

Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR

**JUDICIAL DEPARTMENT**

**WP No.2963-P of 2014**

**JUDGMENT**

*Date of hearing...15/02/2017... ..*

*Petitioner(s)(Pakistan Telecommunication Company Ltd)  
By Barrister Babar Shahzad....*

*Respondent(s)(Government of KPK through Secretary Law  
etc) By Mr. Shumail Ahmad Butt and Waqar  
Ahmad Khan, AAG,*

\*\*\*\*\*

**YAHYA AFRIDI, C.J.-**

Pakistan

Telecommunication Company Limited

("PTCL"), petitioner, through Mr. Khalid

Mehmood Chaudhary, General Manager,

Revenue Account, PTCL, authorized attorney,

seeks the constitutional jurisdiction of this Court,

praying that:

***"It is therefore, most humbly  
prayed, that on acceptance of  
this Writ Petition, this Hon'ble  
Court may be pleased:***

***(a) To declare the 19.5% tax  
on Internet/email/data  
services as per Serial No.4  
Schedule II of the Act  
read in collaboration with  
Section 19 as irrational,***

*unjustified, illegal, discriminatory, without lawful authority & of no legal effect.*

- (b) To declare the 19.5% tax on Internet/email/data services as per Serial No.4, Schedule II of the Act read in collaboration with Section 19 as discriminatory, void ab initio & liable to be quashed being ultra-vires to the provisions of the constitution.*
- (c) Declare the 19.5% tax on Internet / email / data services as per Serial No.4, Schedule II of the Act read in collaboration with Section 19 as against the basic fundamental rights of the Petitioner & be quashed forthwith.*
- (d) Granting costs of the suit.*
- (e) Granting any other relief as may be deemed just & appropriate by this Hon'ble Court."*

2. The brief and essential facts leading to the present petition, as asserted in the petition, are that PTCL having engaged in, *inter alia*, providing internet services in Pakistan, is aggrieved of imposition of the Sales Tax at the rate of 19.5% upon internet services through the Khyber Pakhtunkhwa Finance Act, 2013 ("Act"); that the respondents could not redress

the grievance of the petitioner despite many meetings; and that the tax imposed by the respondents is *illegal, discriminatory and arbitrary*.

3. Respondents No.2, 4 and 5 submitted para-wise comments, wherein, they have raised several legal and factual preliminary objections, including the very maintainability of present constitutional petition.

4. Valuable arguments of the learned counsel for the parties heard and the available record of the case and written submissions of the parties thoroughly considered.

5. The extract from the written submissions submitted by the learned counsel for the petitioner for ease of reference is reproduced below:

***“The petitioner relies on the case law and their ratio decidendi as set out in appended synopsis of such precedent for declaring the provincial sales tax on internet/email/data services as per serial No.4/schedule 2 of KPK Finance Act 2013 read with section 19 as irrational, unjustified, illegal, discriminatory, unlawful, without authority, void ab-initio and against the basic fundamental rights of petitioner. It is also against Article 23 of the Constitution of Pakistan, 1973 as it fails to pass the reasonable restrictions. It is also not a valid law as it fails the following tests of proportionality as set***

*forth in the Landmark judgment of Lahore High Court authored by his Lordship Syed Mansoor Ali Shah, the Hon'ble Chief Justice, Lahore High Court, Lahore in case titled D.G Khan Cement Company vs The Federation of Pakistan (Writ Petition No.3515/2012):*

*(a) Proportionality strictosensu*

*“Proportionality is a legal construction. It is a methodological too. It is made up of four components; proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right.” (Para 21 of DG Khan Cement case)*

*The only purpose of KPK legislature was to increase revenue. This purpose has come at the cost of restricting the usage of internet which is a lifeline for students and small businesses in the Province already ravaged by terrorism and poverty. Such is the importance of internet in business and education that it must be considered as an extension of the fundamental right to do business, the right to free speech and the right to education under Articles 18, 19, 25-A respectively. Surely the benefit of raising of revenue (which itself is not achieved as explained later) is clearly disproportional to the harm caused to the above crucial fundamental rights. It must be noted that in the case of students from lower income groups it is entirely plausible that internet has become simply too expensive to avail, at least for any meaningful amount of time/quantity.*

*(b) Proper purpose*

*“The element of proper purpose reflects a value-laden component. It reflects that the notion that not every purpose can justify a limitation on a constitutional right. The purposes that justify limitation on human rights are derived from the values on which the society is founded. In a constitutional democracy, these value are democratic values. Indeed, a proper purpose is one that suits the values of the society in a constitutional democracy.” (Para 22 of DG Khan case)*

*In the earlier paragraph 21 of the DG Khan Cement case it is explained that comparative jurisprudence has moved on from the general public interest argument to a more structured approach of proportionality. It follows then that the mere purpose of increasing public revenue for 'public interest' is no longer a sufficient 'proper purpose.' It must pass the other tests of proportionality.*

*(c) Rational connection test*

*"The requirement is that the means used by the limiting law fit (or are rationally connected to) the purpose the limiting law was designed to fulfill. The requirement is that the means used by the limiting law can realize or advance the underlying purpose of that..Accordingly, if the realization of the means does not contribute to the realization of the 'laws' purpose, the use of such means would be disproportional." (Para 23 of the DG Khan Cement judgment)*

*Given the decrease in internet connections in KPK. The revenue from internet services is actually decreasing. It is also resulting in decrease in income tax payable by PTCL as is attributable to KPK thereby resulting in decrease in KPK Government's revenue via the NFC Award. Furthermore, when costumers disconnect internet services in majority cases they also disconnect the entire landline connection resulting in decrease n sales tax on voice calls. Clearly the means adopted to achieve the purpose of increasing provincial revenue are resulting in decrease of such revenue making such means disproportional.*

*(d) Necessity test*

*"t is also referred to as the requirement of 'the less restrictive means.' According to this test, the legislator has to choose-of all those means that may advance the purpose of the limiting law-that which wuld least limit the human right in question"(Para 24 of the DG Khan case)*

*The Provincial legislature has still not taxed many services including the following services appearing in Schedule-I of the Act (i.e. not notified in Schedule-II)*

*that are consumed by the elite or corporate class:*

- 9828.0000 *Program Producers*
- 9841.0000 *Packaging services*
- 9861.0000 *Quality control services*
- 9863.0000 *Debt collection agencies*
- 9864.0000 *Amusement parks*
- 9866.0000 *Film and drama studios including mobile stage shows or cinemas*
- 9867.0000 *Entertainment services*
- 9876.0000 *Valuation service including competency and eligibility or distribution services.*

*By taxing the above and other such services the legislature could have achieved the purpose of increasing its revenue without causing substantial harm to other fundamental rights as discussed above. Hence taxing internet services by no means was necessary to achieve the purpose of increasing provincial revenue.”*

6. The Constitution of Islamic Republic of Pakistan, 1973 (“**Constitution**”) envisages Pakistan to be a Federation, with four federating units, the four provinces. The Federation and each of its unit has a separate legislative body. The mandate of the Federal and the Provincial legislature has also been clearly defined under the enabling provisions of the Constitution, and in particular Article 142, which provides that:

*“142. Subject to the Constitution—  
(a) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws*

- with respect to any matter in the Federal Legislative List;*
- (b) *Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence;*
- (c) *Subject to paragraph (b), a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List;*
- (d) *Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province.”*  
**(emphasis provided)**

The subject-matters on which the *Federal Legislature* can legislate have been clearly provided in the *Federal Legislative List*, appended as *Fourth Schedule* to the Constitution. While the subject-matters not listed therein falls within the *legislative* domain of the Provincial Legislature to legislate thereon.

7. The Constitution (Eighteenth Amendment) Act, 2010 (“**Eighteenth Amendment**”) brought in its wake *provincial autonomy*, vesting more authority in the Provincial Legislatures. In this regard, the main striking feature was the omission of *Concurrent List* from the *Fourth Schedule* of the Constitution. However, in regard to the present case, the

domain of the Provincial Legislature to levy sale tax on services was evident from the amendment introduced in Entry 49 of Federal Legislation List contained in part-I of the Fourth Schedule of the Constitution, which now reads:

**“49. Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed, except sales tax on services.”**

**(emphasis provided)**

In view of the above, the legislative competence of the Khyber Pakhtunkhwa Provincial Assembly to impose sale tax on internet services is *intra vires*. Accordingly, the Khyber Pakhtunkhwa Provincial Assembly passed and thus enacted the *Khyber Pakhtunkhwa Finance Act, 2013* (“**Finance Act, 2013**”), wherein section 19 clearly provided for levy of sale tax on *services* in terms that:

**“19. Taxable Service.—(1) A taxable service is a service listed in the Second Schedule to this Act, which is provided:**

- (a) by a registered person from his registered office or place of business in the Khyber Pakhtunkhwa;**
- (b) in the course of an economic activity, including its commencement or termination of the activity.**

**Explanation: This sub-section deals with services provided by registered persons, regardless of whether those services are provide to resident persons or non-resident persons.**



**(2) A service that is not provided by a registered person shall be treated as a taxable service, if the service is listed in the Second Schedule to this Act and-**

**(a) is provided to a resident person;**

**(b) by a non-resident person in the course of an economic activity, including its commencement or termination of the activity.**

**Explanation: This sub-section deals with services provided by non-resident persons to resident persons.**

**(3) For the purpose of sub-section (2), where a person has a registered office or place of business in the Khyber Pakhtunkhwa and another office outside Khyber Pakhtunkhwa, the registered office or place of business in Khyber Pakhtunkhwa and that outside Khyber Pakhtunkhwa shall be treated as separate legal persons.**

**(4) The Authority by notification, prescribe regulation ofr determining the conditions under which a particular service or class of services will be considered to have been provided by a person from his registered office or place of business in the Khyber Pakhtunkhwa.”**

Item 4 of the Second Schedule thereof, further expressly provided that:

S #	Description of Service	Rate of Tax
“4	1. Telecommunication Services 2. Telephone Services 3. Fixed line voice telephone service 4. Wireless telephone 5. Cellular telephone 6. Wireless local loop telephone	Nineteen-and-a half percent (19.5%)

8. Now, when we review the impugned provisions of the Finance Act, 2013, it is apparent that the Khyber Pakhtunkhwa Provincial

Assembly had the legal mandate to legislate and impose the levy of sale tax on internet services impugned in the instant case.

9. It seems the petitioner-company was *alive* to this constitutional mandate of the Khyber Pakhtunkhwa Provincial Assembly, which prompted them not to directly challenge the *vires* of the Finance Act of 2013, and in particular, section 19 thereof.

10. In essence, the challenge made by the petitioner-company is the *rate* of 19.5% so imposed and **not** to the very *vires* of the charging section 19 of the Finance Act, 2013.

11. The Apex Court has enumerated the *general principles* of considering the constitutional validity of an enactment challenged before a Constitutional Court in **Lahore Development Authority's case (2015 SCMR 1739)** that:

- “(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 will not strike down statutes on principles of republication or democratic government unless those principles are placed beyond legislative encroachment by the Constitution.*
  - (viii) *Malafide will not be attributed to the Legislature.”*

12. The Indian Supreme Court in *Rakehs Kohli’s Case* (2013 SCMR 34) has addressed the specific principles of testing the constitutionality of *fiscal* enactments in terms that:

*“29. While dealing with constitutional validity of a taxation law, Court must consider following principles:*

- (i) *There is always a presumption in favour of constitutionality of a law made by Parliament or a State Legislature;*
- (ii) *No enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found;*

- (iii) *Court is not concerned with the wisdom or un-wisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence;*
- (iv) *Hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute;*
- (v) *In the field of taxation, the Legislature enjoys greater latitude for classification.”*

13. Keeping in view the *ratio decidendi* of two landmark decisions discussed hereinabove, it is but clear that a fiscal statute cannot be struck down merely on the ground of its *harshness* or the *hardship* it may cause, unless it is *confiscatory*. This issue has been deliberated upon by the Apex Court in an earlier decision in *Messrs Elahi Cotton Mill's case* (1997 PTD 1555) has explained why *fiscal* statute ought not to be readily struck down on the touchstone of it being *disadvantageous* or the *hardship* it may cause, in terms that:

*“We may observe that once the Court finds that, a fiscal statute does not suffer from any Constitutional infirmity, it is not supposed to entangle itself with the technical questions as to the scope and modality of its working etc. The above questions pre-eminently deserve to be decided by the Government which possesses of experts’ services and the*

*relevant information which necessitated imposition of the tax involved unless the same suffers from any legal infirmity which may warrant interference by the Court. Additionally, while examining a Fiscal statute the Court should not be carried away with the fact that the same may be disadvantageous to some of the taxpayers. If such a fiscal statute is beneficial to the country on the whole, the individuals; interest should yield to the nationals' interest.....*

.....  
 (vii) *That the policy of a tax, in its operation, may result in hardships or advantages or disadvantages to individual assesses which are accidental and inevitable. Simpliciter this fact will not constitute violation of any of the fundamental rights.*

*Legislature enjoys plenary power to impose taxes within the framework of the Constitution. It has prima facie power to tax when it chooses, power to exempt whom it chooses, power to impose such conditions as to liability or as to exemptions as it chooses, so long as they do not exceed the mandate of the Constitution.”*

(emphasis provided)

14. Similarly, the judicial consensus is by now settled that a *fiscal* statute cannot be struck down merely on the ground of its *unreasonableness*. This issue has been aptly dealt with in *Anoud Power Generation's case* (PLD 2001 SC 340), wherein, it was held that:

*“In construing a taxing measure for determining its Constitutional validity, the question of reasonableness cannot enter a judicial mind. The only consideration, which is germane, is whether the legislation challenged is permitted by the Constitution. The reasonableness or otherwise of such a state is a matter of*

*legislative policy and it is not for the Courts to adjudicate upon.”*

The principle so laid down in the above cited case has also been consistently followed by our superior Courts. The leading judgment in this regard is *Haji Muhammad Sadiq's case* (2007 PTD 67).

15. As far as the applicability of *ratio decidendi* of *D.G,Khan Cement's case* (*Supra*) to the present case, so ably and vehemently advocated by the worthy counsel for the petitioner-company, the facts and circumstances of the said case were entirely different and distinguishable from that of the instant case. In the *D.G. Khan Cement's case* (*Supra*), the Lahore High Court had discussed and deliberated upon the very *procedure* provided under section 8(1) (a) of the Sales Tax Act, 1990, and found the same being self-defeating and contrary to the *theme* and *purpose* of the enactment itself, and thus struck down the same on the touchstone of being violative of the *fundamental rights* enshrined in Articles 23 and 24 of the Constitution. The crucial issue to be noted is that

the challenge in the present case is only to the *rate* of sale tax, which was not an issue in *D.G. Khan's Cement's case (Supra)*. Moreover, in the present case, the petitioner-company has neither raised any objection to the *vires* of the law nor challenged the procedure for recovery of the impugned levy, as done in the cited case. Hence, reliance of the worthy counsel for the petitioner-company on the said case is clearly misplaced. What is also important to note is that in a very recent decision rendered by Lahore High Court in *Ali Haider Khan's Case (2016 PTD 2525)*, it has very elaborately discussed the criteria for the Constitutional Court in determining the *vires* of a *fiscal* statute, in terms that:

*“The criteria before the Court, for determining the vires of a provision of law, is that the Court must be able to hold beyond any iota of doubt that violation of the Constitutional provisions was so glaring that the legislative provision under challenge could not stand. Without Parliament or a state legislature, cannot be declared bad. Reliance, in this regard, is placed upon State of M.P. v. Rakesh Kohli and another (2013 SCMR 34) and Badshah Gul Wazir V. Government of Khyber Pakhtunkhwa and others (PLD 2014 Peshawar 210)”*

*Needless to observe here that while examining a provision of law, enacted through legislative process provided under*

*the Constitution, power of the Court was limited to examine whether the provision of law was repugnant, inconsistent or in conflict with the provisions of the Constitution, whether legislature had legislative competence as envisaged in the Constitution, and whether the legislation violated or abridged fundamental rights guaranteed by the Constitution.....*

.....  
 .....

*As long as legislature has competence to legislate, grounds or wisdom of legislation remains its exclusive prerogative. Legislature is not debarred from promulgating said provisions of law under the Constitution. Reliance, in this regard, is placed upon Zaman Cement Company (Pvt.) Ltd. V. Central Board of Revenue and others (2002 SCMR 312), Ardeshir Cowasjee and 11 others v. Sindh Province and others (2004 CLC 1353) and Syed Muhammad Murtaza Zaidi v. Motor Registration Authority and others (2010 CLC 494).”*

16. Moving to the last leg of the argument of the worthy counsel for the petitioner-company, regarding the issue of *discrimination*; this Court is not in consonance with the said submission. The very spirit of the Constitution, envisages a Federal form of Government, vesting in its federating units with autonomy. This theme of *provincial autonomy* has now gained such high momentum, as witnessed in the Eighteenth Amendment, whereby the *Concurrent List* enumerated in the Fourth Schedule of the Constitution was omitted



and powers were vested in the Provinces. To agree with the contention of the worthy counsel for the petitioner Company would in fact be putting a *clog* upon the authority of the Provinces, and in particular the Khyber Pakhtunkhwa Provincial Assembly, which would not be appropriate for this constitutional Court to legally endorse. In this regard, the Apex Court in *Muzaffar Khan's Case* (2013 SCMR 304), while discussing the procedure relating to collection of *Zakat* and *Ushr* clearly emphasized the prominence of *Provincial autonomy vis-à-vis* the question of *discrimination* in terms that:

**“As regards the question of discrimination, it may be pointed out that each Province is empowered and entitled to make its own decision regarding the subjects that fall within their respective domain in accordance with their own circumstances. A decision by one Province regarding any matter cannot be cited as ground for discrimination if another Province does not take the same decision. To hold otherwise would be an intrusion into the provincial economy of the Provinces. Now that the subject of Zakat and Ushr is within the domain of the Provinces, it is up each Provincial Government to decide the terms and conditions of the petitioners’ services.”**

**(emphasis provided)**

Earlier, the Apex Court in *Jehangir Sarwar's Case* (2001 SCMR 363), while dilating upon the service rules framed by the Province of Punjab

and Sindh, dispelled the ground of *discrimination*, in terms that:

***“The State has the power of what is known as “classification” on the basis of rational distinctions relevant to the particular subject dealt with. Classification may be due to geographical situation or it may be based on territorial, economic, communal and other similar considerations. The constitution itself contemplates passing of different laws for different provinces by their respective legislatures. The doctrine of reasonable classification is founded on the assumption that the State has to perform multifarious activities and deal with a vast number of problems.”***

**(emphasis provided)**

17. In view of the above legal discourse, it would be safe to state that;

- I.** 19.5% tax on internet/email/data services as per serial No.4, schedule II of the Finance Act, 2013 is *intra vires*;
- II.** 19.5% tax on internet/email/data services as per serial No.4, schedule II of the Finance Act, 2013 is not discriminatory, *unreasonable* or *disproportionate*, so as to declare illegal and without lawful authority or in violation of any provision of the Constitution and the *fundamental rights* declared therein;
- III.** In order to test the constitutionality of a fiscal statute, the following principles may be of guidance and be considered by Courts;

- (i) *There is always a presumption in favour of constitutionality of a law made by Parliament or a State Legislature;*
- (ii) *No enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found;*
- (iii) *Court is not concerned with the wisdom or un-wisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence;*
- (iv) *Hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute;*
- (v) *In the field of taxation, the Legislature enjoys greater latitude for classification.”*

- IV. A fiscal statute cannot be struck down merely on the basis of it being *harsh*, or causing *hardship* or *disadvantageous* to the *assessee*, *unless it is declared confiscatory*;
- V. A *fiscal* statute cannot be struck down solely on the ground that the *rate* of tax levied is *unreasonably* high;
- VI. Any interpretation of a law, which is in conflict of the *spirit* of the Constitution is to be avoided and the one in support thereof is to be applied;
- VII. *Provincial autonomy* is ingrained in the Constitution and is to be upheld.

18. Accordingly, for the reasons rendered hereinabove, this Court is of the concerted opinion that the instant petition is bereft of legal merit and is thus dismissed.

19. The order dated 25.11.2014 is hereby recalled, and the amount so deposited in the Designated Account of Registrar of this Court be transferred to the Account of Director General, Khyber Pakhtunkhwa Revenue Authority, Peshawar.

**Announced:**  
**Dated. 07.03.2017.**

**CHIEF JUSTICE**

**J U D G E**

**\*/M.Saleem/\***