JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Federal Excise Reference No.174 of 2011

Pakistan Television Corporation Limited
Vs.
The Appellate Tribunal Inland Revenue and others

Federal Excise Reference No.175 of 2011

Pakistan Television Corporation Limited
Vs.
The Appellate Tribunal Inland Revenue and others

Applicant by: Hafiz Muhammad Idrees Advocate.

Respondents by: Barrister Muhammad Usama Rauf Advocate for respondents No.2 & 3.
Muhammad Saqib, proxy counsel for the respondent No.4.

Date of hearing: 05.05.2025

MUHAMMAD AZAM KHAN, J.

1. By this common Judgment, we intend to dispose of both the titled Federal Excise Reference Applications arising out of the Order dated 17.02.2011 **("Impugned Order")** passed by the Respondent No. 1/learned Appellate Tribunal Inland Revenue (**"ATIR"**).

2. Through the instant references filed under Section 34A of the Federal Excise Act, 2005 **("Federal Excise Act")**, the Applicant, Pakistan Television Corporation Limited (**"PTVC"**), has assailed the Impugned Order passed by the learned ATIR whereby its Appeal against the Order in Original issued by Collector (Adjudication) was dismissed.

3. Background facts of the References are that an information was received by the Directorate General, Intelligence and Investigation, Federal Board of Revenue, Islamabad that two foreign companies through their local agents have rendered telecommunication services to the Applicant during the years 2001 and 2004 but failed to pay central excise duty leviable thereon. Director General (Intelligence & Investigation) sought year-wise information from PTVC in respect

of all telecommunication services which followed a Notice under Section 14 of the Central Excise Act, 1944 **("Act of 1944")** for provision of copies of agreement with Respondent No. 4. Whereafter, on 30.09.2004 a Show Cause Notice was issued to the Applicant for payment of excise duty amounting to Rs.30,085,161/- which was responded by the Applicant by filing a reply. The Respondent No. 2 after evaluating the pleadings held the Applicant liable for payment of excise duty, additional duty and penalty. Aggrieved from the Order in Original passed by Respondent No. 2, the Applicant filed an Appeal before the Appellate Tribunal Inland Revenue which was dismissed on 17.2.2011. Hence the instant reference.

4. The learned counsel for the Applicant submitted that the PTVC is not a service provider but a service recipient; and that the learned ATIR has misinterpreted Section 3 of the Act of 1944 which shows that duty is leviable on the service provider and not on the recipient.

5. The learned counsel for the Respondents No.2 & 3 submits that the mandate of the Act of 1944 is clear and sets out a scheme whereby excisable goods and excisable services are subjected to excise duty. He submits that it is a matter of record that PTVC and Respondent No. 4 formed their agreement for services from 1994-2004 at the time, the applicable legislation was Act of 1944, notices whereunder were issued, answered and Order in Original was passed. He further submits that the Applicant after failing to recover a favourable outcome from the Appellate Tribunal attempted to uproot the legislature scheme altogether and challenged the vires of the Federal Excise Act through a Writ Petition No. 1821-2019. The writ petition filed by the Applicant was dismissed which order was further affirmed by the Hon'ble Supreme Court. The learned counsel lastly contended that the Applicant has the remedy to make recourse to A.D.R as per provisions cited in Section 38 of the Act which remedy has been acknowledged and endorsed by the Hon'ble Supreme Court in number of cases in which either of the party was stated owned entity including but not limited to PTVC.

6. Mr. Saad M. Hashmi, learned counsel for Respondent No. 4 has pleaded that if two interpretations of a fiscal statute are possible, then the one favouring the tax payer should be preferred. He argued that the Applicant is not liable to pay Federal Excise duty, therefore reference may be answered in favour of the Applicant.

7. This Court vide Order dated 04.03.2020 proposed the following questions of law for consideration with the assistance of the learned counsel for the parties:-

a. Whether ATIR has erred in interpreting the agreement executed between the applicant and respondent No.3 as well as the provisions of the Central Excise Act, 1994 ("the 1994 Act") particularly section 3 thereof, which unequivocally provides that the levy and charge is on a person rendering or providing services?

b. Whether the ATIR was justified in going beyond the show cause notice and also in holding the applicant as a withholding agent within the meaning of section 68 of the Sales Tax Act, 1990?

c. Whether the ATIR was justified in ignoring the law laid down by the superior courts to the effect that fiscal statues have to be interpreted strictly and words not found in a statue imposing tax, can neither be inferred, presumed or analogies drawn?

d. Whether the ATIR was justified in not taking into consideration the fact that the applicant neither provides nor renders services which could be classified as "telecommunication services" whereas the 'lease' of Transponder does not fall within item 9812.9000 of the First Schedule to the Act 1944 and that the services provided and rendered by the Transponder, fall elsewhere?

e. Whether section 2(20) of the Federal Excise Act, 2005 could have been relied upon in isolation for the purpose of levy and charge of duty under the 1944 Act, by ignoring the charging section i.e. section 3 of the Act, 1944?

8. We have gone through the judgment of the learned ATIR as well Order-in-Original passed by the Collector Customs with reference to the provisions contained in Federal Excise Act.

9. The office has also placed the Order dated 06.03.2025 of the august Supreme Court passed in C.P.No.5178/2023 which is reproduced herein below:-

> *"At the very outset, the Director-General (Law), Federal Board of Revenue stated that the issue involved in this petition relates to State-owned enterprise, it would be appropriate that the forum of Alternate Dispute Resolution Committee provided under section 47A of the Sales Tax Act, 1990 be invoked for a resolution of the matter.*
>
> *2.We note that the request made by the Director-General (Law), Federal Board of Revenue, representing the petitioner is reasonable and has invoked the relevant provisions of the law. It is high time that matters of State-owned entities be resolved within the mechanism provided under the law.*
>
> *3.In view of the above, this petition is disposed of with the direction to refer the same to the forum of Alternate Dispute Resolution Committee provided under section 47A of the Sales Tax Act, 1990 for resolution of the matter."*

10. Section 38 of the Federal Excise Act has provided the resolution of disputes through Alternate Dispute Resolution (**"ADR"**). The language used in the Income Tax Reference Ordinance, 2001 referred in the order of the august

Supreme Court is synonymous to the wording postulated in Section 38 of the Federal Excise Act. For facility of reference, the same is reproduced herein below:-

> *"Alternative dispute resolution.— (1) Notwithstanding any other provision of this Act, or the rules made thereunder, an aggrieved person in connection with any dispute pertaining to—*
>
> *(a) the liability of tax of fifty million-rupees or above against the aggrieved person, or admissibility of refund, as the case may be;*
> *(b) the extent of waiver of default surcharge and penalty; or*
> *(c) any other specific relief required to resolve the dispute may apply, except where criminal proceedings have been initiated, to the Board for the appointment of a committee for the resolution of any hardship or dispute mentioned in detail in the application.*
>
> *Provided that where the aggrieved person is a state-owned enterprise (SOE), the limit of tax liability of fifty million rupees or above mentioned in clause (a) of sub-section (1) shall not apply and it shall be mandatory for such aggrieved SOE to apply to the Board for the appointment of a committee for the resolution of any dispute under this section.*
>
> *Provided further that no suit, prosecution, or other legal proceedings shall lie against the SOE in relation to the dispute resolved under this section."*

11. Admittedly the Applicant is a State-owned entity within the meaning of "The State-owned Enterprises (Governance and Operations Act, 2023) and by operation of law was required to apply to the Board for the appointment of a committee for the resolution of the disputes under Section 38 of the Federal Excise Act. The Federal Excise Act is a fiscal statute. The principles of interpreting such statutes are well settled. Any provision of law so far as it exists in the statute has to be respected and followed. Where a law requires something to be done in a particular manner, it must be done in that manner and not otherwise. It has been made mandatory in the Federal Excise Act that State-owned entities have to apply for resolution of the disputes through ADR. The plain reading of the provision of the statute laid down a complete mechanism using word 'shall' which have the mandatory application. It is settled law that when the word 'shall' is used in a provision of law, it is to be construed in its ordinary grammatical meaning and normally the use of word 'shall' by the legislature brands a provision as mandatory, especially when an authority is required to do something in a particular manner. Reference in this behalf may be made to the case of *Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited*, **(PLD 2012 SC 247)** wherein, whilst interpreting Order VII, Rule 11 of the Code of Civil Procedure, 1908, the august Supreme Court held that the Courts were bound by the word 'shall' used therein which made it mandatory to reject a plaint if it appeared from the statements in the plaint that it was barred by any law. Similarly, in the judgment reported as *Safeer Travels (Pvt.) Ltd. v. Muhammad Khalid Shafi through legal heirs* **(PLD 2007 SC**

504), it was held with regard to Section 16(2) of the Sindh Rented Premises Ordinance, 1979 that the word 'shall' made it obligatory for the Court to strike off a defense in case of default. Therefore, we find that the use of the word 'shall' is a strong indicator that the provisos in question are mandatory in nature.

12. The ultimate test to determine whether a provision is mandatory or directory is that of ascertaining the legislative intent. While the use of the word 'shall' is not the sole factor which determines the mandatory or directory nature of a provision, it is certainly one of the indicators of legislative intent. Other factors include the presence of penal consequences in case of non-compliance, but perhaps the clearest indicator is the object and purpose of the statute and the provision in question. It is the duty of the Court to garner the real intent of the legislature as expressed in the law itself. Reference may be made to the cases of *Syed Zia Haider Rizvi and others v. Deputy Commissioner of Wealth Tax, Lahore and others* **(2011 SCMR 420),** *Re. Presidential Election, 1974* **(AIR 1974 SC 1682)**, *Lachmi Narain v. Union of India,* **(AIR 1976 SC 714)** and *Dinesh Chandra Pandey v. High Court of Madhya Pradesh and another,* **[(2010) 11 SCC 500)**].

13. The Constitution of THE Islamic Republic of Pakistan, 1973 has clearly set out limits for each organ of the State based on seminal principle of trichotomy of powers. The legislature makes the laws, the executives execute it while the judicial branch is entrusted with the duty to interpret it. The judicial branch has no jurisdiction to promulgate laws and, therefore, stringent rules and principles have been laid down in the context of the exercise of the power of judicial review. Burden to prove that promulgated law is invalid is on the person who challenges its vires. The court must lean in favour of upholding the legislation and law should be saved rather than destroyed. The wisdom of the legislature to promulgate a law and to achieve a particular object and purpose cannot be questioned. The august Supreme Court while interpreting a fiscal statute in case titled *Elahi Cotton Mills Ltd. Vs. Federation of Pakistan* reported as **(PLD 1997 SC 582)** held that:

> *"(viii) That while interpreting Constitutional provisions Court should keep in mind, social setting of the country, growing requirements of the society/nation, burning problems of the day and the complex issues facing the people, which the Legislature in its wisdom through legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid.*
>
> *(ix) That the law should be saved rather than destroyed and the Court must lean in favour of upholding the constitutionality of a legislation keeping in view that the rule Constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a Constitutional provision."*

A similar view was expressed by the apex Court in the case titled *Lahore Development Authority and others Vs. Imrana Tiwana and others* reported as **(2015 SCMR 1739)** with reference to exercise of judicial review related to fiscal matters and reads as follows:

> *"(i) There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two:*
> *(ii) Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;*
> *(iii) A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;*
> *(iv) If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;*
> *(v) The Court will not decide a larger constitutional question than is necessary for the determination of the case;*
> *(vi) The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;*
> *(vii) The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;*
> *(viii) The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution.*
> *(ix) Mala fides will not be attributed to the Legislature."*

14. At this stage the learned counsel for the Applicant argues that at the time of initiation of the proceedings, Federal Excise Act was not in the field and its applicability on the Applicant company could not be made retrospectively and that the Lahore High Court in an unreported case had held that amendment in the Act shall commence from the date of commencement of the Amended Act. He has cited operative part of the order which reads here under:-

> ***"****6. Controversy summed up: In terms of the Explanation to section 133 of the* ***Ordinance 2001****, remedy of filing of reference application, subject to the limits of pecuniary jurisdiction prescribed, is available against the order of the Commissioner (Appeals) communicated after the date of commencement of the* ***Amendment Act****, notwithstanding pendency of the proceedings before the Commissioner (Appeals), prior to the commencement of the* ***Amendment Act****. And for the purposes of present controversy the* ***Amendment Act*** *shall commence from the date of commencement of the* ***Amendment Act****, when assent was extended by the President, which was 3rd of May 2024. Issues stand settled. It is pertinent to mention that determination qua date of commencement of the* ***Amendment Act*** *and issue of availability of remedy of reference application is also valid for the purposes of remedy in terms of section 47 of the* ***Act 1990****, for the reason that sub-section (2) of section 47 of the* ***Act 1990****, makes application of the provisions of section 133 of the* ***Ordinance 2001*** *and rules made thereunder, mutatis mutandis, to the reference application under the* ***Act 1990****. It is noted that determination of the issue through this order is without prejudice to the individual grievances of the applicants, which may be raised in the context of their respective reference application(s) and facts involved.*

*7. In view of the aforesaid, matter referred to us is settled in terms of findings/observations in preceding paragraph. Hence, Reference applications, listed in **Annex-A**, shall be placed before respective Division Benches, assigned with the task of hearing tax Reference Application(s).***"**

15. We are unable to substantiate the grounds urged by the learned counsel, for two reasons. Firstly, the decision of the Lahore High Court is not binding on this court in terms of Article 201 of the Constitution. Another High Court may make a different decision. Pakistan, as per Article 1 of the Constitution is Federal republic and the territories of Pakistan have been mentioned therein. The High Court of each Federating unit is independent, and fortiori that acts independently. There is no constitutional provision that supports the binding effect of the judgment of one High Court upon the other as provision of Article 201 of the Constitution states so, which is iterated by Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973.

The august Supreme Court in the case titled *Shahtaj Sugar Mills Vs. Government of Pakistan* reported as **(2024 SCMR 1656)** pleased to hold that:-

"3. Article 201 of the Constitution of the Islamic Republic of Pakistan ('the Constitution), reproduced hereunder, stipulates that a High Court's decision is binding on all courts subordinate to it:

> *'201. Subject to Article 189, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it.'*

4. Article 201 does not state that a High Court's decision is binding on other High Courts too. On the other hand Article 189 of the Constitution, reproduced hereunder, stipulates that the decisions of the Supreme Court are binding on all other courts, which would include all High Courts, but not the Supreme Court itself since the word other is used in Article 189.

> *'189. Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan.'*

Reference in this regard may also be made to the case of Hussain Raza v. Lahore High Court.'

5. Article 201 commences with the words subject to Article 189 which removed all doubts (if at all there could be any) that the decisions of the High Court are only binding on all courts subordinate to it, which are those within its territorial jurisdiction. Therefore, while a decision of a High Court is persuasive and may be followed by another High Court it is not binding on it, and another High Court may make a different decision. This also accords with the very first Article of the Constitution which states that 'Pakistan shall be Federal Republic' and mention the territories of Pakistan'. The High Court of each federating unit is independent, and a fortiori that it acts independently. Their independence can only be curtailed to the extent that the Constitution itself may do so. There is no constitutional provision which supports the said two sentences, on the contrary Article 201 of the Constitution states the opposite, which is iterated by its Article 189."

16. So far as the second ground that the provision of Section 38 of the Federal Excise Act could not be made applicable retrospectively suffice it to state that any

law or a piece of legislation, executive orders, or notifications that confer right and are beneficial would always be given retrospective effect and those which adversely affect or invade upon vested right cannot be applied with retrospective effect. Since Section 38 does not infringe the right of any party and is beneficial for resolution of the dispute through A.D.R, to make an objection and questioning its applicability with retrospective effect is, therefore, repelled.

17. For the foregoing reasons, we intend to dispose of the petition with the direction to refer the same to the forum of Alternate Dispute Resolution Committee provided under Section 38 of the Federal Excise Act, 2005 for resolution of the matter.

18. Order accordingly.

19. Office is directed to transmit a copy of decision under seal of the Court to the Appellate Tribunal pursuant to Section 34 A (5) of the Federal Excise Act, 2005.

(INAAM AMEEN MINHAS)
JUDGE

(MUHAMMAD AZAM KHAN)
JUDGE

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

JUDGE **JUDGE**

Approved for Reporting
Blue Slip added.