JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.20727 of 2014

Pak Telecom Mobile Limited

Versus

Federation of Pakistan & others

J U D G M E N T

Date of Hearing.	12-09-2017 & 04-10-2017
PETITIONERS BY:	Sardar Ahmad Jamal Sukhera, Advocate.
RESPONDENTS BY:	Mr. Sarfraz Ahmad Cheema, Advocate.

Shahid Karim, J:- This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (**"the Constitution"**) has the following prayer:-

> *"In view of the above submissions, it is most respectfully prayed that this honourable Court may most graciously strike down:*
>
> *i. Sub-section (3B) of Section 3 of the Sales Tax Act, 1990 as being unconstitutional*
>
> *ii. Ninth Schedule to the Sales Tax Act, 1990 as being unconstitutional*
>
> *Any other relief deemed appropriate in the circumstances by this honourable Court may also most graciously be granted."*

2. This judgment shall also decide connected constitutional petition W.P No.21010 of 2014 which raises a common question of law.

3. For facility, the facts in the instant petition are being reproduced and it would not be necessary for

the decision of these petitions to narrate the facts in W.P No.21010 of 2014.

4. Pak Telecom Mobile Ltd. (**"Pak Telecom"**) is engaged in the business of providing telecommunication services and is a Cellular Mobile Operator (**CMO**). Through Finance Act, 2014, the Sales Tax Act, 1990 (**"the Act, 1990"**) was amended and sub-section 3B was inserted after sub-section 3A of Section 3. Simultaneously, 9th Schedule was incorporated to the Act, 1990 and which was merely intended to give effect to the provisions of section 3B. For facility, sub-section 3B of section 3 and the 9th Schedule are reproduced as under:-

> *"(3B) Notwithstanding anything contained in sub-sections (1) and (3), sales tax on the import and supply of the goods specified in the Ninth Schedule to this Act shall be charged, collected and paid at the rates, in the manner, at the time, and subject to the procedure and conditions as specified therein or as may be prescribed, and the liability to charge, collect and pay the tax shall be on the persons specified therein".*

NINTH SCHEDULE
[See sub-section (3B) of section 3]
Table

1.	*2.*	*3*	*4*	*5*
S. No.	*Description/Specification of Goods*	*Sales tax on Import (payable) by importer at the time of import)*	*Sales tax (chargeable) at the time of registration of IMEI number by CMOs)*	*Sales tax on supply (payable at the time of supply by CMOs)*

1. Subscriber Identification Module - - Rs.250

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2. A. Low Priced Cellular Mobile Phones Rs.150 Rs.150
or satellite phones
i. All cameras; 2.0 mega-pixels or less
ii. Screen size : 2.6 inches or less
iii. Key pad

B. Medium Priced Cellular Mobile Rs.250Rs.250
Phones or Satellite Phones

i. One or two cameras: between 2.1 to 10 mega-pixels
ii. Screen sixe: between 2.6 inches and 5.0 inches
iii. Micro-processor; less than 2 GHZ

C. Smart Cellular Mobile Phones or rs.500 Rs.500
Satellite Phones
i. One or two cameras: 10 mega-pixels and above
ii. Touch Screen: size 5.0 inches and above
iii. 4GB or higher Basic Memory
iv. Operating system of the type IOS, Android V2.3, Android Gingerbread or Higher, windows 8 or Blackberry RIM
v. Micro-processor: 2GHZ or higher, Dual core or quad core."

5. In a nub, Pak Telecom has been made liable to pay sales tax on account of registration of IMEI (International Mobile Equipment Identity) number and supply of Subscriber Identification Module (SIM) to its customers. The learned counsel for the petitioners did not choose to address arguments on the challenge regarding the registration of IMEI as according to them the issue is not required to be dilated upon and determined in this petition and left the matter to be addressed as and when the need arose at a future time. The challenge with regard to the supply of SIM, however, remains to be decided in this petition.

Issue:

6. Although Pak Telecom has raised a challenge to the constitutionality of sub-section 3B of section 3 but, in essence, the challenge merely relates to whether at all there is a supply of SIM and if so, the sales tax to be collected and charged at the time of its supply. Pak Telecom contends that in fact no supply of SIM takes place within the meaning of the term "supply" as defined in Act, 1990 and, therefore, no liability arises in respect of payment of sales tax against Pak Telecom and the company is not under obligation to charge and collect sales tax on the supply of SIM. The document at the heart of the petitioners' case is the Cellular Services Agreement (**the Agreement**) which is to be executed between Pak Telecom and a customer to whom the SIM is supplied and for porting into the PTML network. In particular clause 13(i) (**Clause**) has been referred to which so far as relevant reads as under:-

> *13(i) All SIM Cards supplied to Customer shall remain the property of PTML."*

7. On the basis of the clause in the Agreement, reproduced above, the learned counsel for Pak Telecom has asserted that since all SIMs supplied to the customers remain the property of Pak Telecom, no question of a supply in fact arises for which the

liability of payment of sales tax could be set up against the company. The second plank of the petitioners' arguments is that at worst the taxable supply in question is that of services and not of goods and is within the provincial domain not liable to be taxed by the Parliament. On this basis too the learned counsel has invited this Court to hold that the provisions are *ultra vires*.

8. Mr. Sarfraz Ahmad Cheema, Advocate has ably controverted the arguments raised by the learned counsel for the petitioner and which arguments shall be referred to during the course of the discussion which follows. In summation, they are as follow:-

i. *The learned counsel contends that the petition is not maintainable and the burden was an indirect tax which was passed on to the consumers.*

ii. *The Constitution by virtue of Article 77 empowers the Parliament to impose taxes and Entry 49 of the fourth schedule permits the Federation to levy tax on the sale and purchase of the goods and there was nothing in the Constitution that restricts the Parliament's powers to legislate as the tax was to be levied and the manner of its collection.*

*iii. Sub-section 3B of section 3 and Ninth Schedule of the Act, 1990 begin with a non obstante clause and, therefore, the provisions will prevail over all other provisions of the Act, 1990. He relied upon M/s Elahi Cotton Mills v. Federation of Pakistan (**1997 PTD 1555**) for the expansion of the concept of non obstante clause.*

iv. According to the learned counsel, 'goods' has been defined in section 2(12) of the Act, 1990 and includes every kind of movable property other than actionable claims, money, stocks, shares and securities..

Section 3(3B) & Ninth Schedule:

9. The imposition under challenge has to be justified as a lawful burden and one which is woven into the fabric of the Act, 1990. As Chief Justice John Roberts (US Supreme Court) said:

> *"The Act imposes current burdens and must be justified by current needs".*

10. As a prefatory, however, the concept of supply of goods, which is a core ingredient of the Act, 1990 must receive some attention, so as to square it with the burden enacted through the Ninth Schedule. Supply of goods specified in the Ninth Schedule has to be taken to mean the construction of the term in the context and setting of the law in which the term has been used. Of special importance is an aspect of the Act, 1990 that is

indisputably central—its structure. The structural considerations which permeate the entire length and breadth of the Act are a source of authoritative insight into its implications in matters such as one in hand. There is a statutory plan to give effect to the intent underlying the various provisions of the Act. It is of essence to bear in mind the intrinsic nature of the tax imposed by the Act, 1990 and which is primarily levied on the occasion of the sale of goods (and now services, too). Over time, decided cases establish a clear destination between the subject-matter of a tax and the standard by which the amount of tax is measured. The sales tax, like any other tax, has three elements: 1) the nature of the tax; 2) the measure of the tax and 3) the machinery of its collection. Of these, the nature of sales tax (or value-added tax intrinsically) is of the first importance. The nature of sales tax has been contrasted with the duties of excise in a number of precedents and it would be useful to refer to a few cases simply to emphasis the need for analyzing the nature of a tax in any challenge to an impost. In *AIR 1939 FC 1, Gwyer CJ* observed:

> *"…the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connection with,*

manufacture or production, and that it extends no further."

"This is to confuse two things, the nature of excise duties and the extent of the federal legislative power to impose them… But there can be no reason in theory why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. Subject always to the legislative competence of the taxing authority, a duty on home-produced goods will obviously be imposed at the stage which the authority finds to be the most convenient and the most lucrative, wherever it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty, that is a duty on home-produced or home-manufactured goods, no matter at what stage it is collected."

11. It was held in the *Province of Madras v. Messrs Boddu Paindanna & Sons AIR 1942 FC 33, 35* that:

"The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are, according to 1939 FCR 18, duties levied upon the manufacturer or producer in respect of the manufacture or production of the commodity taxed. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer; but it is levied upon him qua seller and not qua manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit; but so is the taxpayer in Canada who has to pay income-tax levied by the Province for Provincial purposes and also income-tax levied by the Dominion for Dominion purposes; see 1924 AC 999; 1937 AC 260. If the taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be an overlapping in one sense; but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. There is in theory nothing to prevent the Central

> *Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory. In the case of a sales tax, the liability to tax arises on the occasion of a sale, and a sale has no necessary connection with manufacture or production. The manufacturer or producer cannot of course sell his commodity unless he has first manufactured or produced it; but he is liable, if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory. In our opinion the power of the Provincial Legislature to levy a tax on the sale of goods extends to sales of every kind, whether first sales or not."*

12. In *Muhammad Younas v. Central Board of Revenue* (**PLD 1964 SC 113**), Supreme Court of Pakistan had the occasion to consider the nature of the excise duty and while doing so, distinguished it from sales tax in the following words:

> *"...It is obvious that the taxing authority will impose it at a stage at which it would be most convenient and most lucrative but that is a matter which does not, in our view, affect the essential nature of the tax. The excise duty which is an indirect tax must, in the ultimate resort, always fall on the consumer but as to the stage at which it is to be collected there can be no inflexible rule. If a legislature is competent to make laws with respect to duties of excise, the question as to*

> *whether that power extends to imposing duties on home-produced or home-manufactured goods at any stage up to consumption must always be determined upon the true construction of the enactment itself. All that can be said is that subject to the provisions of the statute, a duty of excise is a tax on goods produced or manufactured in the taxing country, and it ought normally not to be confused with a tax which is a turnover or sales tax."*

13. A subject which has received little attention in considering a taxing statute is the constitutional aspect and its source from the supreme law of the land. This was alluded to in *Pakistan v. Kohat Cement Company* (**PLD 1995 SC 659, 674**) in the following manner:

> *"...The concept of the excise duty is a Constitutional concept. While under the government of India Act, 1935, excise duty was a central subject, and sales tax was a provincial subject, under our Constitution, as also under the Indian Constitution, both are now central subjects. (see items 44 and 49 of Federal Legislative list in the Fourth Schedule to the 1973 Constitution). But that fact cannot alter the fundamental nature of the excise duty. Even under the government of India Act, the Provincial, and not the Federal, legislature had power, in certain cases, to impose a duty of excise as also the sales tax. In those excepted cases, so observed their Lordships of the Privy Council in G.G. in Council v. Province of Madras AIR 1945 PC 98, 101, "there appears to be no reason why the Provincial Legislature should not impose a duty of excise in respect of the commodity manufactured and then a tax on first or other sales of the same commodity.*
>
> *16. The decided cases referred to above have long settled that the duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. Unlike the sales tax, where the liability to tax arises on the occasion of a sale, it is the fact of manufacture or production which attracts the duty of excise, even though it may be collected at a later stage. This is recognized by section 3 of the Act of 1944 itself--that section*

> *authorizes the levy and collection "in such manner" as may be prescribed of "duties of excise on all excisable goods, produced or manufactured ... in Pakistan."*

14. Thus the liability of sales tax arises 'on the occasion of a sale'. The Act of 1990 refers to it as 'supply' or 'taxable supply' and defines those terms but whatever the words used, the sense remains the same. Legal texts cannot alter the fundamental nature of the tax. And this has to chime with the entry No.49 in the Federal Legislative List which is the provenance of the power to impose sales tax (as it is called in the Act, 1990). The statutory enterprise of the Act, 1990 must conform to the legislative field delineated by entry No.49 and cannot travel beyond that field. Entry No.49 reads as under:

> *"49. Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed [, except sales tax on services.]"*

15. A question could legitimately be asked whether the provisions of the Act, 1990 are within the periphery of powers conferred on the Federal Legislature. However, that question was neither raised nor forms the subject matter of challenge in these petitions. I shall therefore restrain myself from entering the thicket. Chief Justice John Roberts (of US Supreme Court) said:

> *"If it is not necessary to decide more, it is necessary not to decide more."*

16. But in putting a construction on sub-section 3B of section 3 and the Ninth Schedule of the Act, 1990, I shall be guided by the well-worn principle that such provisions are to be strictly construed with a leaning in favour of the taxpayer in case of ambiguity. Again quoting from the dissent in *Kohat Cement*:

> *"...The rule of law, and it is a Constitutional rule, "that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate, or toll, except under clear and distinct legal authority, established by those who seek to impose the burden, has so often been the subject of legal decisions that it may be deemed a legal axiom ... " (Wilde C.J. in Goshing v. Velry (1850) 12 QB 328, 407. The rule is "that a charge cannot be made unless the power to charge is given by express words or by necessary implication. These last words impose a rigorous test going far beyond the proposition that it would be reasonable or even conducive or incidental to charge for the provision of a service ... " Reg v. Richmond (1992) 2 AC 48, 67."*

17. The term 'sale' has not been defined in the Act, 1990 and by section 3, sales tax is charged on taxable supplies made by a registered person in the course or furtherance of a taxable activity or goods imported into Pakistan (which too are purchased from a foreign seller). These activities are, however, included in the broad concept of 'sale and purchase of goods imported, produced, manufactured or consumed", and it is presumed that they are valid

and within the constitutional limitation. The definitions of 'supply' and 'taxable supply' are the fulcrum around which, in large measure, the concept of taxation under the Act, 1990, revolves. 'Supply' has been defined as:

> *"**Supply**" means a sale or other transfer of the right to dispose of goods as owner, including such sale or transfer under a hire purchase agreement, and also includes –*
>
> *(a) putting to private, business or non-business use of goods produced or manufactured in the course of taxable activity for purposes other than those of making a taxable supply;*
>
> *(b) auction or disposal of goods to satisfy a debt owed by a person;*
>
> *(c) possession of taxable goods held immediately before a person ceases to be a registered person; and*
>
> *(d) in case of manufacture of goods belonging to another person, the transfer or delivery of such goods to the owner or to a person nominated by him:*
>
> *Provided that the Federal Government may, by notification in the official Gazette, specify such other transactions which shall or shall not constitute supply.*

18. And 'taxable supply' as follows:

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

19. It can be seen that sales tax has been imposed on 'taxable supplies' and a taxable supply, in turn, means a 'supply' of taxable goods made by an importer, manufacturer, wholesaler (including dealer) distributor or retailer. Thus the crucial

concept is that of 'supply' to which legislature continues to revert.

20. We are here not concerned with the entire definition of the term 'supply' and so I shall confine myself to the words "a sale or other transfer of the right to dispose of goods as owner'. These words assume significance in the factual matrix of the instant petitions. The term 'sale' does not present much of a problem as to the core meaning of the term. The words 'transfer of the right to dispose of goods as owner' need to be interpreted as their true explication has presented problems over the years. Interestingly, in our jurisprudence much of the emphasis has gone into seeking the true meaning of the term 'dispose of' or 'disposition' in a bid to capture the spirit of the term 'sale' and to align the two. With due deference to that approach, however, the real emphasis should be to analyse the two terms viz. 'sale' and 'transfer of the right to dispose of goods as owner'. There is no doubt in my mind that the term 'sale' and the words 'other transfer of the right to dispose of goods as owner' are similar and have to be read *ejusdem generis* with each other. Given the context, the words have to be given a meaning which appear to determine its aptest, most likely sense. As stated above, since the words 'sale'

and 'transfer' have not been defined in the Act, we will have to fall back on the meaning of these words for their semantic nuances in the judicial dictionaries:

STROUD'S Judicial Dictionary of Words and Phrases:

> ***Sale****; Sell; Sold. " 'Sale' undoubtedly, in general, implies an exchange for money; and is so defined in Benjamin on Sale".*
>
> *"A "sale" means the exchanging of property for money and applies to a sale of land and to a sale of chattels equally. An agreement to extinguish an existing debt if land is transferred is not a contract for the sale of land (Simpson v Connolly [1953] 1 W.L.R. 911."*

> ***Transfer****: The operative verb "transfer" "is one of the widest terms that can be used" (per James L.J., Gathercole v Smith, 17 Ch. D. 1; see further per Erle J., R. v General Cemetery Co, 6 E. & B. 419; see* TRANSFERABLE*). Learned counsel for the petitioner.* SUBROGATION*.*
>
> *"Transfer of assets" (finance Act 1936 (c.34) s.21) in the definition of settlement included an absolute and unconditional gift (Thomas v Marshall [1953] A.C. 543."*

Merriam – Webster's Dictionary of Law:

> ***Sale****: n 1 a : the transfer of title to property from one party to another for a price; also : the contract of such a transaction –."*
>
> ***Transfer****: n 1 : a conveyance of a right, title, or interest in real or personal property from one person or entity to another 2: a passing of something from one to another."*

Black's Law Dictionary, Ninth edition:

> ***Sale****: n (bef. 12c) 1. The transfer of property or title for a price. See UCC 2-106(1). [Cases: Sales 1; Vendor and Purchaser 1.] 2. The agreement by which such a transfer takes place. The four elements are (1) parties competent to*

contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised."

Transfer*:, n (14c) 1. Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance. The term embraces every method – direct or indirect, absolute or conditional, voluntary or involuntary – of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. 2. Negotiation of an instrument according to the forms of law. The four methods of transfer are by indorsement, by delivery, by assignment, and by operation of law. [Cases: Bills and Notes, 176-222.] 3. A conveyance of property or title from one person to another. [Cases: Bills and Notes, 176-222.]"*

21. An elaboration of the words 'sale' and 'transfer' would bring forth at once the clear demarcation of the two concepts and the restrictive nature of the word 'sale' as against a wider meaning assigned to the word 'transfer' which generally means a conveyance of a right, title, or interest in real or personal property from the person or entity to another. It includes any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance. The much broader sweep of the term 'transfer' is at once noticeable and what is required to be done as a judicial task is to discern its true meaning in the context and setting of the law in which the word is found.

22. With this background in mind, we can now analyse the definition of the term 'supply' used in the Act, 1990. 'Sale', it will be recalled, is the transfer of property or title for a price. It connotes a parting of possession to pass to the buyer and does not envisage a reversion of that title or retention of any right in the property transferred. Against price in money paid, the seller passes on the title, absolutely and unconditionally. I have no doubt in my mind that the concept of supply has to comport to the constitutional concept of levy of sales tax. The words **'transfer of the right to dispose of goods as owner'** when weighed on this scale, merely convey the concept of sale in fact, though by using different semantics. The crucial words are 'transfer of the right' and 'as owner'. Thus the act must result in the transfer of the right to dispose of goods **as owner**. In other words, what is being transferred is ownership right to deal with the goods (by the vendee) and to dispose of them at will. When a supply is made, the vendee shall become the new owner as transferee of that right as such and may dispose of those goods. I have no doubt in my mind that the transfer of right of ownership is at the heart of the expression when read in its entirety. The act to dispose of is associated with the new

owner. However, prior to that the crucial step is the transfer of all rights and the property in the goods which includes the right to dispose of those goods as the subsequent owner. In pith and substance, therefore, this too, constitutes sale.

23. An analysis of the legal landscape will be incomplete without referring to *Halsbury's Laws of England (volume 91), Fifth Edition*, and the construction which has been put on these terms. The meaning of sale has been described as:-

> *"Sale is the transfer by mutual asset of the ownership of a thing from one person to another for a money price. Where the consideration for the transfer consists of other goods or some other valuable consideration (not being money), the transaction is called exchange or barter, although in certain circumstances it may be treated as one of sale.*
>
> *It is clear that statutes relating to the sale of goods do not, as such, apply to transactions by way of barter, where the consideration for the thing does not consist in money, or by way of hire, where ownership in the thing is not transferred. The terms implied in contracts for the sale of goods by the Sale of Goods Act 1979 are, however, similarly implied in contracts for the supply of goods by the Supply of Goods and Services Act 1982, which applies to contracts for the transfer of goods, other than (inter alia) contracts for the sale of goods, and to contracts for the hire of goods, other than a hire-purchase agreement. Contracts of exchange or barter and contracts for the hire of goods would consequently be covered by the terms implied by the Supply of Goods and Services Act 1982 and this would be the case whether or not either type of contract also provides for the carrying out of a service and, in either type of contract, whatever the nature of the consideration."*

24. So the essence of sale consists in transfer of ownership for a money price. Where the consideration does not consist in money, it may be barter or exchange but not sale.

25. As to the meaning of 'contract for the transfer of goods', it says that:-

> *"A 'contract for the transfer of goods' means a contract under which one person transfers or agrees to transfer to another the property in goods."*

26. Thus transfer of goods envisages a transfer of property in goods and to reiterate, property here means general property and not merely a special property. Terms about title etc. transfer by description, quality or fitness are implied in contracts for the transfer of goods and an elaboration of the concept has been alluded to in the following words:-

> *"71.* ***Title, quiet possession and freedom from charges in contracts for the transfer of goods****. In a contract for the transfer of goods, other than one in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the transferor should transfer only such title as he or a third person may have, there is:*
>
> *1) an implied condition on the part of the transferor that, in the case of a transfer of the property in the goods, he has a right to transfer the property and, in the case of an agreement to transfer the property in the goods, he will have such a right at the time when the property is to be transferred;*
>
> *2) an implied warranty that the goods are free, and will remain free until the time when the property is to be transferred, from any charge*

or encumbrance not disclosed or known to the transferee before the contract is made, and

3) an implied warranty that the transferee will enjoy quiet possession of the good, except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known."

27. Thus the foundational element in any transfer, in the given paradigm, seems to be a sale of property in the goods so as to pass the title in the goods. Whether it is an executory contract of sale (Agreement to sell) or an executed contract of sale plus a conveyance is to be determined by the intention of the parties.

28. The above discussion forms the backcloth of the analysis of sub-section 3B and the Ninth Schedule that follows. The term supply as defined in the Act, 1990, has to comport with the broad contours of the field of taxation delineated in entry 49 of the Federal Legislative List. The simple terms in which the entry is couched is at once striking. Not much leevay is handed to the legislature to play with taxation in this area. The core ingredient of this entry is the concept of sale and that is the foundational element. Thus if a sale or purchase takes place, tax may be imposed on the transaction. Every sale envisages a purchase necessarily and *vice versa*. The case of Pak Telecom is refreshingly simple. It is that the supply of certain goods is the

subject matter of sub-section 3B of section 3 and this is notwithstanding anything contained in sub-section (1) and (3). Those goods are mentioned in the Ninth schedule and the sales tax is to be charged, collected and paid at the rate, in the manner, at the time and subject to the procedure and conditions as specified therein as also that the liability to charge, collect and pay the tax shall be on the persons specified therein. Although one of the goods mentioned in the Ninth schedule i.e. Subscriber Identification Module (SIM) cards, concerns Pak Telecom, the said goods are not **'sold'** by Pak Telecom and thus no **'supply of goods'** takes place. Consequently, since sales tax of Rs.250 is to be paid on the supply of SIM cards, and no supply in fact is effected, no liability in respect of payment of sales tax arises regarding SIM cards.

29. The basis for the above assertion is the Cellular Services Agreement executed between the customer and Pak Telecom. Some of the clauses which will exercise a gravitational pull on the controversy in hand are reproduced below.

Agreement and Provisions:

> *"**Connection**" means activation of Customer Equipment on the System;*
>
> *"**Customer**" means the customer named overleaf porting into the PTML Network;*

> *"**Customer Equipment**" means the telephone equipment, SIM Card and/or accessories supplied to the Customer by PTML or its authorized dealer(s), and other telephone equipment, SIM Card, and/or accessories specifically approved by PTML as Customer Equipment;*
>
> *"**SIM Card**" means a Subscriber Identity Module Card that contains Customer information."*
>
> *"13. Miscellaneous:*
>
> *a) It is the Customer's duty to acquaint himself and to comply with all applicable requirements and restrictions imposed by the Government of Pakistan and other applicable authorities including PTA relating to use of the Service. In particular, the Customer may not use or allow the use of Customer Equipment while on board, or in the proximity of any aircraft whether stationary or not. The Customer hereby indemnifies PTML against all liability it may incur in consequence of the Customer failing to comply herewith."*
>
> *b)*
> *c)*
> *d)*
> *e)*
>
> *f) This contract including the particulars overleaf constitutes the entire agreement between PTML and the Customer. All orders accepted by PTML and all Service provided by PTML are subject to these conditions only."*
>
> *g)*
> *h)*
>
> *i) All SIM Cards supplied to Customer shall remain the property of PTML."*

30. Thus connection means the activation of customer equipment on the system whereas SIM card means a Subscriber Identification Module card that contains customer's information. The pivotal clause in this agreement is 13(h)(i) which, without equivocation, says that all SIM cards supplied to the customers shall remain the property of Pak Telecom. There could not be any clearer expression of the

property of the SIM card vesting in Pak Telecom. This agreement and its stipulations are not denied by the respondents as also that it seems that the agreement is a standard document which has been approved by Pakistan Telecommunication Authority (**PTA**) and, therefore, will be deemed to have been issued as a condition of the regulation prescribed by PTA. For all intents and purposes therefore the SIM card does not become the property of the customer and therefore no sale takes place between Pak Telecom and the customer. Consequently, there is no escape from the conclusion that in fact there is no supply of goods in the case of a SIM card and it is otiose to presume that since a sale took place sales tax can be imposed on the supply of SIM card. This is not countenanced by the provisions of the Act, 1990 nor is it covered by the definition of supply given in the Act, 1990. No amount of fiction can be employed to include such a transaction to be one of sale so as to be caught by the mischief of the term 'supply' as given in the Act, 1990.

31. The learned counsel for Pak Telecom relied upon some observations made in the Indian Supreme Court judgment reported as *Idea Mobile Communication Limited v. Commissioner of Central Excise and Customs, Cochin* [**(2011) 12 Supreme**

Court Cases 608]. The issue was encapsulated in paragraph 2 in the following words:-

> *"2. The issue which arises for our consideration in this appeal is: whether the value of the SIM cards sold by the appellant herein to their mobile subscribers is to be included in taxable service under Section 65(105)(zzzx) of the Finance Act, 1994, which provides for levy of service tax on telecommunication service OR whether it is taxable as sale of goods under the Sales Tax Act?"*

32. In conclusion, the position was summed up as follows:-

> "*"...The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards the SIM cards will form part of the taxable value for levy of service tax, for the SIM cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM card which on is own but without the service would hardly have any value at all.*
>
> *21. Thus, it is established from the records and facts of this case that the value of the SIM cards forms part of the activation charges as no activation is possible without a valid functioning of a SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from he subscribers. The Sales Tax Authorities understood the aforesaid position that no element of sale is involved in the present transaction."*

33. Although the matter in dispute in *Idea Mobile* was not squarely the one involved in the present petition, the observations reproduced above will lend some support to the conclusion drawn in this judgment. However, in coming to the conclusion as aforesaid the Indian Supreme Court relied upon a

holding of the Supreme Court of India in an earlier precedent reported as *Bharat Sanchar Nigam Ltd. and another v. Union of India and others* [**(2006) 3 Supreme Court Cases 1**] and which is more pertinent for our purposes. In BSNL in dilating upon a similar proposition of law it was held that:-

> *"87. It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact, as has been correctly submitted by the States. In determining the issue, however the assessing authorities will have to keep in mind the following principles: if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However we emphasise that if the sale of a SIM card is merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the "aspects" doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in Federation of Hotel & Restaurant Assn. of India v. Union of India (SCC pp. 652-53, paras 30-31)*
>
> *" '... subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power'.*
>
> *There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects."*

> *88. No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the union List and tax services by including the cost of such service in the value of the goods…"*

34. The above precedent is an authority for the proposition that in determining the issue of what a SIM card actually represents, it would depend entirely upon the intention of the parties. Also in determining the issue, the assessing authority will have to keep in mind the principles that if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. Contrarily, if the SIM card was a separate object of sale it would be open to the Sales Tax Authorities to levy sales tax thereon. In conclusion, while admitting the legislative competence of the State to levy sales tax, it was made subject to the necessary concomitant of sale to be present in the transaction and the act of sale is distinctly discernible in the transaction.

35. In the same vein is a judgment of Chancery Division (United Kingdom) reported as <u>*Beecham Foods, Ltd. v. North Supplies (Edmonton), Ltd.*</u> **[1959] 2 All E.R. 336**, where the question arose

under Section 25(1) of the Restrictive Trade Practices Act, 1956 which enacted:

> *"Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold . . . that condition may . . . be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto."*

36. On the question whether the bottles in which goods were sold were themselves sold or not, it was held that :-

> *"The short answer to this action is that the bottles in which "Lucozade" is sold are never themselves sold at all. Section 25 (1) of the Act has nothing to do with hiring agreements. It applies only to sales, and these bottles in respect of which the 3d. is claimed, are, so far as I can see, never sold at all to a purchasing customer. It is interesting to observe that in the distributors' Retail Price List dated may, 1958, there is a statement on the back page that " Lucozade " (twenty-six ounce) bottles are " charged at 3s. per dozen, refundable", followed by a statement that*
>
> *"Actual ownership of these . . . bottles does not pass to our customers although a charge for them is made.*
>
> *It is further stated that any charge in this respect is "in the nature of a deposit and will be refunded when the . . . bottles are returned". I think that the distributors' view is perfectly right, and that the goods which are sold in the present case are the contents of the bottles and not the bottles themselves. Indeed, it is this fact, and this fact only, which justifies the prominence given to the figures 2s. 6d. on the labels.*
>
> *It is, of course, impossible to regard a bottle as convertible currency, which it plainly is not, for it cannot be used to pay an omnibus fare or buy a postage stamp. The contract with the customer with regard to the bottles is entirely different from that which affects their contents; they are merely hired while the contents are sold out and out. This sort of dealing may raise some difficult questions, whether, for example, the customer*

> *could be compelled to return the bottles to the retailer or the distributor or the plaintiffs or anybody else, or whether he could be sued for conversion of the bottles in any, and what, circumstances. All such questions are beside the point of the present case if the truth be, as I think it is, that the bottles are never sold to a customer and so do not come within s. 25(1) at all. The plaintiffs' claim is, in my judgment, misconceived, and I think that the action fails and must be dismissed with costs."*

37. The learned judge of the Chancery Division upon a consideration of the entire transaction, came to the conclusion that the bottles in which the Lucozade was sold were never themselves sold at all and, therefore, the price of the bottles could not be included in the goods which were sold. Also that section 25 had nothing to do with hiring agreements and applied only to goods. Although the judgment did not involve the levy and payment of sales tax but the concept of whether the price of the bottles could be included in the value of supply, is aptly applicable to the facts of the present case and the same set of reasoning will apply to these cases. The transactions in the present case are also similar in nature and the underlying concept shall apply, *a fortiori*.

38. In view of the above, these petitions are ***allowed***. However, as stated above, the relief claimed by the petitioners is polycentric and invites this Court to strike down sub-section 3B of section 3 of the Act, 1990 as well as the Ninth Schedule. It

will not be necessary to hold the sub-section 3B of section 3 as unconstitutional and it would suffice if it is held that serial No.1 (relating to SIM cards) of Ninth Schedule is *ultra vires* the Act, 1990 and consequently the petitioners are not liable to charge, collect and pay sales tax on the supply of SIM cards to its customers.

(SHAHID KARIM)
JUDGE

Announced in open Court on 05.10.2017.

Approved for reporting.

JUDGE

*

Rafaqat Ali