

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Gulzar Ahmed
Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi

CIVIL PETITIONS NO. 1069-K TO 1071-K OF 2018

(Against the judgment dated 30.05.2018 of the High Court of Sindh at Karachi passed in C.P.No.D-2798/09, C.P.No. D-614/10, C.P.No.D-783/10 and Spl. STRA Nos. 195 and 196/09)

M/s Independent Media Corporation (Pvt.) Limited.

(In all cases)

... Petitioner

Versus

Province of Sindh, through Chief Secretary and others.

(In CP. 1069-K/18)

Commissioner Inland Revenue, Karachi and others.

(In CPs. 1070-K & 1071-K/18)

... Respondents

For the Petitioner:

(In all cases)

Mr. Khalid Javed Khan, ASC.

Mr. Abdul Saeed Khan Ghori, AOR
(absent)

For Respondent No. 1:

Barrister Shabbir Shah,
Addl. Advocate General, Sindh.
a/w Malik Naeem Iqbal, ASC.

For Respondent No. 2 (FBR):

Mr. Muhammad Waqar Rana, ASC.
Mr. M. S. Khattak, AOR.

For Respondent No. 3:

Nemo.

Date of Hearing:

10.04.2019.

J U D G M E N T

Qazi Faez Isa, J.

1. These three petitions for leave to appeal assail the judgment dated 30th May, 2018 of a division Bench of the High Court of Sindh at Karachi through which three constitutional petitions (C.P. Nos. D-2798/09, D-614/10 and D-783/10) and two special sales tax references (Spl. STRA Nos. 195 and 196 of 2009) were decided.

Civil Petition for Leave to Appeal No. 1069-K of 2018 has arisen out of C.P. No. D-2798/09, Civil Petition for Leave to Appeal No. 1070-K of 2018 arises out of Spl. STRA No. 195/09 and Civil Petition for Leave to Appeal No. 171-K of 2018 arises out of Spl. STRA No. 196 of 2009. The said cases were decided through one judgment of the High Court and are accordingly decided through this one judgment. Notices were issued to the respondents and the Sindh Revenue Board and they were provided an opportunity to file documents. These petitions were heard at length on 10th April, 2019. Since the petitions involved public revenues the learned counsel were informed that either the petitions would be dismissed or converted into appeals and allowed. After conclusion of the hearing the learned counsel requested for a period of two weeks to file their respective written arguments. The written arguments on behalf of the Government of Sindh were belatedly filed on 29th April 2019; however, the delay in filing is condoned.

2. The petitioner in all these petitions is Independent Media Corporation (Pvt.) Limited, a company incorporated under the laws of Pakistan (hereinafter referred to as "**IMC Pakistan**") and it was also the petitioner before the High Court. IMC Pakistan produces television programs for the Jang group of companies under the 'Geo' trademark. IMC Pakistan purchases airtime from International Media Corporation, a company incorporated and based in Dubai (hereinafter referred to as "**IMC Dubai**"), and utilizes their broadcasting equipment to telecast the advertisements of its customers. A dispute arose with regard to the payment of sales tax on services on the invoices of IMC Pakistan in respect of such advertisements.

3. Section 3 of the Sindh Sales Tax Ordinance, 2000 required that sales tax be paid on services rendered or provided in the province of Sindh. The services on which sales tax was levied were listed in the Schedule to the Sales Tax Ordinance, 2000. Item II of the said Schedule imposed sales tax on, "*Advertisement on T.V. and Radio*". The Additional Collector (Adjudication) of Sales Tax *vide*

order-in-original dated 4th January, 2007 upheld the demand made by the department on IMC Pakistan and ordered recovery of sales tax and penalty equal to 100 per cent of the amount of tax involved together with the default surcharge levied under section 34 of the Sales Tax Act, 1990. The said order-in-original was assailed before the Collector (Appeals) who concluded that the IMC Pakistan in purchasing airtime from IMC Dubai was an activity which did not come within the ambit of the Sindh Sales Tax Ordinance, 2000 and the Sales Tax Special Procedure Rules, 2006, however, as IMC Pakistan had issued sales tax invoices and charged sales tax from its customers for the period commencing from July, 2004 to July, 2006, but had failed to deposit the same with the department, therefore, IMC Pakistan was liable and accordingly was directed to pay the amount of sales tax, penalty and default surcharge. IMC Pakistan and the department both filed appeals before the Customs, Excise and Sales Tax Appellate Tribunal ("**the Tribunal**"). The Tribunal dismissed the appeal filed by IMC Pakistan and allowed the department's appeal *vide* judgment dated 24th October, 2009. The Tribunal's judgment was assailed by IMC Pakistan in Special Tax Reference Nos. 195 and 196 of 2009 before the High Court of Sindh. IMC Pakistan also filed constitutional petitions challenging certain provisions of the Sindh Sales Tax Ordinance, 2000, the Sales Tax Special Procedure Rules, 2006 and a number of standing regulatory orders. The grounds taken in challenging the same included, that IMC Pakistan did not have a license to broadcast and, therefore, it neither could broadcast nor did broadcast the said advertisements, consequently, the broadcast of advertisement by IMC Dubai could not be construed as a *taxable service* provided by IMC Pakistan and thus liable to the payment of sales tax. The learned Mr. Justice Muhammad Iqbal Kalhoro authored the main judgment impugned herein and decided that IMC Pakistan was liable to pay sales tax and upheld the decisions of the Tribunal.

4. The learned Mr. Khalid Javed Khan stated that IMC Pakistan no longer challenges that it is not liable to pay sales tax and

therefore to such extent does not assail the impugned judgment of the High Court and that of the Tribunal. The learned counsel submits that IMC Pakistan now only seeks the benefit of exemption / amnesty schemes issued by the Revenue Division of Finance of the Economic Affairs, Statistics and Revenue of the Government of Pakistan being S.R.O. 648(1)/2011 dated 25th June, 2011 and of the one issued by the Government of Sindh being notification No. SRB-3-416/2014 dated 17th April, 2014 ("**the notification dated 17th April, 2014**" or "**the said notification**"). The notification dated 17th April, 2014 exempted from payment of the whole of the penalty amount and ninety-five per cent of the default surcharge if the principal amount and five per cent of the outstanding default surcharge was paid. IMC Pakistan, the learned counsel submits, availed of these exemptions and made full payment in terms thereof, therefore, it is not liable to pay the penalty and ninety-five per cent of the default surcharge. According to the learned counsel IMC Pakistan was deprived of the benefit of the notification dated 17th April, 2014.

5. In paragraph 24 of the impugned judgment the contention of the petitioner, IMC Pakistan, was repelled by the learned judges of the High Court, as under:

"24. As to learned counsel's contention that the petitioner availed the benefit of amnesty scheme under the notification dated 17.04.2014 of Sindh Revenue Board (SRB) (available at page 517 of CP No.D-2798/2009) granting exemption of the whole penalty amount and 95 percent of default surcharge on payment of entire principal amount plus 5 percent of the outstanding default surcharge. As such, nothing such as principal amount, penalty or default surcharge is outstanding against the petitioner and nothing in this regard can be demanded from it. It may be said that the subject transactions took place prior to enactment of the Sindh Sales Tax on Services Act, 2011 ('2011 Act') which led to the formation of SRB. Before the year 2011, the FBR was competent to administer and collect sales tax under the 2000 Ordinance and transfer it to the province of Sindh accordingly. The 2011 Act was promulgated on 10th June 2011 and admittedly it has no retroactive effect. The subject notification stipulating exemption of penalty, etc. on payment of principal amount plus 5 percent of default surcharge was issued under section 45 of 2011 Act and as such would be strictly considered within the context and scope of that law, which would mean that this notification has no retrospective effect either insofar as the period before the year 2011 is concerned. For this reason, and this is irrespective of whether the petitioner has paid the entire

principal amount of the tax which is one of the conditions as both FBR and SRB have disputed this fact, in our view this notification would not cover the overdue amount of sales tax or any penalty, etc. therefrom on the transactions that took place prior to the year 2011 and to grant certain amnesty thereon. That being the case, we are of the humble view that the petitioner's compliance, if any, of the terms of that notification would not help it wipe off its liability to pay penalty and default surcharge as adjudicated by the forums below.

6. To appreciate the respective contentions of the learned counsel it would be appropriate to reproduce the referred to notifications. Notification dated 25th June, 2011 issued by the Government of Pakistan, Ministry of Finance, Economic Affairs Statistics and Revenue, (Revenue Division), Islamabad is reproduced hereunder:

S.R.O.48(1)/2011.- In exercise of the powers conferred by section 34A of the Sales Tax Act, 1990 and sub-section (4) of section 16 of the Federal Excise Act, 2005, the Federal Government is pleased to exempt whole of the amount of default surcharge and penalties payable by a person against whom an amount of sales tax or federal excise duty is outstanding on account of any audit observation, audit report, show cause notice or any adjudication order or who has failed to pay any amount of sales tax or federal excise duty or claimed inadmissible input tax credit, adjustment, refund, drawback or rebate due to any reason subject to the condition that the outstanding principal amount of sales tax or federal excise duty is paid by 30th June 2011.

2. Benefit of this notification shall not be available in cases of fraudulent refunds or drawback and other tax frauds.

Notification dated 17th April, 2014 issued by the Sindh Revenue Board, Government of Sindh is reproduced hereunder:

No.SRB-34-4/6/2014.- In exercise of the powers conferred by section 45 of the Sindh Sales Tax on Services Act, 2011 (Sindh Act No. XII of 2011), the Sindh Revenue Board, with the approval of the Government of Sindh, is pleased to exempt the whole of the amount of penalty and 95 *per cent* of the amount of default surcharge, payable on the principal amount of arrears of the tax as are outstanding on the date of this notification, if the said principal amount of tax and the 5 *per cent* of the amount of default surcharge are paid in the prescribed manner in Sindh Government's head of account "B-02384" during the period from the date of this notification to the 30th day of April, 2014, and the tax returns or the revised tax returns, as the case may be, for the relevant tax periods are also e-filed in the prescribed manner by the 9th day of May, 2014.

2. The benefit of exemption under this notification shall, *inter alia*, also be available in relation to the arrears of the tax payable:

(i) under the Sindh Sales Tax Ordinance, 2000 (Sindh Ordinance No. VIII of 2000) or under the Sindh Sales Tax on Services Act, 2011 (Sindh Act No. XII of 2011);

(ii) by persons who are liable to be registered under section 24 of the Act but were not registered, provided that:

(a) they get themselves registered with SRB in the prescribed manner during the period from the date of this notification to the 30th day of April, 2014; and

(b) they also e-file their tax returns, for the tax periods from the tax period of the commencement of their economic activity of taxable services to the tax period March, 2014, during the period from the date of this notification to the 9th day of May, 2014;

Explanation: For the purpose of this sub-paragraph (i), the word "registered" in the case of withholding agents shall mean "e-Signed up" in terms of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2011;

(iii) by persons who were registered but were non-filers or null-filers of their tax returns;

(iv) by persons who were late-registered with SRB and they did not file their tax returns from the date of commencement of their economic activity of taxable services;

(v) by persons who withheld any amount of Sindh sales tax but have either not deposited that withheld amount in Sindh Government's head of account "B-02384" or have deposited the withheld amount, in a head of account other than the Sindh Government's head of account "B-02384";

(vi) by persons who determine the arrears through self-detection and self-assessment;

(vii) by persons who short-paid any amount of tax in their tax returns and persons against whom any arrears of tax was detected in SRB's scrutiny of tax returns or in SRB's audit of taxpayers' record;

(viii) by persons against whom any tax amount has been determined or assessed or adjudged, by an officer of the SRB, through an order or decision passed under the Sindh Sales Tax on Services Act, 2011, or the rules/notification issued thereunder;

(ix) by persons against whom any tax liability has been adjudged or confirmed by the Commissioner (Appeals) or the Appellate Tribunal;

(x) by persons whose cases are under assessment or under adjudication with any officer of the SRB or is pending, at the appellate stage, with the Commissioner (Appeals) or with the Appellate Tribunal; and

(xi) by persons whose cases are under litigation in any court of law including the High Court or the Supreme Court.

3. The benefits of this notification shall also be available in cases where a person has late paid the principal amount of tax prior to the date of this notification but has not yet discharged the liability of default surcharge on such late payment provided that he pays an amount equal to 5 per cent of the outstanding arrears of the amount of such default surcharge in the Sindh Government's head account "B-02384" during the period from the date of this notification to the 30th day of April, 2014.

4. If the whole of the dues of the principal amount of tax and of 5 per cent of the default surcharge are paid by a person in terms of this notification, he shall not be prosecuted under section 49 of the Act and the offence, to the extent of the arrears of the tax paid under this notification, shall also be compounded under section 46 of the Act.

5. If the principal amount of tax and the 5 per cent of the amount of default surcharge thereon, as are paid in terms of this notification by the persons described in sub-paragraphs (vii), (viii), (ix), (x) and (xi) of paragraph 2 of this notification, are held to be not payable in view of the order issued by the respective competent authority (i.e. the adjudicating officer or the Commissioner Appeals or the Appellate Tribunal or the Court of Law), the Officer of the SRB, not below the rank of an Assistant Commissioner, shall allow tax adjustment/credit of the amount or, alternately, shall refund the amount, so paid, within 60 days from the date of receipt of the taxpayers application, for refund or tax adjustment/credit, together with a copy of the order/judgment and also of the evidence that the incidence of the tax was not passed on to the service recipient.

6. This notification shall not apply for the refund or adjustment of any amount of tax or default surcharge or penalty as has been paid before the date of this notification.

7. The learned Mr. Khalid Javed Khan, representing the petitioner, stated that sales tax on services was first levied through the Sindh Sales Tax Ordinance, 2000. However, the Sindh Sales Tax Ordinance, 2000 was repealed by the Sindh Sales Tax on Services Act, 2011 which came into effect from the first day of July, 2011 (subsection (3) of section 1). Section 83 of the Sindh Sales Tax on Services Act, 2011 had repealed the Sindh Sales Tax Ordinance, 2000 but had saved certain matters which had arisen under the repealed Sindh Sales Tax Ordinance, 2000. Section 83 is reproduced hereunder:

83. Repeal and Saving.

(1) The Sindh Sales Tax Ordinance, 2000 shall stand repealed with effect from the date this Act comes into force.

(2) Subject to sub-section (3), in making any assessment in respect of any financial year ending prior to the date notified under sub-section (3) of section 1, the provisions of the repealed

Ordinance shall in so far as these relate to the amount of sales tax payable in such financial year as if this Act had not come into force.

(3) The assessment, referred to in sub-section (2), shall be made by the officer of the SRB competent under this Act to make an assessment in respect of a financial year beginning after the date notified under subsection (3) of section 1, in accordance with the procedure specified in this Act.

(4) The recovery of any sum found due as a result of the assessment under sub-section (2) shall be recovered under the provisions of this Act.

(5) Any proceeding under the repealed Ordinance pending on the date notified under sub-section (3) of section 1 before any authority, the Appellate Tribunal or any Court by way of appeal, reference, revision or prosecution shall be continued and disposed off as if this Act had not come into force.

(6) Any proceeding relating to an assessment in respect of any financial year ending prior to the date notified under sub-section (3) of section 1 which is initiated after the date notified under sub-section (3) of section 1 will be initiated and conducted in accordance with the procedure specified in this Act.

(7) Any sales tax payable under the repealed Ordinance may be recovered under this Act, but without prejudice to any action already taken for the recovery of the amount under the repealed Ordinance.

The learned counsel, with reference to the aforesaid section, contended that after the promulgation of the Sindh Sales Tax on Services Act, 2011 the Sindh Revenue Board ("**SRB**") took over the responsibilities which had been assigned to and were being performed by the Federal Board of Revenue ("**FBR**"), including recovering outstanding tax, penalty and default surcharge which had arisen under the Sindh Sales Tax Ordinance, 2000 and the Sales Tax Act, 1990, and from the first day of July 2011 the Sindh Revenue Board alone could exercise powers with regard to sales tax on services, including the power to grant exemptions, as were granted by the notification dated 17th April, 2014. He further submitted that the power vested in the Sindh Revenue Board was not restricted to only issuing exemptions in respect of to a period after the Sindh Sales Tax on Services Act, 2011 had come into effect, that is, from the first day of July, 2011. He submitted the learned Judges had overlooked the definition of "tax" contained in section 2 (92) of the Sindh Sales Tax on Services Act, 2011 which includes tax, additional tax, default surcharge, fine, penalty or fee

imposed under this Act and all sums *payable or recoverable under the provisions of this Act* and that as per section 83 (7) any amount payable under the repealed Ordinance was to be recovered under this Act. Reference was also made by him to section 10 of the Sindh Sales Tax on Services Act, 2011 which granted to the Sindh Revenue Board the power to exempt any taxable service or class of persons or any person and to section which granted to the Sindh Revenue Board the power to exempt the payment of penalty and default surcharge. The learned counsel stated that the Sindh Revenue Board stood by the said notification and had conceded that IMC Pakistan had made payment of the principal amount of the sales tax and had also paid five per cent of the default surcharge in terms of the said notification. Therefore, IMC Pakistan was exempted from paying the penalty and the remaining ninety-five per cent of the default surcharge. The learned counsel concluded his submissions by referring to section 66 (2) of the Sindh Sales Tax on Services Act, 2011 which specifically empowered the Sindh Revenue Board to write off the arrears of accrued tax, penalty and default surcharge.

8. Mr. Waqar Ahmed Rana, the learned counsel for FBR, supported the impugned judgment and reiterated what the learned Judges had held to rebut the submissions of Mr. Khalid Javed Khan. The learned counsel also referred to Article 147 of the Constitution of the Islamic Republic of Pakistan ("**the Constitution**") to state that the provinces, including the province of Sindh, had entrusted to the Federal Board of Revenue the power to collect sales tax on services therefore the Federal Board of Revenue's determination would prevail over that of the Sindh Board of Revenue. The learned FBR's counsel by referring to sections 10 and 45 of the Sindh Sales Tax on Services Act, 2011 contended that under these sections the Sindh Revenue Board could exempt payment of penalty and default surcharge which had been levied under the said Act and that it was not empowered to exempt what had already accumulated under the Sindh Sales Tax Ordinance, 2000 and the Sales Tax Act, 1990, and to the extent that this was

done in the notification dated 17th April, 2014 by the Sindh Revenue Board it was *ultra vires* the Sindh Sales Tax on Services Act, 2011.

9. Mr. Shabbir Shah, the learned Additional Advocate General, Sindh, supported the contentions of the learned FBR's counsel. In the written arguments filed on behalf of the Government of Sindh the following question was framed:

Whether the SRB exemption notification was issued within the four corners of law (the 2011 Act) and more specifically whether the petitioner's penalty and default surcharge (in respect of a period well before the 2011 Act came into force) was lawfully waved off in terms of the said notification?

It was then pointed out that in the, "*two concise statements* [filed by SRB] *however on this aspect did not take any stance therein in respect of the effect and interpretation of the SRB exemption*".

The learned Malik Naeem Iqbal represented the Sindh Revenue Board and supported the said notification. Therefore, an interesting situation developed one in which the Federation and the Government of Sindh sought to restrict the scope of the said notification by contending that the said notification could not have been issued exempting payment of penalty and default surcharge for a period prior to the first day of July, 2011, whilst the Sindh Revenue Board maintained that it could.

10. To appreciate the contentions of the learned FBR's counsel and the learned Additional Advocate General, Sindh, it would be appropriate to also reproduce paragraph 26 of the impugned judgment.

26. Meanwhile, the Sindh Revenue Board has filed an application (Misc. application no.27365/2017) under Order 1 Rule 10 CPC to be impleaded as a party in these matters on the grounds, inter alia, that under 2000 Ordinance, the FBR would collect sales tax on behalf of SRB and then deposit it in the exchequer of Sindh Province. But after the enactment of the Sindh Sales Tax on Services Act, 2011 which repealed 2000 Ordinance, the SRB has been performing that duty accordingly; as such SRB is now the relevant body for receiving the overdue amount of sales tax. That section 83 of 2011 Act is the saving provision whereby all the subject transactions that took place during life of the 2000 Ordinance have been saved. That in view of such legal position the amount of sales tax which is due in

respect of those transactions and the amount of Rs. 8,00,00,000 (rupees eight crore) deposited by the petitioner with Nazir of the court may be ordered to be deposited with the SRB and not with the FBR. The petitioner did not show any serious concern to this application and maintained that it mainly reflected a tussle between a federal and provincial department. Learned Addl. Attorney General on this point submitted that it is an admitted position that prior to the year 2011 when SRB was constituted as a result of enactment of 2011 Act, the FBR would collect the sales tax amount in terms of 2000 Ordinance for onward remittance to the Sindh Government. The relevant law, therefore, applicable here would be 2000 Ordinance and the FBR the relevant body to receive the overdue amount of sales tax, etc. from the petitioner. He, however, maintained that the FBR could be directed to transfer the amount so received to Sindh Government within a certain period in accordance with their past agreement in this regard. However, the FBR has opposed this application on the grounds that the SRB was constituted in the year 2011 only as a result of the 2011 Act which has no retrospective effect, as such the SRB has no right to claim subject sales tax amount which accrued much prior to its coming into being and fell within the domain of the FBR. We have considered these assertions that were reiterated by the learned counsel for the FBR and SRB in their respective arguments. These matters were filed in 2009, and on 10th June 2011 the Sindh Sales Tax on Services Act 2011 was enacted leading to formation of the SRB in the same year. But the SRB since then remained silent and filed the listed application only in the later part of the last year i.e. 29.09.2017 for becoming a party in the proceedings with the claim as staged above. Regardless of the merits of SRB's claim which it needs to agitate in the proper proceedings, the silence of SRB from 2011 to 2017 is a circumstance which would adversely reflect on its plea and which admittedly in these proceedings filed by the petitioner challenging the vires of 2000 Ordinance and the rules thereunder besides impugning the order of the Appellate Tribunal cannot be adjudged. Nonetheless, we may observe that the subject transactions took place before the year 2011, and are saved under section 83 of 2011 Act. This saving clause would mean that the FBR which undisputedly was administering and collecting sales tax in terms of 2000 Ordinance on behalf of province of Sindh would still be the relevant body for the said purpose. Keeping in view this position, we do not think the SRB is a necessary party to be impleaded as one of the respondents in the present proceedings, especially as they will not be prejudiced and their share of the sales tax amount will, as before, be passed on to them by the FBR. Resultantly we dismiss the listed application (Misc. application no.27365/2017) and leave the SRB at liberty to avail a remedy according to law, if so advised. But as suggested by learned Addl. Attorney General we would like to direct the FBR that within two month of receipt of the sales tax amount, penalty and default surcharge from the petitioner in terms of this judgment, it shall transfer the same in the same manner as it used to do before the year 2011 to the exchequer of province of Sindh accordingly. Needless to mention that the FBR while calculating the liability of sales tax in all respects against the petitioner from time to time including the ones which the petitioner paid in order to avail of some amnesty under the schemes discussed earlier in this judgment and the one which the petitioner deposited with the Nazir of this court in compliance of the order of this court dated 06.04.2011.

11. We have heard the learned counsel for IMC Pakistan, the learned FBR's counsel, the learned Additional Advocate General Sindh, the learned counsel for the Sindh Revenue Board, examined the referred to statutes, the notifications and documents on record with their able assistance.

12. IMC Pakistan admittedly paid 237,702,668 rupees in respect of the period of July 2004 to December 2006. It is also admitted that IMC Pakistan paid 744,442,264 rupees for the period January 2007 to June 2009 pursuant to the Federal Board of Revenue's notification dated 25th June, 2011. The dispute is with regard to the accrued amount of penalty and default surcharge amounting to 444,625,560 rupees for the period July 2004 to December 2006. IMC Pakistan claimed the benefit of the notification dated 17th April, 2014 and paid five per cent of the default surcharge which, according to it, exempted it from the remaining ninety-five per cent of the default surcharge and the entire penalty amount.

13. The notification dated 17th April, 2014 states that, "*the Sindh Revenue Board with approval of the Government of Sindh is pleased to exempt the whole of the amount of penalty and 95 per cent of the amount of default surcharge, payable on the principal amount of arrears of the tax as are outstanding on the date of this notification, if the said principal amount of tax and the 5 per cent of the amount of default surcharge are paid in the prescribed manner in Sindh Government's head account "B-02384" during the period from the date of this notification to the 30th day of April, 2014, and the tax returns or the revised tax returns as the case may be, for the relevant tax periods are also e-filed in the prescribed manner by the 9th of May, 2014.*" It is not the case of the FBR or the Government of Sindh that IMC Pakistan did not make payment of 5 per cent of the amount of default surcharge in terms of the said notification. It is also not their case that the said notification was issued without the prior approval of the Government of Sindh.

14. The Government of Sindh has not withdrawn, supplanted or varied the said notification. Nor was the said notification assailed before a competent court of law, let alone it having been struck down or restricted to the extent of its retrospective application with regard to the penalty and default surcharge. However, the High Court has itself restricted the application of the said notification for the reason that, "*The 2011 Act [the Sindh Sales Tax or Services Act, 2011] was promulgated on 10th June, 2011 and admittedly it has no retroactive effect.*" The Sindh Sales Tax on Services Act, 2011 was promulgated on 10th June, 2011 and came into effect on 1st July, 2011, however in its section 83 matters which had accrued under the Sindh Sales Tax Ordinance, 2000, have been attended to, including recovery of "*any sum found due*" in respect of assessments made under the repealed Ordinance and those "*may be recovered under this Act*" (respectively subsection (3) and (7) of section 83). The notification dated 17th April, 2014 encouraged those who had not paid the penalty and default surcharge to get exemption from payment, provided they came forward and paid five per cent of the default surcharge amount. Once the requisite amount was paid pursuant to the said notification, the Government of Sindh, which had itself approved the issuance of the said notification, could not seek to restrict the scope of the said notification and contend that under the Sindh Sales Tax on Services Act, 2011 the said exemptions could not be given. By contending this the Government of Sindh undermines its own credibility. The Government of Sindh would have been within its rights to withdraw the said notification, substitute it or issue a another notification by restricting its scope, but it cannot contend that the said notification was contrary to the provisions of the statute and deprive those who availed the benefit of the said notification. There must be clarity and certainty in taxing instruments and exemptions issued thereunder. The Government of Sindh undermined the said notification which it had itself approved and, thus, undermined its credibility.

15. It needs to be recognized that with the promulgation of the Sindh Sales Tax on Services Act, 2011, the Sindh Revenue Board Act, 2010 and the establishment of the Sindh Revenue Board the province of Sindh's dependency on the Federation and on the Federal Board of Revenue to administer and collect on its behalf sales tax on services, including penalty and default surcharge thereon, came to an end. The Constitution also clearly states that the "sales tax on services" (item 49 to the Fourth Schedule) is within the exclusive domain of the provinces. The Sindh Sales Tax on Services Act, 2011 is to be interpreted keeping in sight these fundamentals and when this is done and sections 2 (92), 45, 66 and 83 are read together it leaves no doubt that the Sindh Revenue Board, with the prior approval of the Government of Sindh, could issue the said notification.

16. The Sindh Revenue Board stood by the said notification and wanted to be heard before the High Court. It had filed an application under Order I rule 10 of the Code of Civil Procedure ("**the Code**") to be impleaded as a party. However, the application submitted by the Sindh Revenue Board was dismissed by the High Court; the dismissal of the application was also through the impugned judgment. In dismissing the application of the Sindh Revenue Board the learned Judges referred to section 83 of the Sindh Sales Tax on Services Act, 2011 and held, that under the said section the Federal Board of Revenue administers and collects sales tax which had accumulated under the Sindh Sales Tax Ordinance, 2000 and that, *"Keeping in view this position, we do not think the SRB is a necessary party to be impleaded as one of the respondents in the present proceedings, especially as they will not be prejudiced and their share of the sales tax amount, as before, be passed on to them by the FBR."* In our opinion the Sindh Revenue Board was both a proper and necessary party in terms of Order I rule 10 of the Code as it had issued the said notification and it was the Sindh Revenue Board which had to recover the sales tax, penalty and default surcharge.

17. The learned Judges of the High Court directed the Federal Board of Revenue to recover the penalty and default surcharge from IMC Pakistan and then to, "*transfer in the same manner as it used to do before the year 2011 to the exchequer of province of Sindh.*" The Sindh Sales Tax Ordinance, 2000 had enabled the Federal Board of Revenue to, amongst other things, recover taxes, penalties and surcharges by applying the provisions of the Sales Tax Act, 1990 however after the promulgation of the Sindh Sales Tax on Services Act, 2011 these functions came to vest in the Sindh Revenue Board. The High Court had also erred in holding that the Sindh Revenue Board was established pursuant to the Sindh Sales Tax on Services Act, 2011. The Sindh Revenue Board had been established a year earlier under the Sindh Revenue Board Act, 2010 whereunder it was given comprehensive powers, including that of the, "*enforcement of, or reduction or remission in duty, penalty and tax, in accordance with the relevant law.*" After the establishment of the Sindh Revenue Board the powers being exercised by the Federal Board of Revenue on behalf of the province of Sindh under Article 147 of the Constitution came to an end. Henceforth, if the Government of Sindh, in exercise of powers under section 14 of the Sindh Sales Tax on Services Act, 2011, elected to authorize the Federal Board of Revenue "by notification in the official Gazette" the power to "collect and enforce the levy" only then could the Federal Board of Revenue do so. It was not the case of the learned law officers that the Government of Sindh had issued a notification under section 14 authorizing the Federal Board of Revenue. The learned Judges of the High Court had overlooked the Sindh Revenue Board Act, 2010 granting powers to the Sindh Revenue Board, overlooked the statutory powers of the Government of Sindh and had curtailed the powers of the Sindh Revenue Board which had been granted to it by the Sindh legislature.

18. We, therefore, conclude that the Sindh Sales Tax on Services Act, 2011, had repealed the Sindh Sales Tax Ordinance, 2000 but by virtue of section 83 had saved certain matters accrued

thereunder which henceforth had to be administered by the Sindh Revenue Board, including the power to issue notifications exempting the collection of sales tax on service, accrued penalties and default charges. It was also not appropriate for the High Court to restrict the scope of the Sindh Revenue Board's notification dated 17th April, 2014, particularly when there was no formal challenge thereto. As regards the Government of Sindh it was inappropriate for it to contend that the said notification was issued in excess of delegated powers or to seek to restrict its scope when it had itself approved its issuance and had not withdrawn it or supplanted it with another restricting the scope of the stated exemptions. We may observe that confusion and mischief may result when those issuing or approving a notification themselves question its legitimacy or grant unfettered discretion to the department and/or its officers with regard to its application.

17. Therefore, for the reasons mentioned above we set aside the impugned judgment to the extent that it curtails the scope of the Sindh Revenue Board, Government of Sindh notification No. SRB-3-416/2014 dated 17th April, 2014. Accordingly, we convert these petitions into appeals and allow the same to the stated extent, but with no order as to costs.

Judge

Judge

Judge

Bench-II
Islamabad
(M. Tauseef)

Announced in open Court at Islamabad on 22nd May, 2019

Judge

Approved for Reporting