JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Sales Tax Reference No. 19/2019

M/s Pak Telecom Mobile Limited, Islamabad
Vs.
Commissioner Inland Revenue, LTU, Islamabad, & others

APPLICANT BY:	Syed Hasnain Ibrahim Kazmi, Advocate.
RESPONDENTS BY:	Mr. Babar Bilal, Advocate.
DATE OF DECISION:	04.02.2025.

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BABAR SATTAR, J.- This reference emanates from the judgment of the Appellate Tribunal Inland Revenue, Islamabad **("Appellate Tribunal")**, dated 24.04.2019, pursuant to which the Order-in-Remand dated 20.06.2017 and the Order-in-Appeal against such remand order dated 30.10.2017 were upheld.

2. In terms of background, the Additional Commissioner Inland Revenue issued a show cause notice dated 28.10.2014 requiring the applicant to show cause as to why sales tax should not be charged on an amount of Rs.67,636,000/- in terms of Section 3(1)(a) of the Sales Tax Act, 1990 **("Sales Tax Act")**, for constituting proceeds from disposal of fixed assets in relation to which sales tax was not charged. The Additional Commissioner then passed an Order-in-Original dated 01.04.2015, wherein it was held that the revenue in question included, *inter alia*, insurance proceeds, which constituted supply for purposes of Section 2(33) of the Sales Tax Act as they involved transfer of right to dispose of damaged goods by the taxpayer to the insurance company. And that proceeds from sale of vehicles and supplies of building materials, including leasehold

improvements, AC units, furniture and fixtures and office equipment, were not exempt from sales tax in terms of SRO 490(I)/2004 dated 12.06.2004 **("SRO 490")**. The Additional Commissioner also imposed default surcharge in terms of Section 34 of the Sales Tax Act as well as a penalty in terms of Section 33(5) of the Sales Tax Act for contravention of provisions of Section 3(1) of the Sales Tax Act. The Order-in-Original was appealed before the Commissioner (Appeals), who, by order dated 25.06.2015, held that proceeds from an insurance claim did not constitute taxable activity in relation to which sales tax was to be withheld. He remanded the matter back to the Additional Commissioner to verify the claim of the taxpayer and also verify the claim of exemption under the Sixth Schedule to the Sales Tax Act. The Additional Commissioner then passed the Order-in-Remand dated 20.06.2017 reiterating his findings in the Order-in-Original. The Order-in-Remand was then appealed before the Commissioner (Appeals), who, by order dated 30.10.2016, upheld the Order-in-Remand in a summary fashion without recording any reasons as to why he had endorsed the findings of the Additional Commissioner. The Appellate Tribunal, in like manner upheld the Order-in-Remand and the order of the Commissioner (Appeals) without recording any reasons and by merely holding that ample opportunity had been provided to the taxpayer to furnish documentary evidence, which the taxpayer had failed to provide and consequently the Order-in-Remand and the order of the Commissioner (Appeals) were upheld.

3. At the time when the reference was admitted for regular hearing, no questions were framed. The questions that arise for

our adjudication in view of the memorandum of the Reference Application read with the impugned orders are the following:

1. *Do insurance proceeds received by an insured person attract levy of sales tax in terms of Section 3(1)(a) of the Sales Tax Act constituting taxable supply in terms of Section 2(41) of the Sales Tax Act?*
2. *Whether the revenue received in lieu of disposal of motor vehicles, building materials and electrical appliances etc. were exempt from sales tax in terms of Section 13 of the Sales Tax Act and Serial No.6 of Table 2 of the Sixth Schedule to the Act read together with SRO 490?*
3. *Whether the applicant was liable for default surcharge and as well as a penalty in terms of Section 33(5) of the Sales Tax Act where there was no determination that there was mens rea involved in any short payment of sales tax.*

4. The learned counsel for the applicant took us through the history of adjudication that has already been summarized above. He submitted that proceeds from insurance company in relation to an insurance claim against loss suffered by the taxpayer did not constitute taxable supply in terms of Section 2(35) of the Sales Tax Act. That an insurance contract constituted an actionable claim in terms of Section 3 of the Transfer of Property Act, 1882 **("Transfer of Property Act")**, and actionable claims have been specifically excluded from the definition of goods in terms of Section 2(12) of the Sales Tax Act. He relied on ***Sunrise Associates vs. Government of NCT of Delhi and others*** ***((2006) 5 SCC 603)*** ***Union of India vs. Sri Sarada Mills Limited*** ***(1973 AIR 281 SC)*** *and* ***LIC of India vs. Insure Policy Plus Services Pvt. Ltd.*** ***(2016(2) SCC 507)*** for this proposition. He also relied on decision of the Appellate Tribunal dated 05.08.2022 in ***M/s Warid Telecom (Pvt.) Ltd. vs. Commissioner Inland Revenue*** ***(STA No.482/IB/2021)*** wherein it was held that an insurance contract constituted an

actionable claim, which was excluded from the definition of goods and consequently sales tax was not chargeable in relation to proceeds from the insured goods. He also relied on Circular No. 2(10)STP/97 dated 18.10.2001 issued by the Federal Board of Revenue (FBR), wherein it was held that the compensation received from an insurance company did not constitute supply in terms of the Sales Tax Act, as such payment was compensation for loss and not consideration for delivery of goods. In relation to sales tax claimed against disposal of vehicles, plant and machinery and building materials, the learned counsel for the applicant submitted that pursuant to Section 13(1) of the Sales Tax Act, the supply of goods, as specified in the Sixth Schedule to the Sales Tax, is exempt from tax subject to the conditions specified by the Federal Government. Serial No.6 of Table 2 of the Sixth Schedule to the Sales Tax Act provided that it constitutes supply of fixed assets against which input tax adjustment is not available under a notification issued in terms of clause (b) of sub-section (1) of Section 8 of the Sales Tax Act is exempt from Sales Tax. He submitted that the Federal Government had issued SRO 490 in exercise of powers under Section 8(1)(b) of the Sales Tax Act, which provided that input tax could not be claimed against, *inter alia,* building materials, including cement, bricks, paints etc., office equipment and

machines, furniture, structure, fixture etc., electrical and gas appliances etc. and wires, cables and electrical fittings etc. He submitted that the aforementioned items constituted fixed assets for purposes of Serial No.6 of Table 2 of the Sixth Schedule to the Sales Tax Act and as input tax could not be claimed in relation thereto, proceeds from the disposal of such fixed assets

were exempt from the application of sales tax. He then submitted that the applicant was not liable to pay sales tax in relation to disposal of fixed assets as was claimed in the show-cause notice and as no sales tax liability was due from the applicant, the question of default surcharge or imposition of penalty in terms of Section 33 of the Sales Tax Act did not arise. Further, even if there was tax liability due to be discharged by the applicant, given that there was no finding of *mens rea* or deliberate wrong doing on part of the applicant, neither default surcharge nor a penalty under Section 33 of the Sales Tax Act could be imposed.

5. Let us now consider the questions framed in Para-3 above.

Question No.1

Do insurance proceeds received by an insured person attract levy of sales tax in terms of Section 3(1)(a) of the Sales Tax Act constituting taxable supply in terms of Section 2(41) of the Sales Tax Act?

The case of the Tax Department is that the funds generated from disposal of fixed assets, which included funds received from insurance company as proceeds of an insurance claim, were liable to sales tax in terms of Section 3(1)(a) of the Sales Tax Act. In other words, for purposes of this question, the insurance proceeds received by the taxpayer as an insured person constituted taxable supplies *"in the course or furtherance of any taxable activity"* carried out by the taxpayer in terms of Section 3(1)(a) of the Sales Tax Act. Let us reproduce here for our convenience the definitions of goods, taxable supply and supply:

S.2(12) "goods" *include every kind of movable property other than actionable claims, money, stocks, shares and securities.*

S.2(33) "supply" *means a sale or other transfer of the right to dispose of goods as owner, including such sale or transfer under a hire purchase agreement, and also includes:–*

(a) putting to private, business or non-business use goods produced or manufactured in the course of taxable activity for purposes other than those of making a taxable supply;

(b) auction or disposal of goods to satisfy a debt owed by a person;

(c) possession of taxable goods held immediately before a person ceases to be a registered person; and

(d) in case of manufacture of goods belonging to another person, the transfer or delivery of such goods to the owner or to a person nominated by him.

Provided that the Board, with the approval of the Federal Minister-in-charge may, by notification in the official Gazette, specify such other transactions which shall or shall not constitute supply.

S.2(41) "taxable supply" *means a supply of taxable goods made by an importer, manufacturer, wholesaler (including dealer), distributor or retailer other than a supply of goods which is exempt under section 13 and includes a supply of goods chargeable to tax at the rate of zero percent under section 4.*

6. In order for insurance proceeds to be taxable in terms of Section 3(1)(a) of the Sales Tax Act, they must be considered proceeds constituting taxable supply by the applicant in the course or furtherance of its taxable activity. In terms of the definition of taxable supply, the insurance proceeds must constitute *"a supply of taxable goods"*. This, in turn, means that

the proceeds should be in lieu of supply of goods, where supply means *"sale or other transfer of the right to dispose of goods"*, and goods have been defined to include *"movable property other than actionable claims, money, stocks, shares and securities"*. It is the case of the Tax Department that insurance proceeds constitute supply as they have been received due to transfer, by the taxpayer, of the right to dispose of damaged goods to the insurance company.

7. The question of what constitutes taxable supply came before the Lahore High Court in ***Coca-Cola Beverages Pakistan Ltd. vs. Customs, Excise and Sales Tax Appellate Tribunal (2017 PTD 2380)***, wherein in its reference jurisdiction, the Lahore High Court held that, *"sales tax under Section 3(1)(a) would be chargeable when (i) a registered person (ii) makes taxable supplies (iii) in the course or furtherance of (iv) a taxable activity. Therefore, amongst other things, twin conditions of making taxable supplies and taxable activity must exist simultaneously."* The Lahore High Court also relied on the law laid down by the Supreme Court in ***Collector of Customs, Sales Tax and Central Excise vs. Messrs Sanghar Sugar Mills Ltd. Karachi (PLD 2007 SC 517)*** (in reliance on which the Additional Commissioner generated the demand for payment of sales tax in relation to disposal of fixed assets of the applicant). In ***Sanghar Sugar Mills*** the Supreme Court had noted in relation to Section 3(1)(a) of the Sales Tax Act that, *"it is not only the business or the taxable activity which has been referred to or mentioned in the Section but the important role is to be played by the words "in the course or furtherance of" which have been prefixed the word business or*

taxable activity…It is abundantly clear that the taxable supply has not been confined or limited to the one which is the product or the goods manufactured but also includes those goods which involve in some way with the progress, promotion, advancement of business/activity/taxable activity." The Lahore High Court observed in ***Coca-Cola Beverages*** that supply as defined in Section 2(33) of the Sales Tax Act used the word includes which was "meant to enlarge and extend the scope of the term". And that, *"the most important factor in supply is that the product is provided on demand".* The Lahore High Court then held that the word disposition in the definition of supply *"should be construed in a manner that it should have the same attribute of transfer of right".*

8. While interpreting the terms supply and taxable supply, the Lahore High Court in ***Pak Telecom Mobile Limited vs. Federation of Pakistan (2017 PTD 2296)*** held that, *"the term 'sale' and the words 'other transfer of the right to dispose of goods as owner' are similar and have to be read ejusdem generis with each other."* The Lahore High Court noted that the authority to legislate for purposes of imposing taxes on sales was provided in entry 49 of Part-I of the Federal Legislative List which read as follows: *"taxes on sales and purchases of goods imported, exported, produced, manufactured and consumed, except sales tax on services".* And that, *"the words 'transfer of the right to dispose of goods as owner' when weighed on this scale, merely convey the concept of sale in fact, though by using different semantics. The crucial words are 'transfer of the right' and 'as owner'. Thus the act must result in the transfer of the right to dispose of goods as owner. In other words, what is being*

transferred is ownership right to deal with the goods (by the vendee) and to dispose of them at will." The Lahore High Court emphasized that, *"the term supply as defined in the Act, 1990, has to comport with the broad contours of the field of taxation delineated in entry 49 of the Federal Legislative List. The simple terms in which the entry is couched is at once striking. Not much leeway is handed to the legislature to play with taxation in this area. The core ingredient of this entry is the concept of sale and that is the foundational element. Thus if a sale or purchase takes place, tax may be imposed on the transaction. Every sale envisages a purchase necessarily and vice versa."* In this case, the Lahore High Court had found that the supply of Subscriber Identification Module (SIM) cards by a telecom company did not constitute sale for purposes of the Sales Tax Act.

9. The law laid down by the Supreme Court in ***Sanghar Sugar Mills*** provided that sale of scrap was liable to sales tax in terms of Section 3(1)(a) of the Sales Tax Act. While construing the provisions of Section 3(1)(a) of the Sales Tax Act including the words *"in the course or furtherance"* of any taxable activity, the Supreme Court held that, *"it is immaterial whether the supplier is in the business of the relevant goods or not so involved but the sale of these items and the utilization of the sale consideration in the business activity is definitely to be considered in the course of or in furtherance of the business/taxable activity…The disposal of fixed assets, scrap by registered person, being not exempt under Section 13 or being not specified in the Sixth Schedule to the Sales Tax Act are chargeable to sales tax and supply thereof is taxable supply."*

Sanghar Sugar Mills did not consider the taxability of proceeds received by an insured person from an insurance company.

10. The first sub-question that arises for adjudication of the present question is whether receipt of insurance proceeds constitutes supply for purpose of Section 2(33) of the Sales Tax Act to the extent that in case of total loss the insured person may be required to hand over the right to dispose of the damaged goods to the insurance company. The approach adopted by the learned counsel for the applicant was to focus on the definition of goods and argue that an insurance claim being an *"actionable claim"* was carved out from the definition of goods in terms of Section 2(12) of the Sales Tax Act. The argument precisely was that an actionable claim has been defined under Section 3 of the Transfer Property Act to mean *"a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."* And further that the provisions of Chapter 8 of the Transfer of Property Act, including Sections 130 and 131, envisage the transfer of actionable claims include insurance contracts/claims. And that insurance claims, being actionable claims in terms of provisions of the Transfer of Property Act, do not fall within the definition of goods as defined under the Sales Tax Act. As the Sales Tax Act does not define an actionable claim, and as the Transfer of Property Act deals with sale of property, the definition of actionable claim within such statute is

to be considered *pari materia* to the 'thing' being dealt within the Sales Tax Act. Further, the definition of supply means *"transfer of right to dispose of goods"* and for a supply to be taxable supply there must be a *"supply of taxable goods"*. Consequently, as insurance receipts are the produce of an actionable claim excluded from the definition of goods, the proceeds do not entail supply of goods for purposes of taxable supply and therefore no sales tax is chargeable on insurance proceeds in terms of Section 3(1)(a) of the Sales Tax Act. It is this approach that has been followed by Appellate Tribunal in the judgment relied on by the learned counsel for the applicant.

11. It is correct that actionable claims have been explicitly excluded from the definition of goods under Section 2 of the Sales Tax Act. It is also correct that actionable goods have not been defined in the Sales Tax Act. And the only other statute where actionable claims have been defined in relation to property, is the Transfer of Property Act. In the law produced by superior courts in India, while considering the applicability of tax in relation to the insurance proceeds, the definition of actionable claim in the Transfer of Property Act has been relied on. It was held by the Supreme Court of India in ***Union of India vs. Sri Sarada Mills Ltd*** that, *"a beneficial interest in movable property will include a right to recover insurance money…"* The same was reiterated by the Indian Supreme Court in ***Sunrise Associates (2006 (5) SCC 603)***. In ***Sunrise Associates*** it was held that the right to claim a prize pursuant to a lottery ticket was an actionable claim and did not qualify as goods under the Sales Tax Laws. The High Court of Bombay in the case of ***Insure Policy Plus Services Pvt. Ltd., Vs. LIC of India (2007 (109)***

BOMLR 559) held that *"The amount payable under a policy of insurance is a debt due from the insurer to the insured on the happening of a certain event or the lapse of a certain time, and the policy is the security for such debts charged upon the property or the stocks or funds of the insurer. A policy of the insurance represents money due and owing to the assured at his death, and it forms part of his estate. A policy of life insurance can be said to be an actionable claim within the meaning of Section 3 of the Transfer of Property Act and is not a mere right to sue".* The Indian Supreme Court subsequently upheld the Bombay High Court's in appeal, ***LIC of India vs Insure Policy Plus Services Pvt. Ltd. (2016 (2) SCC 507)***. In reaching such conclusion, the court relied on the definition of actionable claim in Section 3 of the Transfer of Property Act. These judgements hold that the exercise of the right to receive insurance money by the insured person constitutes an actionable claim and is outside the scope of the definition of service.

12. We are cognizant of the fact that the definition in another statute cannot be adopted to interpret the meaning of a term that has not been defined in the statute in question. It is a settled principle of interpretation of statutes that where a word is not defined in the statute, its ordinary dictionary meaning is to be adopted in the relevant context, and the definition used in another statute cannot be adopted for purposes of interpretation unless the other statute is *pari materia* to the statute in question. For our present purposes, we need not delve into the question of whether the Transfer of Property Act is in *pari materia* to the Sales Tax Act or not. This is because the focus on insurance-proceeds-not-being-goods does not address the

argument being built by the Tax Department. In the context of the present reference, the question before us does not relate to the transfer of an insurance claim and whether such transfer constitutes transfer of goods for purposes of Section 2(12) of the Sales Tax Act. The question before us is whether while receiving insurance proceeds from an insurance company, after losses were suffered by the taxpayer, the transfer of right to the damaged goods, if any, handed over to the insurance company constituted supply for purpose of Section 2(33) of the Sales Tax Act, which supply then constituted taxable supply and was liable to sales tax in terms of Section 3(1)(a) of the Sales Tax Act.

13. Let us now look at the definition of insurance. ***Osborn's Concise Law Dictionary (Sixth Edition)*** defines insurance as, *"a contract whereby a person called the insurer agrees in lieu of consideration of money paid to him, called the premium, by another person, called the assured, to indemnify the latter against loss resulting to him on the happening of certain events."* ***Black's Law Dictionary (Eighth Edition)*** defines insurance as, *"a contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency, and usu. to defend the insured or to pay for a defense regardless of whether the insured is ultimately found liable. An insured party usu. pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk".* ***George J. Couch, Couch on Insurance, § 1.2, at 4-5 (2nd Edition 1984)*** provides that, *"insurance, or as it is sometimes called, assurance, is a contract by which one party, for a consideration, which is usually paid in money either in one*

sum or at different times during the continuance of the risk, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest". The concept of insurance has been enumerated in ***Corpus Juris Secundum, (Volume 44), § 2, at 73*** as follows:

> *Insurance has been said to be best defined as a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event. More broadly, however, the term "insurance," or "insurance contract," or "insurance policy," in the sense of the subject matter with which it deals, denotes a contract by which one party, for a compensation called the "premium," assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency.*

It is in view of the aforementioned definitions of the term *"insurance"* that it has to be considered whether transfer of the right to dispose of insured goods, in the event that they suffer loss or destruction, upon receipt of insurance proceeds, can be treated as supply for purpose of Section 2(33) of the Sales Tax Act.

14. It would not be possible, without inflicting serious violence on the concept of an insurance contract, to treat it as a contract where the underlying intent of the contracting parties was for the insurer to pay the insured consideration for sale or transfer of the right to dispose of damaged goods. An insurance contract constitutes an actionable claim and is not a contract for sale of goods or transfer of right for disposal of goods. It is a contract vesting in the insured person the right to recover a determined amount from the insurance company, in terms of the insurance

policy, upon the occurrence of a contingency. In case of vehicle insurance, such contingency would involve compensating for the damage inflicted on the vehicle. In case of a life or accident insurance, the contingency would be any injury caused to such individual. Thus, even without relying on any definition in the Transfer of Property Act, an insurance claim would qualify as an actionable claim in terms of the ordinary dictionary meaning of an actionable claim. The contract (i.e. an insurance policy) that entails the terms defining the contingency and requirements to be satisfied for an insured person to recover from the insurance company cannot be treated as a contract for sale or a contract for transferring the right to dispose of goods. An insurance company is not in the business of purchasing damaged goods. For example, an insurance policy in relation to a vehicle would not necessarily entail transfer of rights to dispose of the vehicle to the insurance company except in case of total loss.

15. As was highlighted by the Lahore High Court in ***Pak Telecom Mobile Limited***, the authority vested in the legislature to tax sales flows from entry 49 of the Federal Legislative List. As already reproduced above, the entry creates the right to tax sales and purchases of goods. The said entry cannot be construed as creating authority to tax insurance proceeds received by an insured person in the event that damage is caused to property that has been insured by such insured person, creating a right to receive insurance proceeds from the insurance company. An insurance contract or insurance policy cannot be logically construed as an agreement to sell damaged goods or an agreement to transfer the right to dispose of damaged goods. And the obvious follow through is that an

insurance transaction entailing payment of insurance proceeds to an insured person whose insured property has been damaged cannot be treated as *"supply"* for purposes of Section 2(33) of the Sales Tax Act. As an insurance transaction does not constitute supply, the funds received in lieu of insurance payments cannot be regarded as taxable supply for purpose of Section 2(41) of the Sales Tax Act. Further, even in terms of Section 3(1)(a) of the Sales Tax Act, it cannot be argued that an insured person who draws out an insurance on its property is in the business of supplying damaged goods to insurance companies. Therefore, even in case of total loss, where the damaged goods including the right to dispose of such goods is transferred to an insurance company, it cannot be argued that such transfer constitutes making a taxable supply *"in the course or furtherance of any taxable activity"* for purposes of Section 3(1)(a) of the Sales Tax Act.

16. In the instant case that the Commissioner (Appeals) during the first round of adjudication found that insurance proceeds were not chargeable to sales tax in terms of Section 3(1)(a) the Sales Tax Act. In the remand order, however, the Additional Commissioner reiterated his original view without applying himself to the definitions discussed above as well as to the nature of an insurance contract. It is also evident from the orders of the Commissioner (Appeals) as well as the Appellate Tribunal that neither of these forums applied their minds and failed to scrutinize the conclusion drawn by the Additional Commissioner that an insurance contract was in the nature of a contract for supply or transfer of right in relation to damaged

goods. It appears that the zeal for recovery got the better of the judgment made by the tax department.

17. We find that insurance proceeds do not constitute taxable supply and are not received in lieu of any taxable supply by an insured person and therefore are not liable to sales tax in terms of Section 3(1)(a) of the Sales Tax Act. We answer this question in favor of the applicant and against the Tax Department.

Question No.2

Whether the revenue received in lieu of disposal of motor vehicles, building materials and electrical appliances etc. were exempt from sales tax in terms of Section 13 of the Sales Tax Act and Serial No.6 of Table 2 of the Sixth Schedule to the Act read together with SRO 490?

18. The show-cause notice alleged that the taxpayer had disposed of fixed assets without charging sales tax in terms of Section 3(1)(a) of the Sales Tax Act. The matter of proceeds received in view of insurance claims has already been addressed above. The remaining assets, in view of which the demand of sales tax has been generated, have been identified by the Additional Commissioner as including motor vehicles, building materials and electrical appliances. The Additional Commissioner appears treated the said fixed assets as scrap in applying the ratio of ***Sanghar Sugar Mills*** and came to the conclusion that proceeds from the disposal of such fixed assets is liable to sales tax. It was held that various items such as bricks, cement, crush, iron etc. could not be considered building materials and further that the taxpayer had not produced evidence to establish that input tax had not been claimed in relation to such fixed assets.

19. Let us consider the relevant provisions of the Sales Tax Act pursuant to which exemption from application of sales tax is being claimed by the applicant. Section 13(1) of the Sales Tax Act provides that the supply of goods as specified in the Sixth Schedule are exempt from tax imposed under Section 3 of the Sales Tax Act subject to conditions specified by the Federal Government. Table 2 of the Sixth Schedule to the Sales Tax Act lists the exemptions in relation to local supplies. Serial No.6 of Table 2 of the Sixth Schedule to the Sales Tax Act provides exemption from sales tax in relation to, *"supply of fixed assets against which input tax adjustment is not available under a notification issued in terms of clause (b) of sub-section (1) of Section 8 of the Sales Tax Act."* Section 8(1)(b) of the Sales Tax Act vests in the Federal Government the authority to notify goods or services in relation to which taxpayer is not entitled to reclaim or deduct input tax. In exercise of authority under Section 8(1)(b) of the Sales Tax Act, the Federal Government has notified SRO 490, which lists various categories of goods in respect of which input tax cannot be claimed (except where such goods are acquired as stock in trade). The categories relevant for our purposes, mentioned in the SRO 490, are listed below:

> *(a) vehicles falling in chapter 87 of the First Schedule to the Customs Act, 1969 (IV of 1969);*
>
> *(e) building materials including cement, bricks, paints, varnishes, distempers etc.;*
>
> *(f) office equipment and machines (excluding electronic fiscal cash registers), furniture, structure, fixture and furnishing excluding those directly used in taxable activity;*
>
> *(g) electrical and gas appliances, pipes, fittings excluding those directly used in taxable activity;*

(h) wires, cables, ordinary electrical fittings and sanitary fittings, excluding those directly used in taxable activity;

20. It is the applicant's claim that the categories of goods mentioned in SRO 490 constitute fixed assets for purposes of the business of the applicant. The disposal of such fixed assets, in relation to which input tax adjustment or deduction is prohibited in terms of SRO 490, does not attract sales tax in terms of Serial No.6 of Table 2 of the Sixth Schedule read with Section 13(1) of the Sales Tax Act. The only question before the Court, therefore, is whether vehicles, building materials and electric appliances etc. disposed of by the applicant as fixed assets are exempt from sales tax in terms of Serial No.6 of Table 2 of the Sixth Schedule read with Section 13(1) of the Sales Tax Act and SRO 490.

21. The first point to be noted is that the show-cause notice itself states that the applicant has disposed of fixed assets and the demand is in relation to such fixed assets. The goods identified in the impugned orders are motor vehicles, building materials and electrical appliances etc. and in another place the Order-in-Original lists such goods as including vehicles, building materials, plant and machinery, computer and accessories and furniture and fittings. The only allegation in the show-cause notice is that what has been disposed by the applicant constitutes fixed assets. And the items identified in the Order-in-Original fall within the categories of goods listed in SRO 490. It is thus confounding that the Tax Department then turned back to say that the fixed assets do not fall within the exemption in Serial No.6 of Table 2 of the Sixth Schedule to the Sales Tax Act. Part of the reasoning of the Additional Commissioner in the Order-in-Original and the Order-in-Remand has been that the

applicant has failed to furnish requisite documents to establish that it did not claim input tax adjustment in relation to the fixed assets disposed of and consequently it was not entitled to claim exemption in terms of Serial No.6 of Table 2 of the Sixth Schedule to the Sales Tax Act. This limb of reasoning of the Tax Department is misconceived. Whether or not the disposal of fixed assets fell within the scope of SRO 490 read with Serial No.6 of Table 2 of the Sixth Schedule to the Sales Tax Act is purely a question of law, to be decided in terms of the description of the goods in question. And whether or not the applicant claimed input tax adjustment as nothing to do with the exemption in question. If the intent of the legislature was to impose a precondition requiring a taxpayer to establish for purposes of claiming an exemption in terms of Serial No.6 of Table 2 of the Sixth Schedule to the Sales Tax Act that such taxpayer must also establish that no input tax had been claimed in relation to the fixed assets upon disposal of which an exemption was being claimed, the legislature would have prescribed such condition in the Sixth Schedule or the Federal Government would have prescribed such condition in the relevant SRO in terms of Section 13(1) of the Sales Tax Act.

22. The only question for us is whether disposal of vehicles, building materials, plant and machinery, computer and accessories and furniture and fittings that fall within various categories of goods listed in SRO 490 constitute fixed assets for purposes of the Sales Tax Act. The term fixed assets has not been defined in the Sales Tax Act. In giving meaning to such term, the ordinary dictionary meaning would need to be relied upon. ***Black's Law Dictionary (Eighth Edition)*** defines a fixed

asset, as used in commercial parlance, as a synonym for capital asset. It goes on to define a capital asset as, *"a long-term asset used in the operation of a business or used to produce goods or services, such as equipment, land or an industrial plant."* It further provides that for purposes of income tax excluded from the definition of capital assets are amongst other things, *"stock in trade, inventory, and property held by the taxpayer primarily for sale to customers in the ordinary course of trade or business".* ***P. Ramanatha Aiyar's, Advanced Law Lexicon, (Third Edition, 2009)*** defines fixed assets as those, *"held for the purpose of providing or producing goods or services and that is not held for resale in the normal course of business."* It further provides that fixed asset, *"in general comprise those assets which are held for the purpose of conducting a business, in contradistinction to those assets which the proprietor holds for the purpose of converting into cash and they include real estate, building, machinery, staff car of technical adviser of the company etc. while relying on the judgment of Indian Supreme Court in Union of India vs. United Colliries Ltd. (AIR 1985 SC 192)."*

23. The question as to the meaning of fixed assets arose before the High Court of Justice in England & Wales, King's Bench Division, in ***Galloway vs. Sehill, Seebohm & Co. Ltd. ([1912] 2 K.B. 354)***. It was held that the term fixed asset had to be understood in the ordinary commercial sense in view of the manner in which companies maintain their balance sheets and that fixed assets bore the same meaning as fixed capital. The Court then drew a distinction between fixed capital and circulating capital and held that fixed capital constituted,

"property acquired and intended for retention and employment with a view to a profit as distinguished from circulating capital, meaning property acquired or produced with a view to sale or resale as a profit." It was held in ***Tudor Heights Ltd. vs. United Dominions Corpn. Finance Ltd.*** ***([1977] 1 NZLR 532 at 543, SC, Jeffries J)*** that fixed assets are those assets of a company that are expected to remain permanently available with the company for purposes of carrying out its business as opposed to assets to be sold for purposes of making a profit.

24. The manner in which assets are to be characterized came before the Sindh High Court in ***Haji Ismail Dossa vs. Monopoly Control Authority*** ***(PLD 1984 Karachi 315)***, in which Saleem Akhtar J. observed that, *"there are two types of assets which are clearly mentioned in the balance sheet. They are known as current assets and fixed assets. The current assets known as liquid and circulating assets are of immediate utility than other assets because they can be converted into cash or other kind of assets quickly and without much loss of time…The fixed assets are permanent in nature which include freehold land, leasehold land, building, plant, machinery and vehicles. These are tangible assets which are costly and relatively expensive having comparatively a longer life. As the valuation of plant, machinery, building and vehicle has to be spread over a period of its estimated life, a practice has developed in audit and accountancy that every year book value of such assets is mentioned after taking into consideration the wear, tear and depreciation."*

25. The meaning of fixed assets need not detain us any further. From the aforementioned definitions as well as the discussions in ***Haji Ismail Dossa*** it is evident that vehicles, building materials, plant and machinery, computers and accessories, furniture and fittings formed part of the fixed assets of the applicant. The applicant being a Telecom Company is not in the business of acquiring such goods as stock-in-trade for purposes of sale to make a profit. It is also not the tax department's case that such goods constituted circulating capital of the applicant and/or were acquired for purposes of resale in order to make a profit as part of the business of the applicant. The categories of goods therefore constituted fixed assets of the applicant and it was upon their disposal that the tax department issued a show-cause notice requiring the applicant to explain as to why sales tax was not payable in lieu of the funds received pursuant to such disposal. All that has been held by the Additional Commissioner in the impugned Order-in-Remand is that the applicant has not furnished sufficient material to establish that it was entitled to an exemption in terms of Section 13(1) of the Sales Tax Act. This has been held notwithstanding the fact that the tax department's own case in the show-cause notice was that the applicant has disposed fixed assets and sales tax has not been charged on the proceeds received from such disposal. We find that the categories of goods mentioned in the Order-in-Original and the Order-in-Remand including motor vehicles, building materials, plant and machinery, computers and accessories and furniture and fittings constituted part of the fixed assets of the applicant and the disposal of such assets would have attracted sales tax but for SRO 490 issued by the

Federal Government in terms of Section 8(1)(b) of the Sales Tax Act. SRO 490 read with Section 8(1)(b) of the Sales Tax Act provides that no input tax is deductible or adjustable in relation to such goods. This then has to be read alongwith Serial No.6 of Table 2 of the Sixth Schedule to the Sales Tax Act, which provides that where in relation to supply of fixed assets input tax adjustment is not available, the supply is exempt from sales tax in terms of Section 13(1) of the Sales Tax Act, which supply would otherwise be taxable in terms of Section 3(1)(a) of the Sales Tax Act.

26. For the aforementioned reasons, we find that the disposal of fixed assets was not liable to sales tax and we accordingly decide this question in favour of the applicant and against the Tax Department.

Question No.3

Whether the applicant was liable for default surcharge and as well as a penalty in terms of Section 33(5) of the Sales Tax Act where there was no determination that there was mens rea involved in any short payment of sales tax.

27. As we have decided Questions No.1 and 2 in favour of the applicant, the outcome of such adjudication is that there was no sales tax due from the applicant and consequently the question of imposition of default surcharge in terms of Section 34 of the Sales Tax Act or a penalty in terms of Serial No.5 of Section 33 of the Sales Tax Act does not arise. This court has already determined the conditions applicable for imposition of default surcharge in terms of Section 34 of the Sales Tax Act in ***M/s Attock Refinery Limited vs. The Collector Of Sales Tax (2021 PTD 1680) and Commissioner Inland Revenue vs.***

M/s Bestway Cement (STR No.257 of 2011), which need not be adjudicated afresh in any event.

28. We have however noted in the facts of the present matter that the Additional Commissioner has also imposed penalty in terms of Serial No.5 of the Table provided under Section 33 of the Sales Tax Act. Section 33 of the Sales Tax Act prescribes punishments for offences. Column 1 of the Table provided under Section 33 of the Sales Tax Act lists the offences and Column 2 of the Table prescribes the relevant penalties. It has been held by the Additional Commissioner in the impugned order that the applicant was liable for an offence of failing to deposit the amount of tax due by it and has proceeded to impose the penalty provided in Column 2 of the Table provided under Section 33 of the Sales Tax Act. Part of the proviso to the prescribed penalty in Column 2 at Serial No.5 states that no penalty shall be imposed when any miscalculation is made for the first time during the year. The impugned order does not state that there was a prior miscalculation in terms of payment of tax due and consequently the said penalty provision was applicable. More importantly, the penalty in Column 2 of the Table under Section 33 of the Sales Tax Act is meant to be imposed after a taxpayer is found liable for an offence provided for in Section 33 of the Sales Tax Act. This raises the obvious question as to whether the Additional Commissioner, as a tax official and member of the Executive, can find a taxpayer guilty of an offence for purposes of Section 33 of the Sales Tax Act and proceed to impose the penalty that is attracted in case a person is found guilty of the relevant offence. Or whether the authority and jurisdiction to try a person for an offence prescribed in

Section 33 of the Sales Tax Act is vested in the Special Judge appointed pursuant to Section 37(c) of the Sales Tax Act.

29. This question is important and can be addressed in an appropriate case where it is not academic in nature, and arises in face of facts leading to the conclusion that the tax liability generated by the tax department was indeed due and payable. As we have found in the instant matter that the tax liability generated by the Tax Department was not sustainable in the eyes of law, we need not adjudicate the question as to who is vested with the authority under the Sales Tax Act to try a taxpayer for an offence under Section 33 of the Sales Tax Act and upon conviction impose the penalty provided for such offence.

30. For the aforementioned reasons, we decide the questions of law in favour of the taxpayer and against the Tax Department and consequently **set-aside** the impugned orders generating a tax demand in terms of Section 3 of the Sales Tax Act against the applicant.

31. Let the office send a copy of this judgment to the Registrar of the Appellate Tribunal under seal of this Court.

(SAMAN RAFAT IMTIAZ)
JUDGE

(BABAR SATTAR)
JUDGE

Approved for reporting.

A.Rahman Abbasi.