

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

C. P. No. D-4967 of 2018

Petitioner : Orix Leasing Pakistan Limited
through Qazi Umair Ali, Advocate.

Respondents : Province of Sindh, through Abdul
Jaleel Zubedi Assistant Advocate
General Sindh, alongwith Ghulam
Abbas Naich, Chief Inspector of
Stamps and Syed Muhammad
Abuzar Abbas, Inspector of Stamps.

Date of hearing : 16.11.2021

JUDGMENT

YOUSUF ALI SAYEED, J. – The Petitioner is a financial institution offering a host of products and services, including the leasing of equipment or vehicles in terms of a standard form Equipment Lease Agreement or Vehicle Lease Agreement (hereinafter referred to as the “**ELA**” and “**VLA**” respectively and collectively as the “**Agreements**”), executed between it and its customer (the “**Lessee**”).

2. Following the execution of the ELA or VLA, as the case may be, a Purchase Order (“**PO**”) is typically issued by the Petitioner to the supplier of the specified equipment or vehicle for acceptance. Whilst referring to the relevant Agreement and designating the Lessee as the party to whom delivery is to be made by the supplier, the PO otherwise sets out the terms and conditions circumscribing the order and delivery.

3. Apparently, the Respondents audited the Petitioners records and assessed a deficit of stamp duty on the POs issued over the period under scrutiny in terms of an Inspection Note dated 28.02.2018, with a Notice dated 13.06.2018 then being issued to the Chief Executive of the Petitioner intimating a date of hearing in the matter and forewarning that an *ex-parte* decision would ensue in the event of non-appearance.
4. Being aggrieved, the Petitioner preferred the captioned Petition under Article 199 of the Constitution impugning the action and questioning firstly whether the POs so issued were chargeable with stamp duty under the (Sindh) Stamp Act 1899 (the “**Act**”) and, if so, whether the liability for deficit of duty and the penal consequences as flow therefrom could be brought to bear against the Petitioner or would lie against some other person.
5. For purpose of properly framing the controversy, it is pertinent to note that Section 3 of the Act stipulates as follows:

3. Instruments chargeable with duty.- Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively, that is to say-

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in Pakistan on or after the first day of July, 1899,

(b) every bill of exchange payable otherwise than on demand or promissory note drawn or made out of Pakistan on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in Pakistan; and

(c) every instrument (other than a bill of exchange or promissory note) mentioned in that Schedule which, not having been previously executed by any person, is executed out of Pakistan on or after that day, relates to any property situate, or to any matter or thing done or to be done, in Pakistan and is received in Pakistan:

Provided that no duty shall be chargeable in respect of-

(1) any instrument executed by, or on behalf of, or in favour of the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894 or under Act XIX of 1838, or the Registration of Ships Act, 1841, as amended by subsequent Acts.

6. A PO stands enlisted under Article 15(b) of Schedule 1 to the Act as an instrument subject to stamp duty, on the following description and terms:

Purchase Order- that is to say, to supply or to undertake cortege of stores and materials.	Twenty paises for every hundred rupees or part thereof of the amount of the Purchase Order.
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7. Section 29 of the Act, identifies the party who is to bear the expense of stamp duty in respect of certain instruments, and in respect of a PO, stipulates as follows:

“Duties payable by whom as per Articles of Schedule.

29. In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne in the case of any instrument described in any of the following Articles of Schedule namely:-

...
...

No.15 (b) (Purchase Order) by the purchaser;”

8. An identical provision contained in both Agreements (i.e. Clause 29 of the ELA and Clause 3.4 of the VLA) on the subject of stamp duty and legal charges reads as follows:

“27. (Stamp duty and legal charges)

The Lessee shall pay all legal charges (including the Lessor’s solicitors charges) in respect of this Lease Agreement and all stamp duties thereon”.

9. Section 44(1) of the Act also falls to be considered due to its interplay with Section 29 in as much as it provides that:

“44. Persons paying duty or penalty may recover same in certain cases.

(1) When any duty or penalty has been paid, under section 35, section 37, section 40, or section 41, by any person in respect of an instrument, and, by agreement or under the provisions of section 29 or any other enactment in force at the time such instrument was executed, some other person was bound to bear the expense of providing the proper stamp of such instrument, the first-mentioned person shall be entitled to recover from such other person the amount of the duty or penalty so paid.”

10. Succinctly, the case set up by the Petitioner is that the POs, were issued only in order to serve a procedural requirement towards fulfilment of the terms and conditions of the underlying Agreement(s), hence did not constitute a separate contract and did not satisfy the definition of an ‘instrument’ in terms of Section 2(14) of the Act 1899, thus were not chargeable with duty. Furthermore, as the Agreements placed the obligation for payment of all stamp duties upon the Lessee, any such liability arising in respect of the POs lay accordingly in view of Section 29 of the Act, and the Petitioner could not be made to suffer a demand for payment of the deficit or be penalized for the same.

11. Proceeding with his submissions, learned counsel for the Petitioner submitted at the outset that the question of chargeability was not being pressed. Indeed, whilst the issuance of the POs may well be driven by the underlying Agreements, they nonetheless undoubtedly constitute a distinct contract on the terms and conditions stated therein and it cannot be said that no rights or liabilities are thereby created or recorded. Confining his arguments to Section 29 of the Act, learned counsel submitted that while the expense of providing the proper stamp in respect of a PO is to normally be borne by the 'purchaser' in terms of Section 29 of the Act, that very section envisages the shifting of the burden through an agreement to the contrary. He contended that since the Agreements placed the obligation for payment of all stamp duties upon the customer, the liability lay accordingly and the Petitioner could not be made to suffer a demand for payment of stamp duty or penalized on account of any deficit. Reliance was placed on a judgment of a learned Divisional Bench of this Court in the case reported as Pakistan Mobile Communications Limited (MOBILINK) and others v. Province of Sindh through Chief Secretary and others 2021 CLD 629.
12. Conversely, the learned AAG categorically refuted the arguments advanced on behalf of the Petitioner and submitted that the same were entirely fallacious. He also pointed out that during the pendency of the Petition, a deficit of stamp duty in the sum of Rs.12,985,575/- together with a penalty of Rs.6,492,879/- had been assessed against the Petitioner in terms of an Order dated 03.11.2021 made by the Board of Revenue and pointed out that if the Petitioner was aggrieved by that determination, a remedy was provided by way of appeal under Section 40-B of the Act. He thus sought dismissal of the Petition.

13. Having considered the arguments advanced, we would turn firstly to Section 48 of the Act, which provides for the recovery of duties and penalties in the following terms:

“Recovery of duties and penalties. (1) All duties, penalties and other sums required to be paid under this Chapter may be recovered by the Collector or Chief Inspector of Stamps, Board of Revenue by distress and sale of the movable property of the person from whom the same are due, or by any other process for the time being in force for the recovery of arrears of land-revenues.

(2) The Chief Inspector of Stamps shall have and exercise the powers of the Collector as defined in the Sindh Land Revenue Act, 1967.]

14. As it stands conceded that the POs were chargeable with stamp duty, what remains in the context of Sections 40 and 48 of the Act is the ascertainment of the person from whom the deficit of duties, penalties and other sums may be treated as due. The stance of the Petitioner is that it stands absolved from responsibility for payment by virtue of the Agreements, and that the person solely liable as a consequence is the Lessee.

15. Whilst the Petitioner seeks to derive support in that regard from the case of Mobilink (Supra), it transpires that the same is distinguishable on the facts from the matter at hand. There the matter pertained to stamp duty on ‘forms’ for subscription to cellular telecommunications services, which had been executed by the customers of the telecom companies but had not been executed by the service providers, who were the petitioners. Contrarily, in the instant case, the present Petitioner is clearly an executant in its capacity as the purchaser, with the supplier and Lessees have signed in acceptance.

16. As the matter stands, it is an earlier judgment of a learned Divisional Bench of this Court in C.P. No. D-2725 of 2009, titled Shirazi Trading Co. (Pvt.) Limited vs. Province of Sindh & Others, authored by Munib Akhtar, J, that is of relevance. That matter also pertained to stamp duty on POs and the question as to whom unpaid duty could be recovered from was specifically considered. After examining the divergent decisions as to the scope Section 29 of the Act rendered by the Lahore High Court and High Courts from the Indian jurisdiction, including the judgment of the Madras High Court in the case reported as Subramaniam Chettiar v. Revenue Divisional Officer and others AIR 1956 Mad 454, the learned Divisional Bench observed and held as follows:

“27. The divergent views that have been expressed in the various High Courts may be summarized as follows. Some High Courts have held that it is the persons mentioned in section 29 alone who are legally liable to pay any unpaid stamp duty to the State. This would of course include any person who has agreed to bear the expenses of the stamp duty. This can perhaps be regarded as the majority view. The Madras High Court has concluded that it is the executants alone who are legally liable, while the minority view in the Andhra Pradesh High Court is that both the executants and the persons specified in section 29 (if different from the former) are liable. We may note that a learned commentator on the Stamp Act has expressed the view that the position taken by the minority in the Andhra Pradesh High Court is to be preferred (see K. Krishnamurthy, The Indian Stamp Act, 10th ed., 2007, pg. 408).

28. After having carefully considered the case law, we find ourselves unable, with the utmost respect, to accept the view that the answer to the question before us lies in section 29 alone. One obvious problem with this position has been noted by the Lahore High Court itself (see para 22 above), namely, that section 29 is not exhaustive. It does not list all the instruments to be found in the Schedule. The Lahore High Court sidestepped the issue by observing that it did not arise in the facts and circumstances before it. The Andhra Pradesh High Court did address it to a certain extent (see para 24 above). With the utmost respect, we find this treatment unsatisfactory. It is in principle incorrect to, in effect, have two separate tests for the various

instruments specified in the Schedule, one based on what may fortuitously be found in section 29 and the other to be determined in some other manner. We are respectfully of the view that both the Lahore and Andhra Pradesh High Courts have misunderstood the purpose and effect of section 29. In order to better appreciate the position, the distinction between the legal incidence of a tax or duty on the one hand and its economic incidence or burden on the other must be kept in mind. A tax or duty that is levied must of course, in the end, be paid by someone. Who that someone is the person with whom the State is concerned. If this person does not make payment, then the statute invariably provides for coercive means to recover or collect the tax or duty. This is the legal incidence of the levy. Now, it may be that the person legally so liable is able to pass on the economic burden on to someone else. In other words, it may be that the legal and economic incidence of the levy can be "divided". With this however, the State in general (and subject to certain exceptions not presently relevant) has no concern. The most obvious example of this "division" is to be found in the classification of taxes between direct and indirect taxes. In the case of the former, both the legal and economic incidence of the tax falls on the same person. The income tax is, or at least is supposed to be, the prime example of a direct tax. In indirect taxes, the legal incidence falls on one person, but he is (or at least in principle may be able to) pass on the economic incidence on to another. The sales tax is a typical example of an indirect tax.

29. In our view, what section 29 is concerned with is the economic incidence or burden of the stamp duty. It does not as (with respect) erroneously concluded by the majority in the Andhra Pradesh case, amount to a statutory liability. This is borne out by the use of the word "expenses" in the section and the fact that it is, in its entirety, subject to any agreement to the contrary. (The use of the words "duties by whom payable" in the marginal note or in the sub-chapter heading is, on well established principles of interpretation, not decisive or even relevant.) All that the legislature has done is to create what may be called a "default" position with respect to certain instruments, presumably selecting those with which the public at large is generally concerned. It is pertinent to note that there is no limit on the agreement to the contrary that may be arrived at. That agreement may allocate the burden of paying the expenses (i.e., the economic incidence) on any of the parties to the instrument other than the one specified, or may provide for an apportionment of the burden in such measure as is deemed appropriate or could even, in principle, shift the incidence in its entirety on to someone else altogether. A section which has such an effect or purpose can hardly, in our respectful view, be regarded as dealing with the legal incidence of the stamp duty.

30. In our view, and for substantially the reasons that found favor with it, the conclusion arrived at by the Madras High Court is correct. The legal liability to pay the stamp duty (and hence the liability for any that remains unpaid) lies on the executants of the instrument concerned. The charging provision, section 3, is (as presently relevant) concerned with the execution of the instrument and there can be no levy at all on an instrument that is not executed. Section 17 expressly requires that an instrument executed in Pakistan must be stamped "before or at the time of execution" and section 62 makes the execution of an instrument not duly stamped an offence, punishable by payment of a penalty. We may note in this context that although the amount of penalty (Rs. 500/-) may today appear derisory, it should be remembered that it was a substantial amount in 1899 when the Stamp Act was enacted. The legislative intent is therefore clear. Execution of the instrument is a key and indispensable element in the scheme of the Act. Everything hinges on execution. In our view, it necessarily follows that the legal liability (i.e., its legal incidence) lies on the executants and cannot lie elsewhere. We cannot therefore, with respect, even accept the minority view in the Andhra Pradesh High Court, which has taken what might be regarded as an intermediate position. We would, with respect, adopt the view taken by the Madras High Court. It is also pertinent to note that the focus must be on the "executants" of the instrument and not the "parties" thereto. It may be that a person may be a party to the instrument without having had (or even, in law, having to) execute it. Such a person can have no legal liability to pay stamp duty. It must be kept in mind that we are dealing with a fiscal statute and the interpretation and application of such statutes is well understood. There is no equity about a tax. There is no room for any intendment. There is no intendment, and nothing is to be read in and nothing applied. It is the strict letter of the law that matters. These well-known principles lead inexorably to the conclusion arrived at above."

[Underlining added for emphasis]

17. For lending further clarity to the scope of the recovery proceedings as may be taken under Sections 40 and 48 of the Act, it would be conducive to also reproduce the relevant excerpt from the judgment of the Madras High Court in Subramaniam Chettiar's case (Supra), in so far as it addresses the matter with reference to Section 29:

“14. We are, therefore, of opinion that the solution to the question propounded above, as to who is the person, against whom the Collector could proceed under Sections 40 and 48, has to be searched for elsewhere than in Sections 29 and 44, and we are unable with great respect, to accept the decision in either of the two rulings quoted above.

15. The learned Advocate-General has suggested, and we agree with him entirely that the true solution lies by following the clue afforded by Sections 17 and 62 regarding instruments chargeable with duty and executed by any person in India, except Part B States, and that the person against whom the Collector should proceed in all such cases, under Sections 40 and 48, is the executant of the document. Section 17 says, "An instrument chargeable with the duty and executed by any person in India, except Part B states shall be stamped before or at the time of execution", and Section 62 says that the executant of such instruments shall for every such offence be punished with fins [sic] which may extend to Rs. 500, provided that when any penalty has been paid in respect of any instrument under Section 35, 40 or 61, the amount of such penalty shall be allowed in reduction of the fine, if any, subsequently imposed under this section in respect of the same instrument upon the person who has paid such penalty. Thus, these sections read together indicate, in the opinion of the learned Advocate-General, with which opinion we entirely agree, that the executant of such document is the person against whom the Collector should proceed under Sections 40 and 48 for collecting the stamp duty and penalty. It is significant that the proviso to Section 62 makes mention also about the penalty levied under Section 40 and makes a provision for its deduction from the fine. Sections 17 and 62 show that the agreement between the parties and the provisions of Sections 29 and 44 are applicable only between the parties, leaving the Collector's right under Sections 40 and 48 unaffected. It is well settled that if the Collector passed an-erroneous order by proceeding against the wrong person under Sections 40 and 48 his order will be subject to appeal or revision by the Board of Revenue, or quashing by this Court, either on a reference by the Board of Revenue or on a writ. The ruling of a Full Bench of the Lahore High Court, consisting of Tek Chand, Abdul Qadir and Bhide, J.J., in Thakar Das v. The Crown I.L.R. (1932) Lah. 745 (F.B.), shows the maintainability of such a reference and revision, and we have already stated above that a writ also lies to this Court in suitable cases. We may add that where several persons jointly execute a document, the Collector can proceed under Sections 40 and 48, against any of them, as they are all jointly and severally liable. He is not bound to collect the pro rata shares from each. That pro rata division is a matter for them to

effect amicably or get settled in suits for contribution, or by moving the Court to include in its order of costs where suits and proceedings are pending. That Section 29 will not bind the Collector under Sections 40 and 48 is not only clear from the fact that that section and Section 44 relate only to rights between the parties (the Collector is, of course not one of them) but can also be deduced from the ruling of Venkataramana Rao, J., in Panakala Rao v. Kumaraswami (1937) 46 L.W. 470. There the learned Judge has held that Section 291 of the Stamp Act will only apply to a case where a document is not produced before the Court, and that once the document has been produced before the Court and [sic] tendered in evidence, the plaintiff is not entitled to recover the penalty levied from him in respect of that document except under Section 44 of the Stamp Act when that amount has been included in the costs at the time of passing of the decree.”

[Underlining added for emphasis]

18. In light of the foregoing, it is unnecessary to record a definitive finding at present as to whether the wording of clause of 27 of the ELA and Clause 3.4 of the VLA encompasses the POs so as to shift the economic incidence or burden of stamp duty chargeable thereon to the Lessee. The Lessees are not before us and the matter of interpretation of those clauses is left open for determination at the opportune moment in an appropriate proceeding. Suffice it to say that in the Petitioner’s stance with respect to Section 29 of the Act is found to be misconceived and the Petition stands dismissed accordingly.

JUDGE

CHIEF JUSTICE

Karachi
Dated _____