

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

C. P. No. D-6520 of 2018

M/s. Bayer Pakistan (Pvt.) Limited.....Petitioner

Versus

Province of Sindh & others.....Respondents

C. P. No. D-3044 of 2020

M/s. Kassim Textile Mills (Pvt.) Limited.....Petitioner

Versus

Province of Sindh & others.....Respondents

C. P. No. D-1479 of 2021

M/s. Gul Ahmed Textile Mills.....Petitioner

Versus

Province of Sindh & others.....Respondents

Zain Mustafa Soomro, Advocate, for the Petitioner in
C.P No. D-6520 of 2018.

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D-3044 of 2020.

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D-1479 of 2021.

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Sindh, in all Petitions.

Dates of hearing : 04.11.2021 and 09.11.2021.

JUDGMENT

YOUSUF ALI SAYEED, J – While engaged in industrial and commercial activity across different sectors, the Petitioners are bound by the common thread that system generated procurement requests constituting Electronic Purchase Orders (“**EPOs**”) are processed and transmitted between them and contracting counterparties from time to time during the course of trade. Albeit indisputably serving the same purpose as a traditional purchase order in terms of encapsulating the salient terms of a transaction, viz – product description, quantity, price, delivery, etc., the EPOs are in the form of an email or otherwise processed digitally online through a software application connecting the transacting parties. Hence they lack the physical form of a document in the traditional sense. Be that as it may, as the designated functionaries of the Board of Revenue, Sindh (“**BOR**”) under the (Sindh) Stamp Act 1899 (the “**Act**”), being the Chief Collector of Stamps and subordinate officers, sought to nonetheless bring the transactions underpinning those EPOs within the fold of the Act so as to charge them with stamp duty under Section 3 of the Act (the “**Charging Section**”) read with Article 15(b) of Schedule I thereof, the Petitioners have preferred the captioned Petitions under Article 199 of the Constitution impugning such action.

2. Suffice it to say, electronic transactions and documents were not in contemplation at the time of promulgation of the Act. However, a step to update the statute in view of technological advances was taken in 2006, when the definition of instrument was firstly amended vide the Sind Finance Act of that year, and when a subsequent step in the same vein was taken by substitution of the term through the Sindh Finance Act 2020 (the “**2020 Act**”). The significance of these amendments and the reliance placed thereon by either side will be discussed in due course.

3. For purpose of properly framing the controversy, it is pertinent to note that the Charging Section states that:

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.

[emphasis supplied]

4. Under Article 15(b) of Schedule 1 to the Act, a Purchase Order stands enlisted as an instrument subject to stamp duty under the following description and terms:

Purchase Order- that is to say, to supply or to undertake cortege of stores and materials.	Twenty pisas for every hundred rupees or part thereof of the amount of the Purchase Order.
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5. Apparently, after inspecting the Petitioners records and financial statements, the functionaries of the BOR assessed a deficit of stamp duty on the total quantum of purchases reflected over the period under scrutiny in each of their cases, on the basis of the ad-valorem duty prescribed under Article 15(b), albeit that the transactions were undertaken through EPOs and no physical document/instrument was detected or identified. In CP No. 6520/18, it was pointed out that a payment of Rs.10,868,167/- had been made under protest against an assessment made on the basis of a system generated spreadsheet listing the purchase transactions through EPO's from January 2014 to December 2018.
6. Succinctly, the case set up by the Petitioners is that prior to the definition of the term 'instrument' being amended vide the 2020 Act, EPOs did not fall within the ambit of the Charging Section. Per learned counsel, whilst there was no cavil that a Purchase Order reduced to writing in paper form would attract stamp duty upon its execution as per the Charging Section read with Article 15(b) of Schedule I, they contended that this was not so with an EPO, which, being neither a bill of exchange nor promissory note, would attract stamp duty only if the necessary ingredients of Clauses (a) and/or (c) of the Charging Section were satisfied.

7. Learned counsel appearing for the Petitioners argued that prior to the 2020 amendment, the wording of those clauses of the Charging Section clearly set out a two-step formula, as per which the subject attracting the charge had to be an "instrument", that too, becoming chargeable only upon being "executed". It was submitted that those elements were lacking in an EPO as per the definitions of those terms under sub-sections (12) and (14) of Section 2 of Act, as prevailed over the period to which the EPOs pertained, which provide that:

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

(14) "instrument" includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded; [and also includes any photograph, disk, tape, film, soundtrack in which images, songs, text or other data are embodied which can be reproduced, with or without the aid of same instrument or machine in visual, audible or readable form].¹

[emphasis supplied]

8. They pointed out that in the Province of Punjab, the definition of an 'instrument' had been amended in the year 2015 so as to include "every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded and includes any instrument executed in electronic form", whereas a similar measure came to subsequently be introduced in Sindh through the 2020 Act, whereby a document in electronic form was also included within the definition of 'instrument', with Section 2(14) being substituted so as to read as follows:

¹ Added by the Sindh Finance Act 2006 (Sindh Act IV of 2006)

"14) "Instrument", includes every document by which any right or liability is, or purports to be, created, transferred, extended, extinguished or recorded and also includes any other instrument in electronic form",

9. It was submitted that in order for an EPO to qualify as an 'instrument' as per the earlier definition of the term inserted through the amendment of 2006, it would have to fall within the meaning of a 'document' or of a photograph, disk, tape, film or soundtrack in which images, songs, text or other data are embodied which can be reproduced. However, it was argued that as an EPO was generated and transmitted digitally via through online servers and was not something tangible contained on any disc, tape, film or soundtrack, it did not fulfill the criteria of a document and could not be regarded as an instrument. Furthermore, it was argued that the amendment of Section 2(14) in 2020 was an acknowledgment of there being a lacuna in that regard, for if all instruments in electronic form already stood covered in terms of the amendment of 2006, then the subsequent amendment was an unnecessary measure.

10. They prayed that the Petitions be allowed with it *inter alia* being declared that EPOs were not chargeable with stamp duty prior to the amendment through the 2020 Act. Furthermore, to the extent of the Petitioner in C.P. No. D-6520/18, it was submitted that an amount of Rs.10,868,167/- had been deposited by the Petitioner towards the claim of the Respondents on account of stamp duty assessed in respect of EPOs prior to that amendment, which was liable to be refunded. It was prayed that directions to that effect be issued accordingly.

11. On the other hand, whilst conceding that EPOs were not envisaged within the definition of ‘instrument’ at the time of promulgation of the Act, the learned AAG argued that EPOs fell within the expanded definition of that term pursuant to the amendment made to Section 2(14) in 2006 (with effect from 01.07.2006), as reproduced hereinabove, whereby the meaning of that term was expanded to include a photograph, disk, tape, film or soundtrack. Furthermore, as a right and liability was being created and recorded in terms of the EPOs in consonance with that part of the definition of the term ‘instrument’, hence attracted Stamp Duty and the assessment of the Respondents in respect of the particular EPOs issued by the Petitioners was well founded.

12. It was also pointed out that through the further amendment subsequently made through the 2020 Act, an ‘instrument in electronic form’ had also been specifically included in the definition of ‘instrument’, with it being argued that such amendment was to be considered as retrospective as it was not procedural. Furthermore, correlating the Act to the Electronic Transaction Ordinance, 2002 (the “**ETO**”), it was pointed out that clauses (l) and (m) of Section 2 of the latter statute defined ‘electronic’ and ‘electronic document’ in the following terms:

(l) “**electronic**” includes electrical, digital, magnetic, optical, biometric, electro-chemical, wireless or electromagnetic technology;

(m) “**electronic document**” includes documents, records, information, communications or transactions in electronic form;

13. We have considered the submissions in light of the provisions of the Act, as amended from time to time. It is common ground that electronic transactions and documents were not envisaged at inception, thus were not covered under the Charging Section. Indeed, that is apparent from Section 10 of the ETO, which recognised that legislative steps would be required on the part of the provinces for bringing instruments executed in electronic form into the fold of the Act, stating that:

“10. Stamp Duty.—Notwithstanding anything contained in the Stamp Act, 1899 (II of 1899), for a period of two years from the date of commencement of this Ordinance or till the time the Provincial Governments devise and implement appropriate measures for payment and recovery of stamp duty through electronic means, whichever is later, stamp duty shall not be payable in respect of any instrument executed in electronic form.”

14. When the divergent arguments are juxtaposed, it is apparent that the focal point arising for determination is whether the amendment made to the definition of ‘instrument’ under Section 2(14) vide the Sindh Finance Act 2006 (the “**2006 Adaptation**”) effectively brought EPOs within that meaning of the term and the orbit of the Charging Section with effect from 01.07.2006?

15. For proper appreciation of that controversy, it merits consideration that the Act is a fiscal enactment, the object of which is to ensure payment of stamp duty on the instruments on which it is chargeable and required to be paid. If any authority is needed in that regard, one may turn to the judgments of this Court in the cases reported as In re: Succession Certificate of Mrs. Parveen Akhtar (deceased) PLD 1993 Karachi 280, In re: M. Aslam Motiwala 1998 MLD 1254, and Bayer Pakistan (Pvt.) Ltd. and others v. Board of Revenue and others 2002 CLD 823.

16. That being so, as per the long line of case law settling the principles of interpretation applicable to fiscal statutes, the Charging Section is to be given a strict interpretation and construed in favour of the subject so that in the event of any substantial doubt as to its application, the same is resolved in favour of the taxpayer and against the revenue. Thus, a levy cannot be imposed on a person from whom it is being claimed if a case does not clearly fall within the purview of the charging section. Furthermore, unless it is given retrospective effect either expressly or by necessary implication, every statute, including an amendatory statute, operates prospectively.

17. Indeed, in *Tennant v. Smith* (1892) A.C. 150 (at 154) Lord Halsbury stated that:--

"In a taxing Act, it is impossible, I believe, to assume any intention, any governing purpose in the Act except to take such tax as the statute imposes..... Cases, therefore, under the taxation Act always resolved themselves into the question whether or not the words of the Act has reached the alleged subject of taxation."

18. In *Attorney-General v. Milne* (1914) A.C. 765 (781) it was held that the Finance Act was a taxing statute and if the Crown claimed a duty thereunder it must show that such a duty was imposed by clear and unambiguous words.

19. In the case reported as *Government of West Pakistan and others v Messrs Jabees Limited* PLD 1991 Supreme Court 870 it was observed that:

It is a well-settled principle of law that all charges upon the subject must be imposed by clear and unambiguous language and a subject is not to be taxed unless the language of the statute clearly imposes the obligation and language must not be stretched in order to tax a transaction, which,

had the Legislature thought of it, would have been covered by the appropriate words. It is also a well settled principle of construction of a fiscal statute that one has to look merely at what is clearly said and there is no room for any intendment, there is no equity about a tax, there is no presumption as to a tax and nothing is to be read in and nothing is to be implied and one has to look fairly at the language used. But at the same time, this is also a well settled principle of law that if a person sought to be taxed comes within the letter of law, he must be taxed, however great the hardship may appear to the judicial mind.

20. In the case reported Zila Council Jehlum through District Coordination Officer versus Messrs Pakistan Tobacco Company Ltd. and others PLD 2016 Supreme Court 398, the Apex Court explicated the law regarding interpretation of fiscal statutes and retrospective operation of laws whilst observing that:

Although the Legislature can legislate prospectively and retrospectively, such power is subject to certain constitutional and judicially recognized restrictions. According to the canons of construction, every statute including amendatory statutes is prima facie prospective, based on the principle of *nova constitutio futuris formam imponere debet, non praeteritis* (which means 'a new law ought to regulate what is to follow, not the past' as per Osborn: Concise Law Dictionary); unless it is given retrospective effect either expressly or by necessary implication. In other words, a statute is not to be applied retrospectively in the absence of express enactment or necessary intendment, especially where the statute is to affect vested rights, past and closed transactions or facts or events that have already occurred. This principle(s) is attracted to fiscal statutes which have to be construed strictly, for they tend to impose liability and are therefore burdensome (as opposed to beneficial legislation).

It may be pertinent to mention here that according to the settled rules of interpretation of a fiscal part of a statute, the charging section is the key and pivotal provision which imposes a fiscal liability upon a taxpayer/person, thus it should be strictly construed and applied. If a person does not clearly fall within the four

corners of the charging section of such a statute he cannot be saddled with a tax liability. Thus, mere amendment of the definition clause of 3(1)(ix) of the Ordinance and inclusion of the urban areas as a part of a zila for the purposes of goods exit tax, with effect from 1.7.1990 does not express a clear intent. For expression of clear intent it would be necessary to change the relevant charging provision for the purposes of retrospective tax liability. The change *ibid*, restricted as it is to a change in the definition clause, cannot be considered to reflect the requisite intendment of the legislature to impose the said tax with retrospective effect.

21. In *Chairman, Federal Board of Revenue, Islamabad v. Messrs Al-Technique Corporation of Pakistan Ltd. and others* PLD 2017 Supreme Court 99 it was held that:

It is settled principle of law that tax cannot be charged and levied unless it falls squarely within the purview of the charging provisions. Taxing laws are not to be extended by implication beyond the clear import of the language used. To hold otherwise would violate another principle of interpretation of taxing statutes: that tax laws should be construed in favour of the taxpayer and any substantial doubt resolved in favour of the citizen and against the government.

We reiterate that there is no cavil with the principle that a charging provision in a fiscal statute is to be given a strict interpretation and if a case does not fall within the purview thereof, tax cannot be charged from a person from whom it is being claimed.

22. Even more recently, in the case reported as *Messrs Pakistan Television Corporation Limited versus Commissioner Inland Revenue (Legal) LTU, Islamabad and others* 2019 SCMR 282, the principles of interpreting fiscal statutes were summarized as follows:-

- i. There is no intendment or equity about tax and the provisions of a taxing statute must be applied as they stand;

- ii. The provision creating a tax liability must be interpreted strictly in favour of the taxpayer and against the revenue authorities;
- iii. Any doubts arising from the interpretation of a fiscal provision must be resolved in favour of the taxpayer;
- iv. If two reasonable interpretations are possible, the one favoring the taxpayer must be adopted;
- v. When a tax is clearly imposed by a statutory provision any exemption from it must be clearly expressed in the statute or clearly implied from it;
- vi. Where the taxpayer claims the benefit of such express or implied exemption, the burden is on him to establish that his case is covered by the exemption;
- vii. The terms of the exemption ought to be reasonably construed; and
- viii. If a taxpayer is entitled to an exemption on a reasonable construction of the law it ought not to be denied to him by a strained, strict or convoluted interpretation of the law.

23. It now falls to apply the foregoing principles to the facts and circumstances of the present case. When the 2006 Adaptation is examined, it is apparent that the same turns on the word 'document', with other media, such as a photograph, disk, tape, film and soundtrack being included so as to expand the scope of the term 'instrument'. The case of the Petitioners is that an EPO is generated and transmitted digitally through online servers and is neither a document having a tangible form, nor is it contained on any disc, tape, film or soundtrack, hence does not constitute an 'instrument' as per a plain reading of the definition. Furthermore, it bears no signature, hence cannot be regarded as 'executed'. As such, the ingredients of the Charging Section are conspicuously absent.

24. As per Section 2(22) of the West Pakistan General Clauses Act, 1956, a “document” is defined to “include any matter written, pressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter’, whereas the ordinary meaning of ‘substance’ in the given context as per the Oxford English Dictionary is:

Substance *n.* **1.** particular kind of material having more or less uniform properties (*a heavy, porous, yellow, transparent, substance, the small number of substances that make up the world*). **2.** reality, solidity, (arch.) wealth and possessions, (*sacrifice the substance for the shadow; there is no substance in him; an argument of little substance*); a man **of** ~, with much property, wealthy, **waste** one’s ~ be spendthrift. **3.** theme, subject, material as opposed to form, (*the substance is good, but the style is repellent*). **4.** essential nature (*the Son being of one substance with the Father*); essence or most important part of anything, pith, purport, real meaning, (*can give you the substance of his remarks*); *I agree with you in*~, generally, apart from details. **5.** (Metaphys.) the substratum that the cognizable properties or qualities or attributes or accidents of things are conceived as inhering in or affecting, the essential nature underling phenomena, (*substance and accidents in metaphysics correspond to subject and predicate in logic*). [MEf. OF, f.L SUB (*stantia* essence f. *stare* stand; see- ANCE)]

25. This dispels any scintilla of doubt as may have existed that apart from the other particular media specifically included as per the 2006 Adaptation, the term ‘instrument’ thereby denoted a conventional document in the tangible sense, having distinct physical properties. As such, its usage for purpose of the Charging Section during the subsistence of that definition falls to be considered accordingly.

26. When the Charging Section is dissected in light of the 2006 Adaptation, it also merits consideration that albeit the Act defining an 'instrument' to include every written document, not all documents are thus rendered dutiable, as it only the instruments listed in the First Schedule of the Act that are subject to the charge. As such, while the substance of the transaction expressed through the document is to be determined so as to ascertain whether it constitutes an instrument falling within one of the heads of charge as per the First Schedule, it is to be borne in mind that what attracts stamp duty is the instrument itself and not the subject matter or transaction.² That being said, it merits reiteration that no argument was advanced on behalf of the Respondents to show that the EPOs in question existed in the form of a physical document or were otherwise encapsulated in any of those forms of media. On the contrary, their pleadings reflect that the assessment of stamp duty had simply been undertaken on the basis of the transactions reflected in the records/accounts of the Petitioners.

27. Furthermore, from a reading of Section 10 of the Act, it also falls to be considered that until the advent of e-stamps³, duties on instruments were to normally be paid either through the use of an impressed stamp or affixation of adhesive stamps. Thus, during subsistence of the 2006 Adaptation, Section 2(11) of the Act defined the term 'duly stamped' to mean:

(11) **“duly stamped”**, as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in Pakistan;

² *Shamim Akhtar v. Najma Bagai* PLD 1977 SC 644, where it was held that "Stamp Duty is leviable only on the 'instrument' as such and not on the transaction".

³ As introduced in the Act vide amendment through the Sindh Finance Act 2020.

28. It is only when the Act was amended through the 2020 Act so as to introduce the innovation of duty payments through e-stamps in Section 10 that the definition of the term 'instrument' was also substituted, as reproduced herein above, with the definition of the term 'duly stamped' also being substituted to envisage an electronically generated stamp and the definition of an 'e-stamp' being introduced through the induction of Section 2(11A). Those definitions of those two terms read as under:

[(11) "Duly stamped" means affixation of an adhesive or impressed stamp or ex-stamp of not less than the requisite amount and that the stamp has legally been affixed, used or electronically generated;]

[(11A) "e-stamp" means wholly or partially printed paper containing a bar code and /or unique identification code or such other information, as may be prescribed by the rules, to be generated and printed, on payment of chargeable stamp duty to be deposited in the account of the Provincial Government;];

29. Just as fundamentally, through the 2020 Act, a proviso was also added to the definition of the term 'executed' so as to address the aspect of execution. That proviso, which is in the nature of a deeming clause, stipulates as follows:

"Provided that the electronically generated instruments not requiring signature which are accepted or the obligation whereof are performed in such manner in a routine business practice, shall be deemed to have been executed for the purpose of stamp duty".

30. In view of the foregoing it is apparent that an EPO (i.e. a purchase order purely in electronic form) is not a document in the sense that the word was used in the 2006 Adaptation and does not fall within the definition of 'instrument' in terms thereof. Furthermore, the Respondents have not argued let alone demonstrated for purpose of advancing their case that the EPOs sought to be subjected to duty were 'executed' in the sense of the term as per Section 2 (12). On the contrary, the amendments introduced through the 2020 Act appear clearly designed to address those omissions in the Act, as it stood at the time.
31. That being so, such EPOs as were generated during the subsistence of the 2006 Adaptation did not fall within the ambit and purview of the Charging Section under that legislative framework on a reasonable interpretation of the law and cannot be inducted through a strained construction thereof, contrary to the principles elucidated in the case law referred to herein above.
32. Accordingly, the captioned Petitions stand allowed to the extent of it being declared that EPOs generated prior to or during the subsistence of the 2006 Adaptation were not covered by the Charging Section so as to be chargeable with stamp duty. Needless to say, the Petitioners may approach the Respondents for refund/adjustment of any sums paid in that regard.

JUDGE

CHIEF JUSTICE

Karachi
Dated _____