so impounding an instrument shall send it in original to the Collector.

¹⁷ 40. Collector's power to stamp instruments impounded. (1) When the Collector impounds any instrument under section 33, or receives any instrument sent to him under section 38, sub-section (2), not being an instrument chargeable with a duty not exceeding twenty five paise only or a bill of exchange or promissory note, he shall adopt the following procedure: (a) if he is of opinion that such instrument is duly stamped, or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable, as the case may be; (b) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees; or, if he thinks fit, 1[an amount not exceeding] ten times the amount of the proper duty or of the deficient portion thereof, whether such

13. The respondents' claim is that the petitioners are liable to pay stamp duty in respect of the Forms; and it was never the respondents' case that the petitioners were required to impound the Forms and convey them to the collector for the relevant proceedings.

14. In consideration of the statutory provisions, cited supra, it is clear that the Act does not impose liability to pay stamp duty upon a *public office / public officer*; therefore, it is considered safe to conclude that the respondents' assertion, holding the petitioners liable for payment of stamp duty as *public office / public officers*, does not find sustenance per the law.

Interpretation of fiscal statutes

15. It is settled law that that interpretation of a fiscal statute has to be made strictly and any doubts arising from the interpretation of a fiscal provision must be resolved in favor of the taxpayer¹⁸. In *Citibank*¹⁹ a Division Bench of this Court has maintained that it is a fundamental principle of interpreting fiscal statutes that there is no intendment or equity with regard to the charging provision, which must be applied as they stand. *Munib Akhtar J* maintained the enshrined principle of law that even if two reasonable interpretations were possible, the one favoring the taxpayer would be adopted²⁰.

16. In the present facts and circumstances the statute is clear in so far as the obligation to pay stamp duty is concerned and there appears to be no question of any divergent interpretations arising in respect of the provisions under scrutiny. It would also be pertinent to mention that the Opinion, rendered by the department itself, also appears to compliment the interpretation of the relevant provisions of the Act relied upon herein.

Implication of Shirazi Trading

17. *Shirazi Trading* is an illumining Division Bench Judgment of this court, upon which the respondents had rested their case. However, such reliance is

amount exceeds or falls short of five rupees: Provided that, when such instrument has been impounded only because it has been written in contravention of section 13 or section 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this section. (2) Every certificate under clause (a) of sub-section (1) shall, for the purposes of this Act, be conclusive evidence of the matters stated therein. (3) Where an instrument has been sent to the Collector under section 38, sub-section (2), the Collector shall, when he has dealt with it as provided by this section, return it to the impounding officer.

¹⁸ Per *Saqib Nisar CJ (as he then was)* in *Pakistan Television v. CIR*, reported as 2019 SCMR 282; reiterating *Pakistan Television v. CIR* reported as 2017 SCMR 1136.

¹⁹ Per *Munib Akhtar J* in *Citibank NA vs. Commissioner Inland Revenue* reported as 2014 PTD 284; cited with approval by the honorable Supreme Court in *Pakistan Television*.

²⁰ Reliance is also placed upon *Oxford University Press vs. Commissioner of Income Tax & Others* reported as 2019 SCMR 235; Per *Munib Akhtar J*.

respectfully entirely misplaced as the pronouncement lends more credence to the petitioners' stance.

18. *Munib Akhtar J* drew a distinction between *parties* to an instrument and the *executant/s* thereof and held that the two roles were mutually exclusive. In the context of purchase orders, it was maintained that it was irrelevant whether the contract was performed by both parties and that a party, who was not the executant, could not be saddled with the obligation to pay stamp duty. It was further held that listing of an instrument in the Schedule to the Act was a necessary but not sufficient condition for the levy of stamp duty and that the obligation pivoted upon satisfaction of the necessary ingredients for such an obligation to crystallize. The crux of the finding was that a party to the contract that had not executed the said instrument could not be encumbered with the obligation to pay stamp duty thereupon.

19. In the present facts and circumstances it has been argued before us, by the petitioners' counsel, that the Forms were executed by the respective customers and the petitioners, while being parties thereto, were not ordinarily executants thereof. While the respondents' counsel did not entirely subscribe to the aforesaid proposition, it is observed that the obligation for the executant to be responsible for stamp duty²¹ is a residual obligation, provided that there is no agreement to the contrary. The existence of an agreement to the contrary is an admitted fact before us; hence, recourse to the residual provision has no application in the present scenario.

Relevance of the Opinion

20. The Opinion was rendered by the department itself and the respondents' counsel has raised no cavil in respect thereof. The Opinion concludes that duty is to be paid by the executant (s), therefore, it is for the executant(s) to decide who shall pay the same or share the burden of duty amongst themselves. The respondents have themselves admitted²² that there is an agreement whereby the customers have expressly agreed to the relevant terms and conditions, thereby, liable to pay stamp duty. In view of the proclaimed adherence to the Opinion by the respondents, no rationale has been placed before us to justify the department's insistence to encumber the petitioners with the levy / recovery of stamp duty.

²¹ Per section 29 of the Act.

²² Paragraph 8 of the paragraph wise comments filed by the respondents.

Vires of the Ordinance

21. The Ordinance was promulgated in 2002, much prior in time to the institution of the present petitions and by way of a belated defense the respondents have asserted that section 10 thereof amounts to colorable legislation. The challenge to the vires was not invoked by the respondents during the hearing of the said petitions and the comments²³ filed by the Respondent no. 1²⁴ are also silent in such regard.

22. During the course of the petitioners' rebuttal, we had specifically queried the respondents' counsel as to whether a challenge to section 10 of the Ordinance had been initiated by the respondents at any time till the said date; and the learned counsel had responded in the negative.

23. The belated defense raised by the respondents pertains to an issue pertaining to the comity of the federating units despite Article 184²⁵ of the Constitution, conferring original jurisdiction in such regard exclusively upon the august Supreme Court. No justification was articulated as to how this Court could exercise jurisdiction in view of the prevailing law.

24. In any event, since the said issue does not have a material bearing on the determination herein as the matter is clinched in so far as the present facts and circumstances are concerned, therefore, we deem it prudent to eschew deliberation hereon and leave the matter for future consideration in an appropriate case²⁶.

25. In view of the reasoning and rationale herein contained, we are of the considered view, in the facts and circumstances pleaded vide the petitions under scrutiny, that the levy / recovery of stamp duty upon the petitioners was dissonant with the law, as well as the avowed Opinion of the department itself.

26. Accordingly, these petitions are disposed of in terms delineated herein below:

- a) In view of an admitted agreement between the petitioners and customers, making the customer liable to pay all duty and taxes in

²³ Dated 05.03.2011; presented on 08.03.2011.

²⁴ Adopted by the respondent no. 2 vide statement available at page 99 of the Court file.

²⁵ 184. Original jurisdiction of Supreme Court.-(1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.

²⁶ Per *Munib Akhtar J* in the recent, yet unreported, judgment in *Shahid Gul & Partners vs. DCIT Peshawar (Civil Appeals 2444-9 of 2016)*.

respect of the Form in question, it is held that the same cannot be recovered from the petitioners.

- b) In respect of the claim for refund, it is our deliberated view²⁷ that the same cannot be adjudicated in a writ petition; as it requires a factual determination including burden of proof and passing of incidence, if any; however, the petitioners may seek appropriate recourse / remedy as may be available per the law.
- c) Since some changes have been introduced in the law, post institution of these petitions, it is clarified that our findings herein are predicated upon the facts and law governing these petitions and not otherwise.

JUDGE

JUDGE

Khuhro/PA

²⁷ Reliance is placed on *Shirazi Trading*.