JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

WRIT PETITION NO. 3422/2022

PAK TELECOM MOBILE LIMITED

Vs

FEDERAL BOARD OF REVENUE, ETC.

Petitioner by : Mr. Wasim Abid and Abuzar Salman Khan, Advocates.

Respondents by : Mr. Ali Nawaz Kharal Advocate.

Date of hearing : 27.02.2025

MUHAMMAD AZAM KHAN, J.

1. The Petitioner [Pak Telecom Mobile Limited], has filed the instant Writ Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, **("Constitution")** challenging therein the Notice dated 14.01.2022 **("Impugned Notice")** and Letter dated 24.08.2022 **("Impugned Letter")** issued by the Commissioner (Audit-II) Inland Revenue **("Respondent No.2")**.

2. The brief facts giving rise to the filing of the instant Writ Petition are that on 14.01.2022, Respondent No. 2 issued the Impugned Notice ostensibly under Section 177 of the Income Tax Ordinance, 2001 **("Ordinance of 2001")** wherein it was informed that Respondent No. 2 intends to carry out an audit of the tax year 2018 of the Petitioner, therefore, information listed in the Impugned Notice be provided to Respondent No. 2. In its response dated 01.02.2022 to the Impugned Notice, the Petitioner objected to the maintainability of the Impugned Notice on the grounds that the same amount to passing an order without providing the Petitioner an opportunity of hearing. The Petitioner also highlighted that, according to Clause 105 of the Second Schedule of the Ordinance of 2001, they are exempted from the provisions of Section 177 of the Ordinance of 2001. Furthermore, the Petitioner is not subject to another audit for the next three years, as their affairs were audited for the tax year 2017 following the notice issued by the Commissioner Inland Revenue on 30.09.2018. Vide Letter dated 10.02.2022, Respondent No. 2 rejected the contentions of the Petitioner vis-à-vis maintainability of the Impugned Notice and directed the Petitioner to participate in the audit proceedings. Vide Notice dated 03.03.2022, the Assistant Commissioner

Inland Revenue called for the record of Petitioner pursuant to the Impugned Notice. Subsequently, the National Assembly passed the Finance Act, 2022, wherein Clause 105A was inserted in the Second Schedule, Part IV. The Petitioner given the insertion of Clause 105A in the second Schedule of the Income Tax Ordinance, vide its Letter dated 18.08.2022 addressed to the Respondent No. 2, requested the Commissioner Inland Revenue to withdraw the Impugned Notice. It was pointed out through Letter dated 18.08.2022 that the Petitioner was selected for audit for tax year 2017 through Notice dated 30.09.2018. It was further pointed out that given FBR's interpretation of Clause 105A, the four years' time is to be calculated from the year the audit proceedings culminated. It was also stated that Clause 105A being a beneficial legislation has to be interpreted in favor of the taxpayer and is to be applied retrospectively. The Commissioner Inland Revenue vide the Impugned Letter rejected the request of the Petitioner to withdraw the Impugned Notice. Being aggrieved by the Impugned Notice and the Impugned Letter, Petitioner has filed the instant Writ Petition.

3. The learned counsel for the Petitioner argued that the Impugned Notice and Impugned Letter are illegal, unlawful, *ultra vires*, of no legal effect, and without jurisdiction and hence are liable to be set aside; that the Impugned Letter is non-speaking, arbitrary, capricious and violative of Section 24-A of the General Clauses Act, therefore, the same is liable to be set aside; that the Impugned Letter has been issued without application of mind and without adverting to the contentions of the Petitioner, therefore, the same being arbitrary exercise of power is liable to be set aside; that it is evident from bare reading of Clause 105A of Part IV of the Second Schedule of the Ordinance of 2001 that income tax affairs of a person cannot be audited for four years after an audit has been conducted; that the Petitioner's audit was conducted for the tax year 2017, therefore, audit of tax year 2018 cannot be undertaken by the Respondents, in view of Clause 105A of Part IV of the Second Schedule of the Ordinance of 2001; that the Impugned Letter ignores this aspect and rejects the contentions of the Petitioner without adverting to this aspect of law; that even otherwise, the audit of the Petitioner for the tax year 2017 was concluded in 2021; that in view of Clause 105A, the audit of the Petitioner cannot be undertaken till the year 2026, therefore, Impugned Notice and Impugned Letter are without jurisdiction as the Respondents are barred from exercising jurisdiction in terms of Clause 105A of Part IV of the Second Schedule of the Ordinance of 2001; that it is settled law that an act which is without jurisdiction is *malafide*; that the Impugned Letter being without jurisdiction, suffers from *malafide* and is liable to be set aside; that the Impugned Letter infringes upon the

Petitioner's right under Article 4 of the Constitution i.e. to be treated in accordance with the law; that the Impugned Notice and the Impugned Letter are in violation of the Petitioner's right guaranteed under Article 10-A of the Constitution. Finally, the learned counsel prayed for declaring and setting aside the Impugned Notice and Impugned Letter as illegal, unlawful, *ultra vires*, without jurisdiction, and of no legal consequence. The learned counsel also prayed that the Respondents be directed, not to conduct an audit of the Petitioner for four years under Clause 105A of Part IV of the Second Schedule of the Ordinance of 2001 and to restrain them from proceeding with the Impugned Notice till final disposal of the instant Writ Petition.

4. On the other hand, the learned counsel for the Respondents Nos. 1, 2 & 4 argued that the Petitioner availed the opportunity to defend the initiation of audit proceedings vide its response dated 01.02.2022 and the Petitioner did not seek a personal hearing; that by operation of Clause 105A, a taxpayer would be exempted from provisions of Section 177 and 214C of the Ordinance of 2001 if their audit was conducted in the Tax Year 2018 onwards, however, the Petitioner's audit was conducted in Tax Year 2017, which falls beyond the scope and ambit of Clause 105A; that the Petitioner's reliance on Clause 105A is based on an unsustainable and erroneous interpretation of law; that once initiated, audit proceedings cannot be quashed by retrospective operation in the absence of express language to that effect; that the Impugned Letter is not violative of law and is based on sound legal reasoning, which was earlier furnished to the Petitioner prior to their audit selection; that the Impugned Letter has been issued in accordance with the established legal position; that ongoing audit proceedings, commenced in accordance with law, would not be affected by the enactment of Clause 105A; that Clause 105A was enacted with effect from 01.07.2022, which constitutes Tax Year 2023; that upon plain reading of Clause 105A, it is evident that exemption thereunder would apply if audit proceedings were conducted for Tax Years 2021, 2020, 2019 or 2018, however, the Petitioner's last audit was conducted for Tax Year, 2017, hence, they do not fall within the scope of Clause 105A; that the Petitioner's audit selection for Tax Year 2018 was in accordance with law and well within the jurisdiction of the Respondents. Lastly, the learned counsel prayed for the dismissal of the instant Writ Petition and for the issuance of direction to the Petitioner to participate effectively in the audit proceedings for Tax Year 2018.

5. I have heard the learned counsel for the parties and perused the available record with their able assistance.

6. The main contention of the Petitioner is that after the insertion of a new amendment under Clause 105A in the Second Schedule of the Ordinance of 2001, the Income Tax department cannot seek an audit of the Petitioner for the tax year 2018, on the ground that it's a beneficial legislation and will effect retrospectively. For ready reference, the newly amended Clause 105A is reproduced hereunder: -

> *"**(105A)**: The provisions of Section 177 and 214 C shall not apply to a person whose income tax affairs have been audited in any of the preceding four tax years:*
>
> *Provided that the commissioner may select a person under section 177 for audit with approval of the board."*

7. This new clause 105A was inserted by the Finance Act, 2022. Meaning thereby that the audit of an income taxpayer cannot be audited in the tax years 2021, 2020, 2019, and 2018. The audit of the Petitioner has already been conducted for the tax year 2017, which culminated in the tax year 2021. Thus, according to the version of the Petitioner, given the new amendment, the audit of the tax year 2018 will be illegal and against the express provision of the Ordinance of 2001; that in light of FBR's interpretation of Clause 105A *ibid*, the four years' time is to be calculated from the year the audit proceedings culminated. The second point raised by the Petitioner is that the new amendment being beneficial legislation is to be given retrospective effect from the date of amendment, in favor of the taxpayer.

8. The case of the Petitioner is selected for audit under Section 177 of the Ordinance of 2001 for the tax year 2018 through the Impugned Notice. The Petitioner responded to the Impugned Notice vide its response dated 01.02.2022 and Respondent No. 2 vide its Letter dated 10.02.2022 rejected the contentions of the Petitioner vis-à-vis maintainability of the Impugned Notice and directed the Petitioner to participate in the audit proceedings. Subsequently, vide Notice dated 03.03.2022, the Assistant Commissioner Inland Revenue called for the record of the Petitioner pursuant to the Impugned Notice. Subsequently, the National Assembly passed the Finance Act, 2022 wherein Clause 105A was inserted in the Schedule, Part-IV.

9. The newly promulgated provision 105A in the Ordinance of 2001 is provided under the Chapter of exemptions from applicability of certain provisions, which reflects that it is a kind of concession or benefit and provides that audit under Section 177 and audit under Section 214C of the Ordinance of 2001 shall not apply to a person whose income tax affairs have been audited in any of the

"preceding four tax years". This clearly provided that the said exemption or concession is only available if the taxpayer has been audited in any of the preceding four tax years. The word "tax year" is defined under Section 74 (1) of the Ordinance of 2001, which is reproduced herein below:-

> *"**74. Tax year.— (1)** For the purpose of this Ordinance and subject to this section, the tax year shall be a period of twelve months ending on the 30th day of June (hereinafter referred to as 'normal tax year') and shall, subject to sub-section (3), be denoted by the calendar year in which the said date falls."*

10. The new amendment referred to "preceding four tax years" and it means the audit of a particular tax year and not the date or year in which the audit is completed. Therefore, Petitioner's selection of audit for tax year 2018 (notwithstanding its completion in the year 2021) would be of the tax year 2018 and not of the tax year 2021 to claim any benefit of Clause 105A *ibid*. It is immaterial when the audit is completed as it will remain an audit for a particular tax year and it is only that tax year (2017 in this matter) which is relevant for calculating the period of concession under Clause 105A. The finalization of the audit in a particular tax year is not at all relevant nor is it provided in Clause 105A. The Sindh High Court, in its Order dated 20.01.2025 in Constitution Petition No. D-6280 of 2024, rejected the Circular dated 21.07.2022 issued by the FBR. The Circular provided an example stating that if a taxpayer's audit for the tax year 2017 is finalized in tax year 2022, the taxpayer could only be audited again after four tax years, i.e., in tax year 2027. The Court dismissed this interpretation, ruling that it conflicts with the main provision of the law. Scrutiny of record of the Petitioner reflects that the audit for the tax year 2017 was conducted and concluded in the year 2021, meaning thereby that no audit/proceedings u/s 177(1) were conducted for any of the preceding four years as per the mandate of Section 105A of the Ordinance, hence, the Petitioner cannot claim the benefit provided under the new amendment under Clause 105A in the Second Schedule of the Ordinance of 2001 introduced through the Finance Act, 2022.

11. As far as the contention raised by the Petitioner's counsel that the new amendment has a retrospective effect is concerned, it is to be mentioned here that in the absence of any indication of its retrospective operation, it must not be given retrospective effect. Generally, beneficial legislation is to be given liberal interpretation, however, for the said legislation to have a retrospective effect, the beneficial legislation must carry curative or remedial content. Such legislation must, therefore, either clarify an ambiguity or an omission in the existing law and

must therefore be explanatory or clarificatory. In the instant case, there is no specific wording that the concession shall apply retrospectively has been used, hence, it cannot be construed by any canon of interpretation that said amendment has a retrospective effect. Consequently, in the absence of any indication in the statute that the legislature intended for it to operate retroactively, it must not be given retrospective effect. Reliance is placed on *M/s RAJBY Industries Karachi and others versus Federation of Pakistan and others,* **2023 SCMR 1407**. The Impugned Notice was issued to the Petitioner on 14.01.2022, while the amendment of Section 105A in the Ordinance was enacted with effect from 01.07.2022, hence, the Petitioner cannot be benefitted from the new amendment. In any case, the provisions related to fiscal statutes will be interpreted prospectively, not retrospectively.

12. In addition to the above, the power to select for audit through random or parametric balloting is provided under the law. Mere selection for audit does not cause any actionable injury to the taxpayer and the reason and objective for conducting an audit under a scheme of self-assessment is the regime provided by the Ordinance of 2001 to check the accuracy, truthfulness, and veracity of the returns filed by the taxpayers. Reliance is placed on *Commissioner of Inland Revenue, Sialkot versus Allah Din Steel and Rolling Mills,* **2018 SCMR 1328**.

13. In light of the above discussion, this petition, being devoid of any merits, is hereby ***dismissed***.

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the Open Court on _____ day of March, 2025.

JUDGE

Approved for Reporting
Blue Slip added.

Sajid/--