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Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

W. P.No.18373 of 2012

LESCO Vs Province of Punjab, etc

J U D G M E N T

Date of Hearing	29.03.2013.
Petitioner By:	Mr. Munawar us Salam, Advocate.
Respondents By:	Mr. Muhammad Bilal Khan, Advocate for Respondent No.6. Mr. Iftikhar Ahmad Mian, Advocate for City District Government with Firdous Akhtar (DDEEE) Syed Nayyar Abbas Rizvi, Addl. A.G.

Ayesha A. Malik J: Through this single judgment, I intend to dispose of W.P.Nos.18373 and 13836 of 2012 filed by LESCO against Province of Punjab and Others as common questions of law and fact arise in both the petitions. The Petitioner in W.P.No.18373/2012 challenges the demand notice for levy of property tax against all the properties of the Petitioner including its grid stations. The Petitioner in W.P.No.13836/2012 impugns the levy of property tax with respect to three grid stations located at Boghiwal grid station, Riwarz Garden and ICI (Public) grid station. Consequent to the issuance of the notices the Respondents sealed the grid stations for non-payment of the tax. In both cases, the Petitioner is LESCO.

2. The Petitioner has impugned the levy of property tax by the Respondents No.1 to 3 under the Urban Immovable Property Tax Act, 1958 (Property Tax Act). The case of the Petitioner is that the Petitioner is not liable to pay property tax under the Property Tax Act on account of the following reasons: i) Article 165 of the Constitution of Islamic Republic of Pakistan, 1973 provides that the Federal Government shall not, in respect of its property or income, be liable to taxation under any Act of the Provincial Assembly. Since the Petitioner is owned and controlled by the Federal Government hence it is not liable to pay property tax; ii) Section 4 of the Urban Immovable Property Tax Act, 1958 exempts the Federal Government

from payment of tax in relation to its property. Again since the Petitioner is owned and controlled by the Federal Government hence it is not liable to pay the property tax; iii) A clarification was issued by the Respondent No.4 on 27 April 2012 wherein it is clarified that the Federal Government owns 100% shares of the Petitioner, hence ownership of the assets of this public sector company vests in the Federal Government. On the basis of this clarification, the Petitioner's case is that Respondent No.4 having clarified the issue with respect to the ownership of the Petitioner, the Respondents cannot levy tax with respect to the property of the Federal Government. Reliance was placed on the cases titled "Province of NWFP through Secretary, Local Government and Rural Development Peshawar Vs. Pakistan Telecommunication Corporation through Chairman and others" (PLD 2005 S.C 670) and "WAPDA Vs Government of Sindh and others" (PLD 1998 Karachi 209).

3. Learned counsel for the Respondents No.1 to 4 and learned Law Officer argued that the Petitioner is a limited liability company, which is independent from the Federal Government. Hence, it is liable to pay property tax. They relied upon Article 165 and 165-A of the Constitution of Islamic Republic of Pakistan, 1973 (the Constitution) to argue that the Petitioner is not the Federal Government, it is a separate juristic person hence it is liable to pay tax. Learned Law Officer also raised the objection that the Petitioner has not availed the remedy provided to it under the statute. Hence, these petitions are not maintainable. Learned counsels for the Respondents placed reliance on PLD 2005 SC 670 (*supra*) to argue the point that a limited liability company is an independent juristic person which is different from the Federal Government. Therefore, the property and income of a limited liability company cannot be construed to be the property and income of the Federal Government. Hence they argued that the Petitioner is liable to pay the property tax to the Respondents.

4. Heard learned counsels for the parties and reviewed the record available on the file.

5. At the very onset I find that the objection with respect to alternate remedy is not relevant here as the Respondents had sealed some of the grid stations of the Petitioner rendering it impossible for the Petitioner to provide

electricity to the public. In such a situation the alternate remedy suggested by the learned Law Officer is not efficacious for the purposes of these petitions. The issue before this Court is whether the Respondents can impose property tax on the property of the Petitioner. Section 3 of the Property Tax Act provides that the Government may levy tax in an urban area and that the tax shall be due from the owners of the building and the land. The entire case of the Petitioner is that since the owner of the land and building is the Federal Government, it is exempt from paying the property tax. Section 4 (a) of the Urban Immovable Property Tax Act, 1958 provides that:-

“4. Exemptions. The tax shall not be leviable in respect of the following properties, namely:

(a) buildings and lands other than those leased in perpetuity vesting in the Federal Government.”

Article 165 of the Constitution of Islamic Republic of Pakistan, 1973 provides that:

“165. Exemption of certain public property from taxation. (1) The Federal Government shall not, in respect of its property or income, be liable to taxation under any Act of Provincial Assembly and, subject to clause (2), a Provincial Government shall not, in respect of its property or income, be liable to taxation under Act of (Majlis-e-Shoora (Parliament) or under the Act of the Provincial Assembly of any other Province.

(2) If a trade or business of any kind is carried on by or on behalf of the Government of a Province outside that Province, that Government may, in respect of any property used in connection with that trade or business or any income arising from that trade or business, be taxed under Act of (Majlis-e-Shoora (Parliament) or under Act of the Provincial Assembly of the Province in which that trade or business is carried on.

(3) Nothing in this Article shall prevent the imposition of fees for services rendered.”

Article 165-A of the Constitution provides that:

“Power of (Majlis-e-Shoora (Parliament) to impose tax on the income of certain corporation, etc—(1) For the removal of doubt, it is hereby declared that (Majlis-e-Shoora (Parliament) has, and shall be deemed always to have had, the power to make a law to provide for the levy and recovery of a tax on the income of a corporation, company or other body or institution established by or under a Federal law or a Provincial law or an existing law or a corporation, company or other body or institution owned or controlled, either directly or indirectly, by the Federal Government or a Provincial Government, regardless of the ultimate destination of such income.”

The basis of the arguments of the learned counsel for the Petitioner is that Petitioner is owned and controlled by the Federal Government, hence the property owned by the Petitioner vests in the Federal Government. The Respondents have taken the stance that since the Petitioner is a limited liability company, it is an independent legal entity, which is not the Federal Government, hence it is liable to pay property tax. The Petitioner is incorporated under the Companies Ordinance, 1984. It is a limited liability company, which is owned hundred percent by the Federal Government. Form-A dated 29.10.2010 evidences this fact and the Respondents have admitted to this fact. The shares of the Petitioner are issued in the name of President of Islamic Republic of Pakistan. The question that arises is whether the Petitioner being owned and controlled one hundred percent by the Federal Government can take the benefit of Article 165 of the Constitution and Section 4 of the Property Tax Act. In order to determine whether they can take this benefit, it is important to review the leading judgments of the Hon'ble Supreme Court of Pakistan on this issue. Both the learned counsel have placed reliance on PLD 2005 SC 670 (*supra*). In this case, the issue was with respect to levy of octroi tax by the Provincial Government on the Pakistan Telecommunication Corporation. The argument raised was that the corporation was performing the function of the State, its assets were acquired by the Federal Government, its employees were public servants and it was totally in the control and in the administration of the Federal Government. Hence Pakistan Telecommunication Corporation was entitled to the exemption under Article 165 of the Constitution and not liable to pay the octroi tax. The Hon'ble Supreme Court of Pakistan after considering the arguments held that *since the company was a juristic person, it was no longer immune and exempt from paying the property tax*. The basis of the decision of the Hon'ble Apex Court was that the Federal Government was not the sole owner of the Pakistan Telecommunication Corporation, therefore, the assets and liabilities of the company were held to be owned by the company and not by the Federal Government. The principal laid down in this case is that a company being a juristic person was a separate legal entity from the Federal Government.

6. Another case to consider is titled “Water and Power Development Authority through General Manager and Project Director and another Vs Administrator, District Council, Swabi and 5 others” (2005 SCMR 487). In this case, Wapda was executing a project for electricity generation by the name of Ghazi Barotha Hydropower Project on behalf of the Federal Government. The contractor made payments under intimation of Wapda and Wapda then reimbursed the payments under a written contract. The Hon’ble Supreme Court of Pakistan held that since Wapda had undertaken qua the reimbursement of Ghazi Barotha Contractors with respect to export tax and educational tax, it was a contractual liability which could not be avoided on the pretext of the exemption under Article 165 of the Constitution. It was also found that the tax was imposed on the contractor and not on Wapda hence the contractual obligation did not get the benefit of Article 165 of the Constitution.

In the case entitled “Pakistan Television Corporation Limited Vs Capital Development Authority and Others”(2011 SCMR 1117) the basic facts were that by virtue of SRO 24(I)/2001 dated 11.01.2001 buildings and lands owned by the Federal Government or a Provincial Government but excluding public and private corporation, were exempt from payment of property tax. After reviewing the provisions of the SRO the Hon’ble Supreme Court of Pakistan found that the use of the word excluding public and private corporation meant that building and lands vesting in the Federal Government through public and private corporation were not exempt. The benefit of the SRO would thus be given to building and lands directly owned by the Federal or Provincial Government. Therefore, by an express provision in the SRO a tax was imposed on public and private companies owned by the government.

In the case titled “Zila Council Jhang District Jhang Vs Daweoo Corporation Kot Ranjeet, Sheikhupura.(2001 SCMR 1012) the Hon’ble Apex Court after lifting the veil of incorporation found that Daewoo Corporation was not a corporation owned and controlled by the Federal Government. The reasons amongst several, were that the Government had not contributed any capital to the corporation, the directors were not appointed by the Government, the Government had no power to remove the

directors, the Government was not a shareholder, the Government has no power to audit its accounts. Therefore, the Court reviewed the effective control of the Federal Government over the company. Having found that the Federal Government did not have effective control, it was liable to pay the tax.

7. The cases reviewed have considered the nature of the ownership and control of the Federal Government as well as the basis or reasons for which Article 165 of the Constitution is being invoked. Based on the principles laid down by the Hon'ble Supreme Court of Pakistan in the aforementioned cases it is important, as a first step, to lift the veil of incorporation to determine to what extent the Petitioner is owned and controlled by the Federal Government and the degree of control exercised by the Federal Government. The Petitioner is a public limited company incorporated under the Companies Ordinance, 1984. The Petitioner was incorporated by the Federal Government to discharge the function of distribution of electricity within its licensed territory. Admittedly, the Federal Government owns one hundred percent of the Petitioner with only one shareholder, being the President of Islamic Republic of Pakistan. This means that the Petitioner is totally owned by the Federal Government. A company is controlled by its board of directors who are elected by the shareholders. In this case, the shareholder is the Federal Government, hence the board of directors are representatives of the Federal Government. The Federal Government nominates the board of directors of the Petitioner and they hold office at the pleasure of the Federal Government under the Companies Ordinance, 1984. The Petitioner provides a public utility being the distribution of electricity. Article 154 of the Constitution provides that a Council of Common Interest can regulate policy in relation to matters of Part-II of the Federal Legislative List and shall exercise supervision and control over related industries. Electricity is at Serial No.4 Part-II of the Federal Legislative List. Therefore, the Petitioner provides a public utility, which is under the control and supervision of the Federal Government. The Federal Government makes its policy on electricity and implements it through the Petitioner. Consequently not only does the Federal Government own and control the Petitioner but it also controls the public utility provided by the Petitioner. This also means

that the facts of the instant petition are distinguishable from the PLD 2005 SC 670 (*supra*) as admittedly Pakistan Telecommunication Corporation was not owned one hundred percent by the Federal Government. There were other private shareholders in the company, on account of which the Hon'ble Apex Court found that it cannot be said that the Federal Government owned this company or the assets of this company. Furthermore, if the reasons reviewed by the Hon'ble Supreme Court of Pakistan in 2001 SCMR 1012 (*supra*) for determining whether a company is effectively controlled by the Federal Government are applied on the Petitioner then it can be said that the Petitioner is a juristic person which is owned and *effectively controlled* by the Federal Government. In the case of the Petitioner, the shares are owned one hundred percent by the President of Pakistan. The directors of the Petitioner are appointed by the Federal Government. They can be removed at the pleasure of the Federal Government under Section 183 of the Companies Ordinance, 1984. Furthermore the Federal Government controls the public utility provided by the Petitioner. So notwithstanding the fact that the Petitioner is an independent juristic person, it is essentially the Federal Government doing its business through a corporate structure. In such cases the distinction between the Federal Government and the Petitioner become obscure.

8. Where the Federal Government enjoys effective control and carries out a constitutional function through a juristic person the question which arises is whether the company being an independent juristic person is an instrumentality of the Federal Government which is immune from the provincial property tax.

9. The Doctrine of *Immunity of Instrumentalities* is applied in taxation cases. The Doctrine provides that the instrumentalities of the central government have immunity from paying tax imposed by the provincial government unless expressly stated otherwise. The meaning of *federal instrumentalities* was given in a case entitled "*McCulloch Vs Maryland, 17 U.S. 316 4 Wheat. (1819)*" a judgment of the US Supreme Court where it was found that federal *instrumentalities* were immune from state taxation. The reasons given was that the state government cannot tax any of the means employed by the federal government to execute its constitutional powers.

The argument used in this case was that the power of state legislature to tax the instruments used in carrying out the functions of the federal government would mean that the state could impede or control any of the constitutional functions of the federal government. Hence the Doctrine of *Immunity of Instrumentalities* was made applicable to a company owned and controlled by the federal government for preserving the federal government's ability to carry out its powers and duties under the Constitution. To apply this Doctrine the Courts have examined the relationship between the government and the statutory corporation to determine whether the corporation was a government *instrumentality*. The following test was applied:

- (1) Whether the body has any discretion of its own; if it has, what is the degree of control by the Executive over the exercise of that discretion;
- (2) Whether the property vested in the corporation is held by it for and on behalf of the Government;
- (3) Whether the corporation has any financial autonomy;
- (4) Whether the functions of the corporation are Governmental functions.”

With the help of this test the distinction between the federal government and the juristic person becomes clear. Therefore I shall apply the test to determine whether there is a real distinction between the Federal Government and the Petitioner or is it simply a case where the Federal Government has used a corporate structure to execute its function and duty. At this point I also find that the arguments with reference to Article 165 A of the Constitution were not relevant as it deals with income tax and the instant case is with reference to property tax.

10. The status of the Petitioner as an *instrumentality* of the Federal Government is evident from the fact that the Petitioner is owned and effectively controlled by the Federal Government. Once it is determined that the Federal Government has effective control the third requirement of financial autonomy is also satisfied. The Petitioner was incorporated to carry out a function of the Federal Government. In order to give the benefit of Section 4 of the Property Tax Act read with Article 165 of the Constitution to the Petitioner, this Court has lifted the veil of incorporation to determine firstly, whether the Federal Government *owns and controls* the Petitioner. In

this regard, I find that the Petitioner is totally owned and controlled by the Federal Government as the President of Pakistan is the only shareholder of the Petitioner. The second test was to determine the *degree of control* exercised by the Federal Government over the Petitioner. In this regard, I find that the Federal Government exercises total control over the corporate structure of the Petitioner, as it is the only shareholder and the board of directors are nominated and removed at the pleasure of the Federal Government. Furthermore the Petitioner was incorporated to undertake a function of the Federal Government that is to provide electricity. All policies related to electricity, its distribution and transmission is under the control of the Federal Government. The third test was to determine, whether the *function of the Petitioner* is that of the Federal Government. Here I find that the Petitioner provides a public utility which is totally controlled by the Federal Government. The Federal Government uses the corporate structure to carry out a function specifically provided for it in the Federal Legislative List of the Constitution. The company is left with no authority of its own. Furthermore the providing of electricity is an essential public utility which is a basic necessity. In such a situation the Petitioner can be described as an *instrumentality* of the Federal Government. This means that the Federal Government is executing its function through the Petitioner. Hence the use of the word Federal Government in Article 165 of the Constitution would include an *instrumentality* of the Federal Government. In this case, the Petitioner is an instrumentality of the Federal Government hence it is entitled to the exemption Section 4 of the Property Tax Act.

Petitions Allowed.

(AYESHA A.MALIK)
JUDGE

Approved for reporting

JUDGE