IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1479 of 2008

Plaintiffs	:	Adamjee Insurance Company Ltd. & others through Mr. Hyder Ali Khan, Advocate.
Defendant No.1	:	The Assistant Collector (P&A), Large Taxpayer Unit, Government of Pakistan, through Mr. Ameer Bakhsh Metlo, Advocate.
Defendants 2&3	:	Nemo.

Suit No. 1494 of 2008

Plaintiff	:	Century Insurance Company Ltd. through Mr. Hyder Ali Khan, Advocate.
Defendants	:	Nemo.
Dates of hearing	:	16-10-2020 and 23-10-2020
Date of decision	:	30-11-2020

JUDGMENT

Adnan Iqbal Chaudhry J. - Plaintiffs in both suits are insurance companies. Facts in both suits are common with the following identical prayer:

> *"(a) declare that the rate of FED on all contracts of insurance concluded or policies issued by the Plaintiffs before 01.07.2006 is 3% of the premium;*
>
> *(b) declare that the demand of the Defendant No.1 for FED at the rate of 5% of the premium on contracts concluded or policies issued before 01.07.2006 is without lawful authority and of no legal effect;*
>
> *(c) declare that the notices issued to the Plaintiffs on 24.10.2008 have been issued without lawful authority and are of no legal effect;*
>
> *(d) declare that Rule 40 of the Federal Excise Rules, 2005, insofar as these seek to affect the rate of FED is ultra vires the Federal Excise Act, 2005 and are unconstitutional;*
>
> *(e) grant a permanent injunction restraining the Defendants jointly and severally from making any demand for payment of any duty at rates in excess of 3% of the amount of premium in respect of the contracts of*

insurance concluded or policies or cover notes issued before 01.07.2006 and from taking any coercive measures or action in pursuance of the notice(s) issued or otherwise for collection of such amounts;

(f) grant costs ……;

(g) grant any other relief ……..”

2. Section 3 of the Federal Excise Act, 2005 [FE Act] levies duties of excise [FED] on services. Prior to the Finance Act, 2006, section 3 of the FE Act read as under:

> “**3. Duties specified in the First Schedule to be levied.—** (1) Subject to the provisions of this Act and rules made thereunder, there shall be levied and collected in such manner as may be prescribed duties of excise on, --
> (a) ……..
> (b) …….
> (c) …….
> (d) services provided or rendered in Pakistan[1];
> at the rate of fifty per cent[2] ad valorem except the goods and services specified in the First Schedule, which shall be charged to Federal excise duty as, and at the rates, set-forth therein.
> (2) …..
> (3) …..
> (4) ….

3. At the relevant time, insurance services subjected to FED were mentioned at Entry No. 7 of Table II of the First Schedule of the FE Act as follows:

> “7. Services provided or rendered in respect of goods insurance …. Three per cent of the premium paid”.

‘Goods insurance’ was/is defined by section 2(14) of the FE Act to include fire, marine, theft, accident and other such miscellaneous insurance.

By the Finance Act, 2006, the above Entry No. 7 of Table II of the First Schedule[3] was substituted as under:

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[1] Subsequently amended by the Finance Act, 2008 to read: “services provided in Pakistan including the services originated outside but rendered in Pakistan.”
[2] Amended to fifteen per cent by the Finance Act, 2006.
[3] Entry No. 7 was eventually omitted by the Finance Act, 2013 when services of insurance were included in Entry No. 8 of Table II of the First Schedule.

"7. Services provided or rendered in respect of insurance to a policy holder by an insurer, including a reinsurer
(i) Goods insurance … Five per cent of the gross premium paid
(ii) Fire insurance .... Five per cent of the gross premium paid
(iii) Theft insurance …. Five per cent of the gross premium paid.
(iv) Marine insurance .... Five per cent of the gross premium paid
(v) Other insurance … Five per cent of the gross premium paid"

The amendment relevant to these suits is the increase in the rate of FED on insurance services from 3% to 5% by the Finance Act, 2006 effective 01-07-2006.

4. By a common notice dated 20-06-2008 addressed to a number of insurance companies, the Excise Officer (Defendant No.1) called upon the Plaintiffs as follows:

"Subject: <u>FED On Services Provided By Insurance Companies</u>

The rate of FED on insurance services was enhanced from 3% to 5% of the gross premium with effect from July 2006 by amendments through Finance Act, 2006 in S.No.7 of Table-II of First Schedule to the Federal Excise Act, 2005.

2. As per rule 40 (3) of Federal Excise Rules, 2005 the duty in respect of an insurance policy shall be accounted for in the same month when premium is received and shall be deposited by the insurance company by 15th day following the month in which the premium is received.

3. It has been learnt that insurance companies are wrongly depositing FED @ 3% of the premium received on or after 1st July 2006 against the insurance policy made/sold prior to 1st July 2006, whereas under Rule 40(3) of Federal Excise Rules, 2005, FED was/is required to be charged and deposited @ 5% of the premium so received with effect from 1st July 2006.

4. You are requested to furnish month-wise details of premium received during the period July 2006 to-date by 23-06-2008 in respect of the insurance policies made/sold prior to July 2006 on which FED was paid @ 3% so that differential amount of duty i.e. 2% of the premium may be determined to deposit/recover the same under section 14 of the Federal Excise Act, 2005 along with default surcharge and penalties.

5. It is pertinent to mention that Federal Government has declared amnesty vide SRO 511(I)/2006 dated 05-06-2008 (copy enclosed) under which if outstanding FED is paid by 30th June 2008 no default surcharge and penalties will be recovered against a person who has failed to pay any amount of Federal Excise Duty due to any reason. Accordingly it is advised in your own interest that the differential short paid amount of duty (principal amount) be deposited before 30-06-2008 availing the said

amnesty, failing which legal proceedings may be initiated under the prevalent law.

6. ……..”

The Plaintiffs replied to the above notice contending as follows:

“3.1 The “services of insurance” are considered to be provided / rendered on the date when the insurance policy is issued and income of insurance is recorded and not on the basis of “premium received”. Hence the relevant rate applicable freezes at the event of recording of the income. Thus for all the policies recorded up to June 30, 2006, the rate applicable is of 3 per cent. Hence the question of payment of any differential does not arise ab-initio.

3.2 …….

4. The company has, however, been discharging the FED due (determined at time of issuing the policy) on the basis of “premium booked” viz a viz “premium received” since the very inception of this levy. This matter was earlier also taken up with the Central Excise & Sales Tax Department and the practical difficulties, inter alia discussed in the following paragraphs, were deliberated and discussed in detail.

5. In the initial years, payment of FED on receipt basis had caused dispute between Tax authorities and the insurance companies on the accuracy of the FED amount. The Tax authorities had always found difficult to verify the FED amount on premium collection basis. Therefore, an understanding was reached between Tax authorities and Insurance companies through various discussions between Insurance Association of Pakistan and Tax authorities to pay the FED on “premium written basis” to avoid any dispute and simplify the verification of the amount which has helped to minimize the disputes and verification problems.

6. You would also appreciate that payment of FED on “premium written basis” is generating more revenue collection for Federal Board of Revenue as FED is being paid on insurance policies issued by the insurance companies irrespective of the premium collected by them. This fact is apparent from the latest available financial statements of the company wherefrom a significant amount of premium is appearing as outstanding and hence it is a fact that insurance companies have already deposited the related FED which has increased the Government revenue.

7. ……..”

5. The Defendant No.1 persisted with the notice dated 20-6-2008 and issued further notices calling upon the Plaintiffs to provide the information sought under section 45 of the FE Act or risk prosecution under sub-section 2(c) of section 19 of the FE Act; hence these suits.

The notice dated 20-06-2008 together with the follow-up notices is hereinafter referred to as 'the impugned notice'.

6. It was pleaded by the Plaintiffs that by virtue of section 10 of the FE Act, the rate of FED applicable was the rate in force on the date 'services are provided or rendered'; that service is provided by the Plaintiffs when they issue the insurance policy or cover-note to the customer; that while insurance contracts are ordinarily issued on receiving the entire premium, some are issued before receipt of premium, while some contracts provide for payment of premium in installments; but that in any event, the entire FED is deposited by the Plaintiffs irrespective of the receipt of premium from customers; that Rule 40 of the FE Rules relates only to the collection of FED and has no bearing on the rate of FED; that alternatively, Rule 40 is *ultra vires* the FE Act; therefore, in respect of insurance contracts issued by the Plaintiffs prior to 01-07-2006, they are liable to pay FED @ 3% regardless of the fact that premium was received by them after 01-07-2006 when the rate of FED stood enhanced to 5%; that the impugned notice amounted to give retrospective effect to the enhanced rate of FED; that since the impugned notice is without jurisdiction and *malafide*, the suits were maintainable.

7. By interim orders passed in these suits, further action on the basis of the impugned notice was stayed. Written statement was filed by the Defendant No.1. The Defendants 2 and 3 (FBR and Federation) were eventually debarred from written statement by the Additional Registrar.

8. It was pleaded by the Defendant No.1 that the suits were barred by the ouster clause in section 41 of the FE Act; that under sub-rule (3) of Rule 40 of the FE Rules, the Plaintiffs were liable to pay FED at the enhanced/amended rate of 5% prevailing on the date premium was received by them from customers notwithstanding that insurance contracts for the same had been issued prior to the amendment; that insurance contracts between the Plaintiffs and their

customers were not concluded contracts until premium was received by the Plaintiffs, and consequently the 'date of services provided or rendered' under section 10 of the FE Act means the date on which premium was received; thus the Plaintiffs had short-assessed and short-paid FED.

9. The suits are in respect of those insurance contracts (non-life) that were executed/issued by the Plaintiffs prior to the increase in the rate of FED from 3% to 5%, which increase came into effect on 01-07-2006 by the Finance Act, 2006, and for which contracts the Plaintiffs had not received premium or had received only part of the premium. It is not disputed that on such contracts the Plaintiffs had booked and deposited FED @ 3% for the month ended 30-06-2006, although as on said date the Plaintiffs had not received the premium or had received only part of the premium from customers. The question is whether the receipt of any premium on or after 01-07-2006 in respect of insurance contracts issued prior to 01-07-2006 attracts the rate of FED applicable as on 01-07-2006. That being a question of law, so also the question raised by the Defendant No.1 to the maintainability of the suits, learned counsel present submitted that since the parties were at issue only on questions of law, and since the suits were listed for settlement of issues, these could be heard for final judgment in view of Order XV Rule 3 CPC. Consequently, with consent of learned counsel, following legal issues were settled in both suits[4]:

(i). Whether the suits are barred by the provisions of the Federal Excise Act, 2005 ?

(ii). Whether the words "date on which the services are provided or rendered" in section 10 of the Federal Excise Act, 2005 mean the date on which the insurance contract is issued by the Plaintiffs to their customers, or the date on which the Plaintiffs received premium from their customers ?

[4] As regards competency of Federal law to levy tax on services, the case of *Pakistan International Freight Forwarders Association v. Province of Sindh* (2017 PTD 1) has been noticed. However, since that enunciation is relevant to the period after 01-07-2011 when the Sindh Sales Tax on Services Act, 2011 had been enacted, said case is not relevant to the instant suits which are in respect of a period prior.

(iii). Whether sub-rule (3) of Rule 40 of the Federal Excise Rules, 2005 envisages that the rate of Federal Excise Duty applicable is the one in force on the date the insurer receives premium ? If so, whether said Rule is *ultra vires* section 10 of the Federal Excise Act, 2005 ?

(iv). What should the decree be ?

After hearing learned counsel on the issues above, my findings on the same follow.

Issue No. (i):

10. Section 41 of the FE Act ousts the jurisdiction of a civil court as under:

> **"41. Bar of suit and limitation of suit and other legal proceedings.—** (1) No suit shall be brought in any Civil Court to set aside or modify any order passed, or any assessment, levy or collection of any duty, under this Act.
> (2) No suit, prosecution or other legal proceeding shall lie against the Federal Government or against any officer of the Government in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.
> (3) ……. "

Mr. Hyder Ali Khan, learned counsel for the Plaintiffs cited *Searle IV Solution (Pvt.) Ltd. v. Federation of Pakistan* (2018 SCMR 1444) to submit firstly that while interpreting a similar ouster clause in section 217(2) of the Customs Act, 1969, the Supreme Court of Pakistan held that the words 'civil court' therein, are not applicable to the High Court of Sindh at Karachi when it exercises jurisdiction in civil suits. Thus, learned counsel submitted that section 41 of the FE Act, which too ousts the jurisdiction of a 'civil court', is no bar to the instant suits before the High Court of Sindh at Karachi. Secondly, he submitted that the impugned notice dated 20-06-2008 issued by the Defendant No.1 was without jurisdiction inasmuch as, he had essentially made a determination of short-paid duty without issuing the requisite show-cause notice under section 14 of the FE Act; and in such circumstances, a civil suit to challenge an act/order made or

passed without jurisdiction was again not barred by any ouster clause as also reiterated in *Searle IV Solution*.

Mr. Ameer Bakhsh Metlo, learned counsel for the Defendant No.1/department in Suit No. 1479/2008, submitted that by the impugned notice dated 20-06-2008 the Excise Officer had only expressed a point of view as to the rate of FED applicable and had not passed any order; that it was open to the Plaintiffs to disagree with the Defendant No.1, in which case he would have issued a show-cause notice under section 14 of the FE Act; but the Plaintiffs proceeded to file the instant suits without waiting for the show-cause notice. He submitted that in the circumstances, the suits were without a cause of action, aimed at by-passing the special *fora* and special remedies provided under the FE Act, and hence not maintainable. In support of his submission, Mr. Metlo relied on the cases of *Van Oord Dredging & Marine Contractors B.V. v. Federation of Pakistan* (unreported judgment dated 13-10-2020 passed by a Division Bench of this Court in C.P. No. D-2867/2018), and *Kirthar Pakistan B.V. v. Federation of Pakistan* (unreported judgment dated 19-03-2020 passed by a learned single Judge of this Court in Suit No. 574/2012).

11. In *Searle IV Solution (supra)*, the question before the Supreme Court of Pakistan was to the exercise of jurisdiction by the single Judge of the High Court of Sindh at Karachi in civil suits to interfere in orders passed by authorities under taxing statutes, which statutes expressly ousted the jurisdiction of civil courts. The Supreme Court first reiterated the well-established exceptions to the ouster of plenary jurisdiction of a civil court, viz., that the jurisdiction of a civil court to examine orders/acts of an Authority or Tribunal is not ousted (a) where the Authority or Tribunal was not validly constituted under the statute; (b) where the order/action of the Authority or Tribunal was *malafide*; (c) where the order/action passed/taken was such which could not have been passed/taken under the law that conferred exclusive jurisdiction on the Authority or Tribunal; and (d) where the order/action violated the principles of natural justice. On a related question, it was further held by the Supreme Court that even

when the High Court of Sindh at Karachi exercises jurisdiction in civil suits, it was nonetheless a High Court and could not be equated with an ordinary civil court; and thus the words 'civil court' in section 217(2) of the Customs Act were not intended by the legislature to include the High Court of Sindh at Karachi when dealing with civil suits. However, that did not mean to say that notwithstanding the availability of a special forum provided by special law, the remedy of a civil suit before the High Court of Sindh at Karachi under section 9 CPC remains unrestricted. That is clear as in some of the appeals before it, which emanated from suits filed in the High Court of Sindh at Karachi, the Supreme Court held that the case did not fall within the ambit of the established exceptions to the ouster of jurisdiction, and thus those appellants could not have resorted to civil suits to escape the hierarchy of the grievance-redressal mechanism provided in the Customs Act, 1969.

Thus, the *ratio decidendi* in *Searle IV Solution* is that even though an ouster clause in a special statute barring the jurisdiction of a 'civil court' did not apply to the High Court of Sindh at Karachi dealing with civil suits, there was nonetheless an 'implied' bar to jurisdiction as contemplated under section 9 CPC, arising as a consequence of special law which envisaged exclusive jurisdiction by a special forum, which implied bar could only be circumvented if the plaintiff demonstrated that the case attracted one of the established exceptions to the ouster of jurisdiction highlighted above. The legal theory behind the said 'exceptions' to the ouster of jurisdiction of civil courts is that when the legislature creates a special tribunal to deal with a civil matter, the jurisdiction committed to such special tribunal is in fact carved out from the general jurisdiction of the civil courts. It is therefore for the civil court to decide the true construction of the statute which defines the area of a tribunal's jurisdiction to see that the tribunal keeps itself within the limits of its special jurisdiction, for if it does not, then it trespasses onto the general jurisdiction of the civil courts[5].

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[5] See *Bahadur v. Umar Hayat* (PLD 1993 Lah 390); and *Begum Syeda Azra Masood v. Begum Noshaba Moeen* (2007 SCMR 914).

12. Applying the ratio of *Searle IV Solution* to the suits in hand, while the jurisdiction of this High Court of Sindh at Karachi to entertain these suits is not barred by reason of the ouster clause in section 41 of the FE Act, there is nonetheless the question of an implied bar within the meaning of section 9 CPC when the FE Act provides for a special mechanism[6] and special *fora* to determine matters arising under the said Act.

13. Section 14 of the FE Act requires serving a show-cause notice on the person who is alleged to have not paid or short-paid FED, and to consider his objections before making a determination. At the relevant time, section 14 of the FE Act read as under:

> **"14. Recovery of unpaid duty or of erroneously refunded duty or arrears of duty, etc.[7] —** (1) Where any person has not levied or paid any duty or has short levied or short paid such duty or where any amount of duty has been refunded erroneously, such person shall be serviced with notice requiring him to show cause for payment of such duty provided that such notice shall be issued within three years from the relevant date.
>
> (2) The Federal Excise Officer, empowered in this behalf, shall after considering the objections of the person served with a notice to show cause under sub-section (1), determine the amount of duty payable by him and such person shall pay the amount so determined along with default surcharge and penalty as specified by such officer under the provisions of this Act.
>
> (3) ……
>
> (4) ……."

14. Learned counsel for the Defendant No.1 had accepted that the impugned notice dated 20-06-2008 was not a show-cause notice under section 14 of the FE Act. In fact, the impugned notice (reproduced in para 4 above) itself stated that a show-cause notice had yet to follow, and yet the Plaintiffs were called upon as under:

> "*Accordingly it is advised in your own interest that the differential short paid amount of duty (principal amount) be deposited before 30-06-2008 availing the said amnesty, failing which legal proceedings may be initiated under the prevalent law."*

[6] Sections 14, 33 and 34 of the FE Act.

[7] Section 14 of the FE Act was subsequently amended by Finance Acts of 2008, 2010 and 2011.

Given the above observation in the impugned notice, it cannot even be confined to a notice under section 45 of the FE Act to call for record and documents. Therefore, the Defendant No.1 had not invoked the prescribed provision of the FE Act, viz., section 14 thereof, to confront the Plaintiffs with FED allegedly short-paid so as to make available to the Plaintiffs the special *fora* and remedies under the FE Act. For all intents and purposes the impugned notice was a collection drive by the Defendant No.1 without undertaking the requisite statutory proceedings, and thus an act without jurisdiction and not an act 'under the FE Act'[8]. Learned counsel for the department had submitted that by the impugned notice dated 20-08-2006 the Defendant No.1 had only expressed a point of view which would have culminated in show-cause proceedings. However, there was no answer to the question under what provision or authority could the Excise Officer (Defendant No.1) circulate his point of view prior to a show-cause notice under section 14 of the FE Act. In fact, the submission of learned counsel for the Defendant No.1 reinforces the Plaintiffs' case that since the Defendant No.1 had, for all intents and purposes, already made a determination, there was no point in waiting for a show-cause notice. The cases of *Van Oord Dredging & Marine Contractors B.V. v. Federation of Pakistan* and *Kirthar Pakistan B.V. v. Federation of Pakistan* cited by learned counsel for the department are of no help to him. In both said cases a show-cause notice had been duly issued.

15. Having concluded that the impugned notice was without jurisdiction, the suits are by way of an exception to the ouster of jurisdiction implied by the provisions of the FE Act, and hence maintainable. As discussed above, the impugned notice had frustrated the purpose of a show-cause notice, and therefore there would be no point now to remand the matter to the Defendant No.1 and to relegate these proceedings which have been pending since 2008. Issue No. (i) is answered in the negative.

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[8] *Punjab Province v. Federation of Pakistan* (PLD 1956 FC 72).

Issues No. (ii) and (iii):

16. The case of the Plaintiffs has already been discussed in para 6 above. Mr. Hyder Ali Khan, learned counsel for the Plaintiffs elaborated that under sections 3 and 10 of the FE Act, the taxing event was the 'providing and rendering of service' viz., the insurance contract; that like any other contract, an insurance contract too is concluded/arrived-at when the offer made by the customer is accepted by the insurer; therefore, the rate of FED applicable would be the one prevailing on the date of the contract regardless of the date of receipt of consideration/premium. Learned counsel submitted that though premium is ordinarily received by the insurer on or before the insurance policy is issued, in cases of cover-notes and in cases where premium is agreed under the policy to be paid in installments, the premium or part thereof is received after the cover-note or policy has been issued. He cited *H.M. Extraction Ghee & Oil Industries (Pvt.) Ltd. v. Federal Board of Revenue* (2019 SCMR 1081) and *Super Engineering v. Commissioner Inland Revenue* (2019 SCMR 1111) to submit that the reliance placed by the Defendant No.1 on Rule 40 of the FE Rules was misplaced inasmuch as, said Rule related to the 'payment' of duty and not to the 'charge' of duty; that Rule 40 of the FE Rules had to be read harmoniously with section 10 of the FE Act, failing which said Rule will be *ultra vires* section 10; that in the event the Court finds Rule 40 to be ambiguous, then the settled rule of interpretation of fiscal statutes is that the doubt had to be resolved in favor of the taxpayer; and that if the contention of the Defendant No.1 were accepted, that would amount to a retrospective application of the enhanced rate of duty which was not expressed by the statute.

17. Contention of the department has already been discussed in para 8 above. Mr. Ameer Bakhsh Metlo, learned counsel for the Defendant No.1 in Suit No. 1479/2008 reiterated that the insurance contract between the Plaintiffs and their customers was not a concluded contract until consideration/premium was paid by the customer and received by the Plaintiffs; that such intent of the

legislature was apparent from sub-rule (3) of Rule 40 of the FE Rules; hence, under section 10 of the FE Act, the 'date on which services are provided or rendered' mean the date on which premium was received by the Plaintiffs, on which date the rate of FED applicable was 5%.

18. While the taxing event for the levy of FED under section 3 of the FE Act is 'services provided or rendered', the rate of FED applicable is governed by section 10 of the FE Act which stipulates (underlining supplied for emphasis):

> "**10. Applicable value and rate of duty.—** The value and the rate of duty applicable to any goods or services shall be the value, retail price, tariff value and the rate of duty in force –
> (a)…..
> (b) in the case of services, on the date on which the services are provided or rendered; and
> (c) ……"

Therefore, by section 10 of the FE Act, the rate of FED is pegged to 'the date on which services are provided or rendered'. The question is, in the context of insurance, what is 'the date on which services are provided or rendered'.

19. Though none of the learned counsel had adverted to it, I am drawn first to the Insurance Ordinance, 2000, section 2(xxvii) whereof defines "insurance" as under:

> "insurance" means the business of entering into and carrying out policies or contracts, by whatever name called, whereby, in consideration of a premium received, a person promises to make payment to another person contingent upon the happening of an event, specified in the contract, on the happening of which the second-named person suffers loss, and includes reinsurance and retrocession:
> Provided that a contract of life insurance shall be deemed to be a contract of insurance notwithstanding that it may not comply with the definition set out in this clause."

The statutory definition of 'insurance' above settles that the service of insurance is the 'entering into and carrying out' insurance

contracts. Since the suits are not in respect of any contract not in writing, I need not examine whether the Insurance Ordinance, 2000 envisages an insurance contract other than a contract in writing. Therefore, for the present purposes, it can be safely said that the written insurance contract (policy, cover-note or other form) was the service of insurance. In such circumstances, the date on which the insurance contract was arrived at to become a concluded contract, would be the date on which services were provided or rendered within the meaning of section 10 of the FE Act. That much was accepted by learned counsel for the department. However, his argument was that there was no concluded contract until consideration/premium was paid by the assured and received by the insurer. While a contract may stipulate that liability thereunder will not arise until consideration is received, the Contract Act, 1872 does not make payment/receipt of the agreed consideration (as distinct from absent consideration) a *sine qua non* for arriving at a concluded contract. However, at first blush the above definition of 'insurance' in using the words 'in consideration of a premium received', gives the impression that perhaps insurance contracts are treated differently by special law. But then, Rule 35 of the erstwhile Securities & Exchange Commission (Insurance) Rules, 2002, which were framed under the Insurance Ordinance, 2000, and which held the field at the relevant time, had stipulated that :

> "**35. Insurance policy not to be avoided for non-payment of premium[9].-** (1) No insurance policy shall be liable to be avoided on the ground that the premium has not been paid.
> (2) Nothing in this rule shall prevent the inclusion in a policy of a provision to the effect that cover under the policy shall not commence until the premium has been paid or guaranteed to be paid in such manner as may be set out in the policy or otherwise accepted or agreed to by the insurer."

[9] Superseded by Rule 58 of the Insurance Rules, 2017 which stipulates that an insurance policy relating to non-life insurance business shall not be issued where premium has not been received by the insurer. However, exceptions are provided for a cover-note not exceeding seven days in the case of motor business, and beyond thirty days in all other cases. An exception is also provided where premium is mutually agreed to be paid in installments and the first installment is received by the insurer.

20. Compared to the Insurance Ordinance, 2000, the Insurance Act, 1938 and Rules made thereunder had contained more categorical provisions[10] to restrict insurers from assuming risk in respect of general insurance business until premium payable was received. Those provisions were interpreted by Justice Wajihuddin Ahmed in the case of *Tyeb v. Alpha Insurance Co. Ltd.* (1990 CLC 428) to hold that such provisions were aimed primarily at regulating the insurance business and not to avoid or to make invalid the insurance contract with the assured inasmuch as no such consequence had been expressly provided in the Insurance Act, 1938. The same view was expressed by a Division Bench of this Court in *S.M. Abdullah & Sons v. Crescent Star Insurance Co. Ltd.* (1993 MLD 1239) were it was further held that provisions in the Insurance Act, 1938 and Rules made thereunder to restrict insurers from assuming risk until premium is received, were intended only to ensure that premium is recovered by the insurer.

21. Like the Insurance Act, 1938, the Insurance Ordinance, 2000 too does not go on to stipulate that an insurance contract entered into by the insurer without receiving premium is invalid, or that there is no concluded contract until premium is received by the insurer. Rather, as highlighted above, Rule 35 of the erstwhile Securities & Exchange Commission (Insurance) Rules, 2002 had categorically stated that an insurance contract shall not to be avoided by the insurer on the ground of non-payment of premium. Therefore, the *dicta* of the cases of *Tyeb* and *S.M. Abdullah & Sons* discussed above can be followed to observe that the words "in consideration of a premium received" in section 2(xxvii) of the Insurance Ordinance, 2000 are only aimed at compelling insurers to recover the premium agreed under the insurance contract, and not to say that there is no concluded contract of insurance until premium is received. That of course is without prejudice to a stipulation in the insurance contract that the insurance

[10] Section 3C(4) of the Insurance Act, 1938 and Rule 44 of the Insurance Rules, 1958, both repealed.

cover shall not commence until premium is received, which by itself would not mean that there was no concluded contract.

22. The argument that there is no concluded contract until consideration is received by the service provider from its customer, would also run amok the scheme of the FE Act, and in fact would prejudice collection of Government revenue, in that a service provider could then evade FED by contending that even though he has provided the agreed service, he is not liable to deposit FED until the agreed consideration is received from the customer. Though the burden of FED is passed on by the service provider to its customer, Rule 9 of the FE Rules stipulates that "Under no circumstances whatsoever, any registered person shall on his own or otherwise defer or postpone the payment of duty on the pretext or ground that he has not received the price inclusive of duty or the amount of duty from a person to whom he has sold excisable goods or rendered or provided excisable services." That aspect of the matter had also been highlighted by the Plaintiffs in their reply to the Defendant No.1 in stating that they were paying FED on the premium booked irrespective of collection of premium from customers.

23. To contend that the rate of FED applicable was the one prevailing on the date premium was received by the Plaintiffs, the case of the Defendant No.1/department was pitched on sub-rule (3) of Rule 40 of the FE Rules. As on the month ended 30-06-2006, Rule 40 of the FE Rules was as under:

> "**40. Special procedure for insurance companies.—** (1) All insurance companies shall pay the Federal excise duty leviable on services provided or rendered by them in respect of all kinds of insurance except life insurance.
> (2) The duty shall be paid on the gross amount of premium charged on risk covered in the insurance policy.
> (3) The duty in respect of an insurance policy shall be accounted for in the same month when the premium is received and shall be deposited by the insurance company on the 7th day following the month in which the premium is received.
> (4) For every month, the insurance company shall file a return electronically in the form FE-IV(a) by the 15th day of the following

month to the Collectorate in whose jurisdiction the insurance company is registered.

(5) ……

(6) ……

(7) ……

(8) ……"

24. First, it will be seen that sub-rule (2) of Rule 40 clearly stipulated that FED was payable on the gross amount of the "premium charged on risk covered in the insurance policy". The above sub-rule (2) of Rule 40 had been brought by Notification No. SRO 561(I)/2006 dated 05-06-2006 to substitute the previous sub-rule (2) which had stipulated that "The duty shall be paid on the premium received by the insurance companies on goods insured." Thus, there was a conscious departure in the Rules from FED on 'premium received' by the insurer to FED on 'premium charged' by the insurer, which was apparently to ensure that collection of FED by the department is not frustrated by non-payment of premium by the assured. As regards sub-rule (3) of Rule 40 of the FE Rules, when that stipulated that FED "shall be accounted for in the same month when premium is received", that was only to state that FED on the premium received by the insurer during the month should be "deposited by the insurance company on the 7th day following the month in which the premium is received", and that such deposit is not to be put-off to a subsequent month, again the intent being to check delay in collection of FED. In other words, Rule 40 of the FE Rules is a collection provision which relates to the mode and manner of receipt or collection of FED. Nothing in Rule 40 of the FE Rules has any bearing on the rate of duty applicable, which rate is governed by section 10 of the FE Act. The distinction between charging provisions, assessment provisions and collection provisions of a fiscal statute, and the rule to construe each is well illustrated by the cases of *Friends Sons and Partnership Concern v. The Deputy Collector Central Excise & Sales Tax* (PLD 1989 Lahore 337); and *H.M. Extraction Ghee & Oil Industries (Pvt.) Ltd. v. Federal Board of Revenue* (2019 SCMR 1081). In *Pakistan Television Corporation Ltd. v. Commissioner Inland Revenue* (2019 SCMR 282) it was held that a provision providing for the mode

of collection of FED is not a charging provision, and cannot abridge nor expand the scope of section 3 of the FE Act which was the charging provision. It has been further held in *Commissioner of Income Tax v. Eli Lilly Pakistan (Pvt.) Ltd.* (2009 SCMR 1279) that where the incidence of tax is clear by the charging provisions, then collection provisions, which provide the machinery for tax collection, are to be construed liberally in a manner that facilitates the collection of the tax. That is precisely what Rule 40 of the FE Rules does.

25. Having held above that even though premium was not received or was received in part by the Plaintiffs on the date the insurance contract was issued by them to their customers, there was nonetheless a concluded insurance contract, it follows that 'services were provided or rendered' by the Plaintiffs within the meaning of section 10 of the FE Act on the date they issued the insurance contract to their customers. Since section 10 of the FE Act pegs the rate of FED applicable to the date on which services are provided or rendered, the rate of FED applicable to the insurance contracts in issue, would be the rate of 3% prevailing when said contracts were issued, and not the rate of 5% when premium or part thereof was received. Sub-rule (3) of Rule 40 of the FE Rules does not envisage otherwise and is *intra vires* section 10 of the FE Act. Issues No. (ii) and (iii) are answered accordingly.

Issue No. (iv):

26. For the foregoing reasons, the suits are decreed as follows:

(a) It is declared that the impugned notice dated 20-06-2008 and subsequent notices in that regard issued by the Defendant No.1 to Plaintiffs were without jurisdiction; are set-aside; and the Defendants are restrained from raising any demand on the basis of the same;

(b) It is declared that the rate of FED applicable to the subject matter insurance contracts issued by the Plaintiffs prior to the

Finance Act, 2006 would be the rate of 3% prevailing when such contracts were issued, and not the rate of 5% prevailing when premium or part thereof was received by the Plaintiffs in respect of such contracts.

Parties are left to bear their own cost. The office shall draw up a separate decree in each suit.

JUDGE

Karachi
Dated: 30-11-2020