

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

Present:  
Mr. Justice Muhammad Shafi Siddiqui  
Mr. Justice Mahmood A. Khan

C.P. No. D-3601 & 3602 of 2018 and  
3302 & 3422 of 2019

Pakistan Stock Exchange Limited  
Versus  
Sindh & others

Date of Hearing: 18.11.2021, 26.10.2021, 07.12.2021 and  
14.12.2021

Petitioner in all petitions: Through Mr. Hyder Ali Khan along with M/s  
Shaheer Roshan Shaikh, Sami-ur-Rehman  
and Hamza Waheed Advocates.

Respondent No.1: Through Mr. Saifullah, Assistant Advocate  
General.

Respondents No.2&3: M/s Muhammad Tariq Masood, Shamshad  
Ahmed Narejo and Muhammad Idrees  
Jakhrani Advocates along with M/s Khalid  
Zamir, Commissioner SRB and Syed Zain-ul-  
Abdin Shah, Deputy Commissioner SRB.

Respondent No.4: Through Mr. Kafeel Ahmed Abbasi, Deputy  
Attorney General.

**LAW/STATUTES DISCUSSED**

- i) Securities Act, 2015 (“Act of 2015”)
- ii) Stock Exchanges (Corporatization, Demutualization &  
Integration) Act, 2012 (“Act 2012”)
- iii) Rule Book Pakistan Stock Exchange Ltd. (PSX)
- iv) Sindh Sales Tax on Services Act, 2011 (SSTA 2011)
- v) Constitution of Islamic Republic of Pakistan, 1973  
 (“Constitution”)

**J U D G M E N T**

Muhammad Shafi Siddiqui, J.- These four petitions impugned four individual show-cause notices dated 13.04.2018 (of same date in CP No.D-3601 and 3602 of 2018), 25.04.2019 and 11.05.2019 respectively in the following petitions, involving different tax period on the count that

imposition of Sindh Sales Tax on Services on the petitioner's income arising from listing fee and exchange operation earned by it, is ultra vires to the Constitution.

2. It is the case made out by the petitioner that the respondent Sindh Revenue Board (SRB) cannot influence or exert their provincial executive authority over petitioner since it is a body created in pursuance of subjects enumerated in Fourth Schedule to the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "Constitution") having federal legislative domain.

3. The petitioners claimed to have been engaged in conducting, regulating and controlling the trade of buying, selling and dealing with securities. The present enactment of Stock Exchanges (Corporatization, Demutualization & Integration) Act, 2012 (hereafter referred to as "Act 2012") was introduced by Federal Legislature to develop a uniform capital market in the country and to facilitate the integration of existing stock exchanges and to sum up such uniformity, in pursuance of Entry 30 of Part-I of the Federal Legislative List that concerns with stock exchange and future markets with the object of business not confined to just one province. Learned counsel laid emphasis on Article 137 of the Constitution and submitted that the question whether a province has a capacity under the Constitution to impose sales tax on services on the body that is covered by Federal Legislative List has now been a concluded and settled issue in terms of authoritative judgment of Hon'ble Supreme Court in the case of Civil Aviation Authority<sup>1</sup>.

4. Learned counsel for petitioner further submitted that the petitioner was fully controlled by a federal body i.e. Securities & Exchange Commission of Pakistan earlier when it was Karachi Stock Exchange Limited through its Article 22(a)(ii) of Articles of Association of

---

<sup>1</sup> 2017 SCMR 1344 (Sindh Revenue Board v. Civil Aviation Authority)

Karachi Stock Exchange Limited. At the relevant time SECP was controlling the Karachi Stock Exchange by nominating and appointing directors to its Board, apart from filling of any casual vacancy on the Board of Directors through Article 24 which include appointment, removal and termination of managing director. Learned counsel however has not pressed entry No.3 and 13 of Part-II of Federal Legislative List though he pleaded them in memo, instead has seriously pictured the effect of Entry 6 of Part-II of Federal Legislative List.

5. Rootage of the impugned notices was triggered on account of earlier correspondence between petitioner and predecessor of respondent No.3 when petitioner received a letter in relation to income realized from listing fee and exchange operation, which was claimed to be taxable under relevant Tariff Headings disclosed. On receipt of such notices, prior to its integration, it underwent departmental proceedings before respondent No.2 i.e. Sindh Revenue Board where the predecessor Karachi Stock Exchange was compulsorily registered as a service provider and was directed to pay sales tax on services on management services “provided in Sindh”.

6. The facts, as disclosed in the instant proceedings, are such that the matter was resolved when respondent No.2 issued notification dated 09.05.2016 to waive all penalties and 90% of the default surcharge levied by the Commissioner Appeals, Sindh Revenue Board whereby the petitioner deposited the principal amount adjudged by the officer of Sindh Revenue Board and began charging Sindh sales tax on services on management services. Those proceedings were in pursuance of show-cause notice of 2015 which ended up before the Tribunal on account of withdrawal of appeal on 02.06.2016 in view of above notification, rendering the impugned order therein as final except for quantum for which notification was issued.

7. In relation to period of July 2011 to June 2012 petitioners' counsel urged that under section 23 of Sindh Sales Tax on Services Act, 2011 respondent No.2 was empowered to pass an order (under section 23) where a notice is given to the person in default of such payment within eight years from the end of tax period to which the order refers. This time period was earlier framed as five years which was substituted by Sindh Finance Act 2016. It is claimed that it cannot have retrospective effect when a show-cause notice was issued in the year 2018 for the period 2011 and 2012 as, in relation to a time barred claim, on the basis of the then existing laws, vested right claimed to have accrued in favour of petitioner.

8. It was further urged that the alleged advertisement services received by the petitioner consists of a number of transactions and some of them do not fall within any of the tariffs or Tariff Headings, as claimed, as they relate to the internal printing of books and letters whereas many other transactions fall outside scope of Sindh sales tax on services on account of notification of exemption.

9. Although Entry 3 and 13 of Part-II of Federal Legislative List was not pressed into service however it is argued that the activities of petitioner are now trans-provincial in nature and as such for Sindh, sales tax liability to be ascertained on the basis of the revenue generated from such services provided by the petitioner and has to be bifurcated between services provided to the customer within Sindh and services provided to customers outside Sindh and thus any fee charged for services provided to the customers outside the province falls outside the purview of the Act i.e. Sindh Sales Tax on Services Act, 2011 and no Sindh sales tax on services can be claimed in this regard and on this count too the notices are ultra vires.

10. Being a member's entity, Mr. Hyder has highlighted the doctrine of mutuality and relied upon Karachi Golf Club's<sup>2</sup> case.

11. In response to the arguments of Mr. Hyder Ali Khan, Mr. Muhammad Tariq Masood, learned counsel for respondents, has assisted this Court and has also taken us to the history prior to corporatization of stock exchanges. He submitted that petitioner's predecessor in interest originally surrendered to the jurisdiction of SRB in March 2013 and hence now the challenge to the jurisdiction is not available with the petitioners.

12. Learned counsel further submitted that the existence and creation of stock exchange is not by way of an act of parliament rather it was a voluntary act of individuals who associated themselves and formed an association. The association was originally dealt with under Companies Act 1913 which was made applicable in the formation of petitioner's predecessor in interest. The company was registered by the Registrar of Companies as a company limited by guarantee.

13. Had petitioner or its predecessor in interest been a creation of statute, it is argued that, the statute itself would have supported it as is in case of National Bank of Pakistan Ordinance 1949, SECP Act, 1997, Civil Aviation Authority Ordinance 1982, Hyderabad Development Authority Act, 1976. This matrix is missing in the instant Act 2012 which was promulgated on account of a global necessity, as felt by the federation, that led to promulgation of the Act 2012 which concerns its corporatization, amalgamation only.

14. On merits, learned counsel for respondent has opposed the applicability of Civil Aviation Authority's judgment of Hon'ble Supreme Court (Supra) as none of the three elements of the control of stock exchange i.e. administrative, financial and power to winding up the

---

<sup>2</sup> 2021 PTD 558 (Karachi Golf Club (Pvt.) Ltd. v. Province of Sindh)

business of petitioner could be exercised by the federation. It is contended that the Government of Pakistan through SECP exercised its control over all issues of stock exchange business including appointment of directors. In response to issue of a regulatory authority and/or Regulations in terms of Section 6 and 7 of the Securities Act, 2015 (hereinafter referred to as “Act of 2015”), Mr. Tariq Masood, by making references of some of the relevant definitions and the necessities of the Act itself, submitted that the ibid Act of 2015 recognizes only one kind of Regulation and that is those by SECP and that alone does not frame petitioner as a regulator within Entry 6 of Part-II of Federal Legislative List.

15. The next limb of arguments of the learned counsel in response to rebut the arguments of statutory regulations is that there is no express provision in the entire Act of 2015 which specifically empowers Karachi Stock Exchange to impose any penalty and there is nothing in the Act of 2015 which can even impliedly suggest such statutory actions to be performed by petitioner. Section 11 of the Act of 2015 deals with review of disciplinary action taken by Securities & Exchange and requires that the exchange shall immediately inform SECP in writing the name of securities and brokers and reasons for disciplinary actions and the amount of penalty imposed so that the Secretary Exchange Commission of Pakistan can review the disciplinary action. It is thus not a statutory penalty since no statutory regulation could be issued by petitioner.

16. The third response of Mr. Tariq Masood was in relation to an action of the Stock Exchange while charging fee which is construed by Mr. Hyder to be parallel to performing functions or sovereign functions of the State. Learned counsel to assist this Court has taken us to the two pronouncements in the cases of Province of Punjab<sup>3</sup> as well as Khawaja

---

<sup>3</sup> PLD 2017 SC 53 (Province of Punjab v. Muhammad Tufail & Co.)

Ahmed Tariq<sup>4</sup> wherein the government functions and sovereign functions were defined. It is urged that listing fee is required to be paid by the company which intends to list itself on its securities or its securities to be treated on the security exchange. This is not recovered or collected under any statutory commands. The Act of 2015 does not confer any such power over the exchange as is in the case of Civil Aviation Authority (Supra) and SECP etc. The Karachi Stock Exchange was collecting such fee in terms of their internal regulations and not as a compulsory extraction under statutory powers and by its recovery petitioner is not rendered as an entity performing functions of State.

17. In response to Entry 6 of Part II of the Federal Legislative List, learned counsel for respondent submitted that the authority must be regulatory in nature and ought to have been established under the federal law i.e. all regulators established under federal law could be subjected to Entry 6 of Part-II of the Federal Legislative List whereas neither Karachi Stock Exchange nor Pakistan Stock Exchange was established by force under any of the federal statute and hence applicability of ibid Entry 6 is denied.

18. In response to Entry 30 of Part-I of Federal Legislative List regarding which legislation vest in the federation and hence provinces lack legislative competence, it is argued that principle of interpretation of entries in Federal Legislative List has been defined by different benches of this Court as well as by Hon'ble Supreme Court. The legislative work claimed to have been distributed through these entries between provincial and federal legislature. The entries in the current federal legislative list of the Fourth Schedule do not transgress or encroach upon powers of other legislature. In this regard even learned counsel for respondent has relied upon the case of Civil Aviation

---

<sup>4</sup> PLD 1992 SC 646 (Kh. Ahmed Tariq Rahim v. Federation of Pakistan)

Authority (Supra). It is claimed that neither federation nor provinces can trespass the rights of others or encroach legislative competence.

19. For the applicability of doctrine of mutuality, it is stated that Karachi Golf Club's case, as relied upon, speaks of its applicability to Member's club only and not to commercially active entity drawing economic benefit. It is denied to have acquired a status of club which could further be transacted/bisected into a member's club. As regards, services rendered by the Stock Exchange to companies, it is stated that their shares are listed on the stock exchange and are being charged initially for listing fee and annual rental fee. They also provide services to brokers and facilitate them in their business of providing brokerage services to general customers, investors, individuals etc. The stock exchange provides management services and charges fee for such management services, therefore, it is not conceivable that stock exchange provide services to its members only.

20. We have heard the learned counsel for parties and perused material available on record.

21. The primary arguments of petitioner's counsel are that the provinces lack competence in view of relied entries of Part-I and Part-II of Federal Legislative List of Fourth Schedule. Reliance is placed on Entries No.30 and 31 of Part-I of Federal Legislative List Fourth Schedule by relying on judgment of Civil Aviation Authority (Supra) and also Entry 6 of Part-II of Federal Legislative List.

22. Key points as evolves on account of submissions of the learned counsel are:

- A) Whether petitioner is a regulator within frame of Entry 6 of Part-II of Federal Legislative List?
- B) Whether Entry 30 and 31 of Part-I of Federal Legislative List of the Constitution could rescue petitioner in establishing



incompetence of province to levy sales tax on services, which is catered by Entry 49 of Part-I of Federal Legislative List?

C) Whether petitioner at all is a creation of Stock Exchanges (Corporatization, Demutualization & Integration) Act 2012 (Act 2012)?

23. In order to apply the effect of Act 2012 for the creation of stock exchange, we need to trace the history of stock exchange, as assisted by Mr. Tariq Masood, learned counsel.

24. The history of formation of stock exchanges as traced by him and to which no factual denial was made by Mr. Hyder is that Karachi Stock Exchange was formed by some individuals associating themselves as members and then by fulfilling the requirements of the then existing corporate law, for the purposes of their association, as disclosed in their Memorandum of Association, forming a company under the then existing corporate structure which is perhaps Companies Act, 1913. The said company was registered by the Registrar of Companies and it commenced its operation. It is thus a voluntary corporate creation by some of the associate members. Corporate creation and creation of an entity by statute (per force) itself is a subject addressed in this judgment.

25. The statutory creation, for the purposes of explaining above voluntary creation, are the creation of National Bank of Pakistan out of National Bank of Pakistan Ordinance 1949, Security Exchange Commission of Pakistan Act 1947 for the creation of Securities & Exchange Commission of Pakistan and Civil Aviation Authority Ordinance 1982 that establishes the Civil Aviation Authority etc.

26. An attempt was made to consider the Act 2012 at par with those of National Bank of Pakistan Ordinance 1949, SECP Act 1947 and Civil Aviation Authority Ordinance, 1982. In the Act 2012 there is nothing to

subscribe that it is this Act which created the stock exchange, which was originally formed as a voluntary act of some of the members who got themselves into an association forming Karachi Stock Exchange. This Act (Act 2012) only provides for corporatization, demutualization and integration of stock exchanges in Pakistan. It enabled the conversion of a company limited by guarantee to company limited by shares and further caters for the amalgamation or integration of different companies of like nature which otherwise could have been done through an extended and complexed process provided by the Companies Ordinance, 1984, as it then prevailed. This was done under a uniform policy of the country since it was felt that there was no level playing field for the investors who were at disadvantageous position and the proper way out as found, was to de-mutualize the companies as followed internationally. Thus, Act 2012 has no provision for a fresh creation or registration of a new stock exchange or new corporate entity which could be other than designated role as disclosed in their earlier Memorandum of Association. No statutory/regulatory role/function or role of federation subscribed in the formation of demutualized company under Act 2012.

27. Act 2012 and its subsequent corporatization also did not affect the nature and legal status of the company. Act 2012 “Effect of Corporatization”<sup>5</sup> also identifies the above facts which have not been repeated for the sake of brevity. It was in fact promulgated to overcome the difficulties, shortcomings and cumbersome procedure for corporatization, demutualization and amalgamation.

28. An attempt has been made that SECP plays a pivotal role in the appointment of directors as considered in the case of Civil Aviation Authority *ibid*.

---

<sup>5</sup> Section 7 of Stock Exchanges (Corporatization, Demutualization & Integration) Act 2012

29. The role of SECP to appoint directors to fill casual vacancies on the Board of Directors and to appoint MD of Karachi Stock Exchange would turn nothing. It would not change the corporate structure of stock exchange. In a ten-member Board of Stock Exchange, five were appointed from amongst the members of the Company without any interference of SECP whereas five independent directors of the Board were appointed from amongst professionals in consultation with different professional organizations and none of them could be an employee of SECP or could have any interest based connection therewith. It is in fact to secure the independence of the Board of Directors rather than having control over it. The Board of Directors approves the proposal of Managing Director of the Board which is only approved by SECP and this was perhaps to monitor as to the whether MD fulfills the criteria for such appointment provided in the Memorandum. Such appointment of Managing Director is not to change the corporate entity of the stock exchange.

30. The emphasis of the petitioner's counsel for the enforcement of Regulations in pursuance of Section 6 and 7 of the Act of 2015 and in consequence whereof the stock exchange said to have been performing regulatory functions of the government, we may take some assistance from the Act itself.

31. Section 2 of the Act of 2015 contains definitions and same are material for the purposes of present issue in hand. The same are as follows:-

**2. Definitions.—(1)** *In this Act, unless there is anything repugnant in the context or subject,*

- (i) ...
- (x) *“Commission” means the Securities and Exchange Commission of Pakistan established under section 3 of the Securities and Exchange Commission of Pakistan Act, 1997 (XLII of 1997);*

- (xlvi) “regulated market” means any securities exchange, over-the-counter market or platform that is licensed by the Commission;
- (xlix) “regulations” means regulations made by the Commission under this Act;
- (lv) “securities exchange” means a public company that is licensed by the Commission as a securities exchange under section 5;
- (lvii) “security market” means any market or place at which or any service or facility (whether electronic or otherwise) by means of which, offers of invitations to sell, purchase or exchange securities are regularly made on a centralized basis, being offers or invitations that are intended or may reasonably be expected, to result, directly or indirectly, in the acceptance or making, respectively, of offers to sell, purchase or exchange securities;

32. Regulations as defined leaves no doubt that Act of 2015 recognizes regulations of Commission i.e. SECP, therefore wherever the word “Regulation” is used in Section 7 of ibid Act it is in its colloquial or liberal sense but not regulations under Act 2012.

33. Sections 160 and 161 of Act of 2015 are also reproduced for the sake of convenience:-

*160. Penalty to be imposed by the Commission.—Wherever a penalty is provided for any offence, contravention of or default in complying with, any of the provisions of this Act, rules or regulations made under this Act, such penalty shall be imposed by the Commission after providing a reasonable opportunity of hearing to the party.*

*161. Appeal.—(1) Any person aggrieved by the final decision of the Commission may, within sixty days of the decision communicated to him, prefer an appeal to the Court.*

*(2) The Court may, on an appeal made to it under sub-section (1), accept, set aside or vary the decision of the Commission or make such other order as the interests of justice require.*

*Explanation.—For the purposes of sub-section (1), “final decision of the Commission” means a decision of the Appellate Bench of the Commission under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (XLII of 1997).*

*(3) The Court shall, at the stage of admission of the appeal or at any time thereafter on the application of the aggrieved person and after due notice to the Commission, decide by means of a reasoned order whether the appeal is to be admitted in part or in whole depending on the facts and circumstances of the case: Provided that the admission of the appeal shall not per se operate as a stay and nor shall any stay be granted therein unless the Commission has been given an opportunity of being heard.*

*(4) Notwithstanding anything contained in any other law, the hearing of appeal shall continue day-to-day, unless sufficient cause has been shown by the parties jointly or severally which is beyond the control of the parties, the Court may adjourn the hearing for maximum of two dates and such adjournment shall not be more than fifteen days at any one time or for more than thirty days in all.*

*(5) Where on third hearing any party fails to appear and address arguments before the Court the Court shall proceed and decide appeal on merits and it shall be deemed that such party has relinquished its rights to address arguments.”*

34. Section 160 of the Act of 2015 empowers SECP to impose penalty for violation of any “Regulation” made under the Act. Had the status of so-called Regulations issued (in pursuance of Section 7 *ibid*) been that of “Regulations” issued under the Act 2012, then Karachi Stock Exchange should have been named as an authority empowered to issue regulations in Section 2(xlix) *ibid* and also as an authority to impose penalty for violation of such regulations under section 160 of the Act of 2015. It thus establishes that the word “Regulations” as used in Section 7 in Act of 2015 is not in context of rendering/referring to any statutory regulations but merely internal regulations of stock exchange for carrying out daily business activities in transparent manner, as required by its regulator.

35. The other definitions such as “security exchange”, “regulated market” and “securities market” available in Section 2 of Act of 2015 cumulatively yields that the definitions are of places where services are provided for commercial/economic activity and it is the commercial activity of the company itself which does not form either functions or sovereign functions of the State. Section 7 of Act of 2015 which deals with the regulations is to be read in connection with Section 5 of Act of

2015 as Section 7 itself makes reference to it which deals with the registration requirement. It is Section 5 subsection (4) that empowers the SECP to grant licence to a company for working as “securities exchange” provided that the SECP is satisfied as to the requirements. Section 5(5) further clarifies that while granting licence, SECP shall ensure that the company to whom licence is being issued has made satisfactory provision in its internal regulations for protection of customers to avoid conflict of interest and to provide level playing field by providing fair, transparent and efficient security market and proper regulation and supervision to control influential entities in the market.

36. The cumulative effect would thus lead us to conclusion that the regulations of the securities exchange is only for regulating the company so that investors should know beforehand that Karachi Stock Exchange has put in place satisfactory arrangement for fair and transparent security market and free from conflicting interest. It is thus not those statutory regulations through which in normal way the official functions of the government are being performed.

37. Penalties imposed by securities exchange and by commission are of two different origin. There is no specific provision or definition under Act 2012 to enable forced penalty of the nature as available in Section 160 for which appeal is also provided.

38. Section 161 of Act of 2015 which deals with appeals does not mention that any appeal can be filed against imposition of so-called penalty by Karachi Stock Exchange as appeals only lie against order of SECP. Even Section 11 of the Act of 2015 suggests that word “penalty” has been used in context of disciplinary actions in colloquial or literal sense rather than for statutory penalty. The statutory penalty has some attributes such as it is to be imposed by some statutory authority and it is to be cleared from any unambiguity and certainly not to be derived by

intendment and that the statutory mechanism of appeal is available against such penalty and lastly the recovery procedure of penalty such as attachment or sale of properties should have been made available including the restrictions, transfer and alienation of property of defaulted person and its recovery as land revenue. No such mechanism is provided for such penalties as relied upon.

39. The penalty imposed and recovered under statutory authority are supposedly meant for government consolidated funds or for public account of the federation in terms of Article 78 of the Constitution. The penalties and levies collected under any of statutory powers are first to be credited to the funds established under the relevant enactment as being done by SECP, Civil Aviation Authority etc. Nothing of its kind is provided in the Act of 2015 regarding the deposit of fee collected by Stock Exchange or the so-called penalty levied by it to any funds and hence it does not said to be performing functions of the State. To the contrary the penalty imposed by Karachi Stock Exchange forms part of its income which is utilized as agreed by the Board of Directors for their internal business activities and surplus is distributed as dividend amongst the shareholders of the company, which facts are not controverted by petitioner.

40. The government function and sovereign functions have been discussed in detail in the case of Province of Punjab and Kh. Ahmed Tariq (Supra). The nature of the listing fee being recovered by the stock exchange is such that company who intends to list itself or its securities to be traded on a securities exchange, they may require designated listing fee for the purposes of economic activities. Once such fee is paid and collected by the stock exchange, it lists such company or companies or its securities on its electronic display along with making them available for sale/trading online/website as in its absence such

securities may not be available for trading. This is a service which is being provided by the stock exchange in course of their economic activity within the scope of Sections 3 and 4 of Sindh Sales Tax on Services Act, 2011. This listing fee cannot be pictured as statutory fee as it is not recovered on account of any statutory command of any statute/law. The Civil Aviation Authority Ordinance however, in contrast has empowered Civil Aviation Authority to levy and collect various fee and charges as well as security exchange Commission of Pakistan Act which empowers SECP to levy and collect fee and other charges. It has been explained by learned counsel for defendants that this amount (listing fee) is being recovered through a Rule Book of Pakistan Stock Exchange Ltd. which clearly mentions that deposit, fee, contributions and other sums are in fact consideration for facilities and services provided by the Exchange which contention again is not materially opposed. Such amount in the shape of listing fee and/or levy as being imposed and recovered by stock exchange were not credited to federal consolidated funds or to public account and there is absolutely no restriction through any statute for the utilization of these funds generated by Stock Exchange which are consumed, as per the decision of the Board of Directors, to their business activities and surplus is distributed regularly as dividends amongst the shareholders which fact is also not denied by petitioner's counsel. We thus conclude that regulations of Commission and those of Stock Exchange are on different footings and regulations of stock exchange cannot be attributed to be statutory regulations.

41. The next submission we take up is one that relates to Entry 6 of Part-II of the Federal Legislative List of the Fourth Schedule, which primarily concern with the regulatory authorities established under any federal law. We have already stated that the stock exchange either in its



original or in the present form is not the creation of any statute i.e. either Karachi Stock Exchange or Pakistan Stock Exchange and such was not established (per force) by any federal law rather it was an act (voluntary) of some of the members who associated themselves to form a company under the enactment available at the relevant time such as Companies Act, 2013. Karachi Stock Exchange or Pakistan Stock Exchange were not performing any statutory or regulatory functions and the imposition and collection of fee/penalty is not under any statutory command rather meant for their internal mechanism to keep their business transparent. The regulator of the stock exchange is the Security Exchange Commission of Pakistan which is established under SECP Act, 1997. The arguments of Mr. Hyder Ali Khan that it being a regulator and formed in pursuance of Entry 6 of Part-II of the Federal Legislative List is not confidence inspiring.

42. As discussed, Act 2012 is not a law for establishment or creation of authority as it merely provides enabling provision for conversion of a company limited by guarantee to a company limited by shares and provides an easy way for amalgamation and integration without undergoing hassle of the recourse available under Company law available at the relevant time. The accounts of security exchange are maintained and audited by a chartered accountant, appointed by stock exchange as per the requirement of Companies Ordinance, 1984 as it then was and Companies Act 2017 as it is now. Karachi Stock Exchange or Pakistan Stock Exchange since are not the forced creation of any federal statute therefore cannot be deemed to be performing functions of the State or acting as a regulator and hence are beyond the scope of Entry 6 of Part-II of Federal Legislative List on the aforesaid count.

43. With regard to constitutional validity of the provincial sales tax on services, the federal legislative entries have played a pivotal role. It is

necessary to always keep in mind the principles of interpretation of these entries as on a number of occasions benches of this Court as well as Hon'ble Supreme Court have delivered.

44. Federal Legislative List as appeared in the Fourth Schedule to the Constitution clearly demarcate and distribute the legislative powers between provincial and federal legislatures; the entries in the Federal Legislative List indicate the subjects as long as it does not transgress or encroach upon the power of the other legislature. A meaningful distinction of Federal Legislative List as Part-I and II of Federal Legislative List is assigned in *Pakistan Medical*<sup>6</sup>. This distinction was only on the count of role of CCI Council of Common Interest in formulating and regulating the policies in relation to subjects/matters contained in Part-II of such list as maintained in *Pakistan Medical's* case above.

45. The Hon'ble Supreme Court in the case of *Elahi Cotton Mills*<sup>7</sup> has emphasized that neither the federation nor the provinces should invade upon the rights of the other nor encroach on the other's legislative domain. The pith and substance of the legislative subject is to be examined to determine in whose legislative sphere a particular subject comes with reasonable interpretation which does not produce impracticable results. Federal legislature in pursuance of Entry 30 has enacted laws such as Act of 2015, Future Markets Act, 2016, SECP Act, 1997 and Stock Exchanges (Corporatization, Demutualization & Integration) Act, 2012 however neither Karachi Stock Exchange nor Pakistan Stock Exchange was established in consideration of said entry in pursuance of Act 2012 or any such federal law as discussed in the earlier part of judgment. For the purpose of regulating the business as undertaken by petitioner, the federal government enjoys the competence to regulate such business and may legislate but its' (stock

---

<sup>6</sup> 2018 SCMR 1956 (*Pakistan Medical & Dental Council v. Muhammad Fahad Malik*)

<sup>7</sup> PLD 1997 SC 582 (*Elahi Cotton Mills Ltd. V. Federation of Pakistan*)

exchange) creation is altogether different subject and taxing events of this entity is also altogether different.

46. Articles 97, 137 and 142 of the Constitution which provide contour line for legislative and executive domain of the federation and provinces. It begin with the phrase “subject to the Constitution” and these articles also define the authority of the federation and the provinces by using a phrase “matters with respect to which” Majlis-e-Shoora (Parliament) has power to make laws (Article 97) and “matters with respect to which” the provincial assembly has power to make laws (Article 137). Article 142 also uses the expression that “Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List. As the Federal Legislative List provides broadly the fields of legislation and they are connected with these articles therefore legislative entries in the fourth schedule to the Constitution cannot be read in isolation without reference to these Articles.

47. As explained by the Hon’ble Supreme Court in the case of LDA<sup>8</sup> the expression “subject to the Constitution” does not make Articles 137 or 142 subservient to the remaining provisions of the Constitution rather it means that where the Constitution creates a specific bar to the exercise of such executive or legislative authority or provide a different manner for such exercise then that authority must either not be exercised at all or be exercised in such manner as the Constitution permits.

48. As the entries in the Federal Legislative List catalogue the legislative powers and domain which has been given in these Articles

---

<sup>8</sup> 2015 SCMR 1739 (LDA v. Imrana Tiwana)

therefore all entries are to be read by articulating them with the words “subject to the Constitution”. To understand the width and amplitude of subject matter mentioned against each entry and to see whether it covers the subject matter of taxation or not the said entry cannot be read as standalone but one has to see the extent or limitation imposed by some other provisions of the Constitution or the other entries in the Federal Legislative List as they are also part of the Constitution.

49. Dealing with somehow similar, if not identical, situation this Court in the case of *Pakistan Mobile Communication*<sup>9</sup> has explained that the entries in the Fourth Schedule have been meaningfully arrayed in serial and sequence and there is a method in it. Competence to regulate such subjects and competence to levy are two elaborate subjects and purposely they have been kept aligned in such sequential way. Regulation of the subject activity/business and levy may have remained with federation however for imposition of tax/duties the subject has to find its way under Entries 43 to 53 in the Fourth Schedule. Parliament’s role under Entry 49 which deals with the taxes on sales and purchases of goods imported, exported, produced, manufactured or consumed purposely excludes sales tax on services via 18<sup>th</sup> Amendment.

50. The scheme of legislative entries in the Fourth Schedule regarding taxation is such that taxes on income, sales tax on purchase and sales of goods, duties of customs and excise etc. fall in the domain of Federation whereas federal legislature has no power to legislate in respect of sales tax on services even regarding those subject matters which are enumerated in the Federal Legislative List subject to strict trans-provincial application<sup>10</sup> (Entry 3 and 13 of Federal Legislative List not pressed by petitioner). Entry 49 enjoys a unique position as it shifts the taxing power (for services) from the federation to the provinces. It

---

<sup>9</sup> *Pakistan Mobil Communication Ltd. v. Federation of Pakistan* (CP No.D-4778/2021)

<sup>10</sup> 2018 SCMR 802 (*Sui Southern Gas Co. Ltd. v. Federation of Pakistan*)

recognizes the scope and extent of the powers and creates a reconciled balance, which allowed federation and provinces to operate in their own fields in harmony.

51. Thus taxing power in respect of sales tax on services irrespective of the other entries in the Federal Legislative List has been exclusively vested in the provinces, therefore, if subject matter of legislation in respect of stock exchanges or future markets is within the exclusive domain of the federation even then such subject matter would not cover subject matter of taxation through said entry identifying the subject independently. These entries with subject heading is for regulating them and it may not distract the entry which covers the subject of taxation. Merely on this proposition of another entry with subject business, provinces cannot be denuded of their power of taxation in respect of sales tax on services as specifically conferred upon them by Entry No.49. Such arguments would also quarrel with the scheme of arrangement of the entries in Federal Legislative List; general legislative powers, which primarily concern administrative powers are separately and distinctly demarcated (Entry 1 to 42) from taxing powers (Entries 43 to 53). If the general legislative powers are also to cover the taxation power then the entries related to taxation would become redundant (having same subject head).

52. To support above submissions that the Entries from 1-42 in the Federal Legislative List do not cover taxation matters reference is made to Entry 7 which deals with legislation in respect of matter of telecommunication but the federation cannot impose sales tax on services related to the matters falling in the Entry 7 due to the fact that Entry 49 itself refrains the federal government to levy sales tax on services which has been entrusted to the provinces by such exclusion. While deciding the issue of extent of legislative power that whether such

power includes or does not include the power of taxation, reference is also made to Entry 31 which empowers the federal legislature to make laws in respect of corporations. If scope of legislation as per this Entry 31 is construed wide enough to cover taxation or taxation should have been covered by this Entry then there was no need for Entry 48 which specifically provides for taxes on corporations and proposed interpretation of petitioner will make Entry 48 redundant. Thus the subject matters covered by entries 1 to 42 do not cover subject of taxation which are separately provided in Entries 43 to 53. Similarly, if proposition of the petitioner is accepted that legislative power in respect of the subject matter mentioned against Entry 30 also covers taxation of stock exchanges then it would be against the scheme of arrangement of legislative power and the judgments of this Court as well as of Hon'ble Supreme Court. Thus to drive or to deprive legislative competence, powers must be available with entries that matters and not those which are not relevant for the purpose of sub-topic of the subject entry.

53. The insistence of applicability of Civil Aviation Authority judgment *ibid* is of no avail for the petitioner as the said authority cannot be kept at par with authority of stock exchange created as a corporate entity. Civil Aviation Authority has been declared as federal regulatory authority in terms of Entry 6 of Part-II of Fourth Schedule which performs functions of the State, falling in the exclusive domain of federation. Entry 6 of Part-II of Federal Legislative List is for all regulatory authorities with federal legislative competence and hence it was held in Civil Aviation Authority (*Supra*) case that the Province of Sindh cannot impose sales tax on services which services are provided by Civil Aviation Authority, a regulatory body, in discharge of their statutory duties and in consequence whereof imposition of sales tax by Sindh was declared

contrary to the provisions of the Constitution i.e. Article 142A and the actions of Sindh Revenue Board in this regard were held to be of no legal effect.

54. The stock exchange in any form before or after Act 2012 cannot be said to have been performing functions and/or sovereign functions of the State. Stock exchanges are commercial entities deriving earning which also retains its earning to itself and invariably distribute dividends to its shareholders out of the funds/income without surrendering any amount to federation and there is no denial to these facts. Stock exchanges were neither before nor now a regulator to be framed in Entry 6 of Part II of Federal Legislative List but in fact were/is (different stock exchanges before/Pakistan Stock Exchange) being regulated by SECP which is a role entrusted by Act of Parliament to SECP via SECP Act, 1997. It is the Securities & Exchange Commission of Pakistan which could be kept at par with Civil Aviation Authority in terms of its regulatory stature, when it comes to discharging duties in connection with the affairs of the federal government i.e. functions of the State.

55. With reference to arguments on doctrine of mutuality, it is to be seen that stock exchange before and after the mutualization provide services to companies whose shares are listed with stock exchange and charges initial listing fee and annual renewal fee. These corporate entities provide services to brokers and facilitate them in their business of providing brokerage services to general body of customers/investors, which is an economic activity for their own benefit. Stock Exchange also provide management services to some funds and charges fee for such management services therefore the services cannot be considered to be for members of club for availing benefits of doctrine relied upon. In the Karachi Golf Club's (Supra) case, as relied upon by the petitioner's counsel, the applicability of doctrine of mutuality was made applicable

to “members club” only and not to a proprietary or a private or commercial club.

56. In the case of Karachi Golf Club the Bench identified three pillars of doctrine in paragraph 31 of the judgment and present corporate entity i.e. petitioner being discussed, does not meet any of them. Those identified pillars are (i) commercial aspect, (ii) complete identity between contributor and participants and (iii) impossibility for the contributor to derive profit from activity. As observed above, these exchanges are commercial organizations and are engaged in business of providing services for trading and securities.

57. Stock Exchange is a commercial organization and is engaged in a business of providing services for the trading of securities. As per definition of the term “Stock Exchange” it is a market place where facilities for trading of securities are provided. The surplus (receipts over expenses) is distributed regularly as dividend amongst the shareholders. Its shareholders taking part in trading activities as brokers derive profit. Even before demutualization the members of stock exchange were entitled to trading on stock exchange and were also provided services as brokers; they have established their offices and solicit business and use their membership for earning income therefore economic and commercial activities were the core activities of the erstwhile members and also the present TRE holders (trading right entitlement). Stock exchanges entertain applications from individuals and corporate entities to issue them such trading certificates for their economic/business activity. The stock exchange lacks the important attribute of “lack of commerciality of a members’ club” for application of the doctrine of mutuality.

58. Next main pillar regarding impossibility of generating profit by the contributors is also completely missing. The surplus generated from the



commercial activities was/is retained by the stock exchange and it was this retained earning along with other factors which was utilized for determination of the value of share to be allocated to each member of stock exchange and consequently the arguments of trans-provincial entity (had it been raised) loses its application. As the shares allocated to the members were and are tradable on the stock exchange therefore these shares become an income generating tool in the hands of such members.

59. Thus being privileged member(s) of stock exchange would act as a licence to earn as they were allowed to transact sale purchase of securities not only in their own behalf but also on behalf of general public thereby earning income from commission, besides benefits from sales of securities and thus the doctrine failed in its applicability here. As against membership of a member's club, in stock exchange, membership enabled a member to earn and hence this is also against the principles settled in Karachi Golf Club's case.

60. Listing fee is not charged from members, rather it is paid by companies which intends to list its securities to be traded on a security exchange. Once the fee is paid, the security appears on the electronic and online system of trading of the stock exchange which was not possible before such listing. Thus stock exchange provides a very specific service of display of securities on its system so that these securities are offered for trading on payment of listing fee. This specific service is provided in the course of economic activity within the meaning and scope of section 3 and 4 of Sindh Sales Tax on Services Act, 2011. Therefore, listing fee also is distinguishable from the membership fee of a club.

61. In view of above facts, circumstances and conclusion drawn on the basis of rival submissions of the parties, we are of the view that the

impugned show-cause notices do not warrant interference by this Court as the same appear to have been issued having authority and legislative competence in this regard. More so, the petitioner has already registered itself voluntarily with Sindh Revenue Board earlier and if any issues of “adjudication” and not competence, is raised or agitated by the petitioner, the same shall be addressed by the authority concerned issuing show-cause notices. The petitions as such merits no consideration and are accordingly dismissed with no orders as to costs along with pending applications.

Dated: 27.01.2022

**Judge**

**Judge**