

IN THE HIGH COURT OF SINDH AT KARACHI

Present:-
Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Muhammad Junaid Ghaffar.

C. P. No. D-256 of 2014

Oil World (Pvt) Ltd. ----- Petitioners

Versus

Federation of Pakistan & Others ----- Respondents

Date of hearing: 29.04.2015.

Date of order: 29.04.2015.

Petitioner: Through Mr. Mansoor Usman Awan Advocate.

Respondent
No. 1: Mr. Salman Talibuddin Additional Attorney
General along with Mr. Dilawar Hussain
Standing Counsel.

Respondent
No. 2: Through Mr. Amjad Javed Hashmi Advocate.

Respondent
No. 3: Through Mr. Kashif Nazeer Advocate. 3

C. P. No. D-5537 of 2014

Agriauto Stamping Company
(Pvt) Ltd. and another ----- Petitioners

Versus

Federation of Pakistan & Others ----- Respondents

C. P. No. D-5808 of 2014

Thal Boshoku Pakistan (Pvt) Ltd & another ----- Petitioners

Versus

Federation of Pakistan & Others ----- Respondents

Petitioner: Through Mr. Ali Almani Advocate in C.P. No. D-5537 & 5808 of 2014.

Respondent
No. 1: Mr. Salman Talibuddin Additional Attorney General along with Mr. Dilawar Hussain Standing Counsel.

Respondent
No. 2: Through Mr. Amjad Javed Hashmi Advocate.

Respondent
No. 3: Through Mr. Kashif Nazeer Advocate. 3

Respondent
No. 6: Through Mrs. Masooda Siraj Advocate. 6 in CP No. D- 5808/2014

Respondent
No. 3 Through Mr. Irshadur Rehman Advocate in C.P. No. D-5537/2014.

J U D G M E N T

Muhammad Junaid Ghaffar, J. The aforesaid petitions involving same controversy regarding petitioners claim of tax credit in terms of Section 65D and issuance of Exemption Certificate under Section 159 of the Income Tax Ordinance, 2001, were dismissed by means of a short order on 29.4.2015. However, before the reasons could be recorded, the petitioners on 4.5.2015 had moved application(s) under Order 41 Rule 5 CPC (bearing CMA 10559 of 2015 in CP No. 256/2014, CMA No. 10557 of 2015 in CP No. 5537/2014 & CMA No. 10560 of 2015 in CP No. 5808/2014), with a request to restrain the respondents from encashment of Bank Guarantees furnished pursuant to interim orders passed by this Court from time to time, as the petitioners intend to file an appeal before the Hon'ble Supreme Court. On

4.5.2015 notice on these applications(s) were issued to respondents as well as DAG for 11.5.2015 and till next date, respondents were directed not to encash the Bank Guarantee(s), as reasons were not recorded till that time. On 11.5.2015 pursuant to Court's notice, learned Counsel for respondents had shown appearance, claimed copy of these application(s) and the matter was adjourned to 26.5.2015. However, it appears that thereafter, the files were sent to the relevant branch for compliance and fixed on 26.5.2015, but could not be taken up for hearing as the matter was discharged. Record further shows that since then, the matter could not be placed in Court as it was being discharged (for various reasons mostly on account of General Adjournment of the Counsel for the parties), however, the files of these petitions were never placed before this bench for recording reasons of above short order. On 22.11.2016, above facts have been brought to the notice of this bench and the files of above petitions have been made available pursuant to directions of the Hon'ble Chief Justice to record the reasons, accordingly the detailed reasons for dismissal of above petitions are as follows:-

1. In C.P. No. D-256/2014 the petitioner has impugned orders dated 8.10.2013 and 10.12.2013 passed by the respondents as being ultra vires to Section 65-D of the Income Tax Ordinance, 2001 (hereinafter referred to as "Ordinance, 2001"). The precise facts in this petition are that the petitioner is a company registered under the Companies Ordinance, 1984 and has set up an Oil Refinery for production of Ghee and Cooking Oil. The case of the petitioner is that they are fully covered under Section 65-D of the Ordinance, 2001 which provides 100% tax credit for newly established industrial undertakings. It is further stated that in the Tax Year 2013 they were issued Exemption Certificate after due verification, however, subsequently, when they applied for a new certificate for Tax

Year 2014, the same was refused by respondent No. 3 though it was issued for Tax Year 2013. Against such dismissal a Revision Application was filed which also stands declined vide order dated 10.12.2013, hence instant petition.

2. In Petition No. 5537 and 5808 of 2014 it is the case of the petitioners that they have setup new industries and are entitled for Tax Credit in terms of Section 65-D of the Ordinance, 2001 and their request for issuance of Exemption Certificate under Section 159 of the Ordinance, 2001 has been refused; hence instant petitions.

3. Mr. Mansoor Usman learned Counsel for Petitioner in C.P. No. D-256/2014 at the very outset submitted that he will not press his arguments in respect of Clause 72-B Part IV of IInd Schedule of the Ordinance, 2001 as well as applicability of SRO-140(I)/2013 as according to him his case falls within the ambit of Section 65-D of the Ordinance, 2001 independently. Learned Counsel has contended that Section 65-D *ibid* entitles exemption at the import stage and therefore, no tax is payable under Section 148 and therefore, an Exemption Certificate ought to have been issued by the respondents under Section 159 of the Ordinance. He has contended that 100% tax credit is available to the petitioner and by the conduct of the respondents, whereby such certificate was issued for Tax year 2013, the petitioner is entitled for such exemption. Per learned Counsel Section 65-D is a fiscal incentive, whereby Tax Credit of 100% has been given to the Industries like the petitioner, which is a blanket tax credit of all sorts, including minimum tax, and therefore, the refusal to issue an Exemption Certificate under Section 159 of the Ordinance, 2001 by the respondents is without any lawful authority. Per learned Counsel in the alternative the petitioners case is also premised on the fact that the petitioners are being

discriminated inasmuch as through Finance Act, 2014 and amendment was carried out by insertion of Section 100-C wherein, a certain category of taxpayers were granted tax credit and a corresponding amendment was also made in Section 159 *ibid*, wherein, such category of tax payers have been permitted to obtain an exemption certificate, therefore, the petitioner is also entitled for similar treatment. Learned Counsel has further contended that Section 159 is procedural in nature and merely for the fact that if only relates to Exemption Certificates, the petitioner cannot be deprived of the benefit already granted under Section 65-D *ibid*. In support of his contention he has relied upon *Messrs Nishat Dairy (Pvt) Limited through Company Secretary v. Commissioner Inland Revenue and 4 others (2013 P T D 1883)* upheld in *ICA No 799 of 2013* by a learned Division Bench *vide* judgment dated 18.3.2014.

4. Mr. Ali Almani learned Counsel for petitioners in C.P. No. D-5537 and 5808 of 2014 has contended that their application for issuance of exemption certificates to the Commissioner, Inland Revenue has been rejected by relying upon Circular No. 8/2013 dated 3.9.2013 read with SRO No. 717/2014 which according to the learned Counsel do not apply to the case of the petitioners. Learned Counsel has also referred to Rule 40 of the Income Tax Rules, 2002 and has contended that by virtue of these rules the petitioners are entitled for issuance of Exemption Certificate in the instant matter. Per learned Counsel advance tax paid by a taxpayer is his property and the Government only holds it in trust and therefore, tax credit is nothing but an exemption from payment of tax; hence petitioners are entitled for issuance of Exemption Certificates. In support he has relied upon *Collector of Customs, Customs House, Lahore and 3 others V. Messrs S.M. Ahmed & Company (Pvt) Limited Islamabad (1999 SCMR 138)*, *Messrs Khyber Electric Lamps V. Assistant Collector*

Customs, and 2 others (1996 CLC 1365), Iqbal Hussain V. Federation of Pakistan and 2 others (2010 PTD 2338), Messrs Pak Land Cement Limited, Karachi V. Central Board of Revenue, Islamabad and another (2007 PTD 1524), Lone Cold Storage, Lahore V. Revenue Officers, Lahore Electric Power Co. and others (2010 PTD 2502), Commissioner of Income Tax V. M/s Habib Sugar Mills Ltd. (1993 PTD 343), Indus Jute Mills Ltd. V. Federation of Pakistan and 3 others (2009 PTD 1473), Call Tell (Pvt) Limited and another V. Federation of Pakistan and others (2004 PTD 3032) and Pakistan International Airlines Corporation V. Pakistan through Secretary, Islamabad and 2 others (2015 PTD 245).

5. On the other hand, Mr. Amjad Javed Hashmi learned Counsel for respondent in C.P. No. D-256/2014 has contended that instant petitions are not maintainable as the petitioners have failed to avail alternate remedy as provided in the Ordinance. On merits the learned Counsel has submitted that the concept of tax credit and exemption is dependent entirely on a different set of facts and circumstances, as it is only upon filing of a Tax Return that rights and liabilities are determined. Per learned Counsel until and unless a proper Return is filed by a taxpayer, benefit of Section 65-D cannot be ascertained and granted. Whereas, an Exemption Certificate can only be granted by following the procedure as provided under Section 159 of the Ordinance, 2001 and without filing of a proper Return it cannot be issued. He has further contended that tax credit under Section 65-D and Exemption Certificate under Section 159 are not co-relative and have no nexus with each other as according to the learned Counsel Section 159 of the Ordinance, 2001 applies to Division II and III of Part V and Chapter XII of this Ordinance, and not to Section 65D which falls in Part X of Chapter III of the Ordinance, 2001. Insofar as the plea of discrimination is concerned, learned Counsel has

contended that it is the clear intent of the legislature, whereby Section 100-C has been inserted for entitlement of certificate under Section 159 of the Ordinance, and the petitioner's case is a conscious omission on the part of the legislature. Learned Counsel has further contended that present regime of taxation provides for electronic filing of Returns, and it is only after a Return is filed that the claim under Section 65-D can be examined, whereas, the law has provided a mechanism which cannot be altered, nor anything could be read into. Insofar as reliance on the judgment of the learned Lahore High Court in the case *Nishat Dairy (supra)* is concerned, learned Counsel has contended that the said judgment is persuasive in nature, whereas, proper assistance was not provided to the learned Lahore High Court and therefore, not binding on this Court.

6. We have heard all the learned Counsel and perused the record with their assistance. The precise controversy in these petitions appears to be that the petitioners claim that they qualify for benefit of hundred percent Tax Credit as provided under Section 65-D of the Ordinance, 2001, and therefore are entitled for issuance of exemption certificates under Section 159 of the Ordinance 2001, whereby, they could claim exemption from withholding of advance tax at the import stage under Section 148 of the Ordinance, 2001. In order to appreciate the respective contention(s) it would be appropriate to go through the relevant provisions of Section 65-D and Section 159 of the Income Tax Ordinance, which reads as under:-

3[65D. Tax credit for newly established industrial undertakings. —
 (1) Where a taxpayer being a company formed for establishing and operating a new industrial undertaking for manufacturing in Pakistan sets up a new industrial undertaking, [including a corporate dairy farm], it shall be given a tax credit equal to hundred per cent of the tax payable on the taxable payable [,including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance,] on the taxable income arising from such industrial undertaking for a period of five years beginning from the date of setting up or commencement of commercial production, whichever is later.

(2) Tax credit under this section shall be admissible where—

- (a) the company is incorporated and industrial undertaking is setup between the first day of July, 2011 and 30th day of June, 2016;
- (b) industrial undertaking is managed by a company formed for operating the said industrial undertaking and registered under the Companies Ordinance, 1984 (XLVII of 1984) and having its registered office in Pakistan;
- (c) the industrial undertaking is not established by the splitting up or reconstruction or reconstitution of an undertaking already in existence or by transfer of machinery or plant from an industrial undertaking established in Pakistan at any time before 1st July 2011; and
- (d) the industrial undertaking is set up with hundred per cent equity [raised through issuance of new shares for cash consideration:]

[Provided that short term loans and finances obtained from banking companies or non-banking financial institutions for the purposes of meeting working capital requirements shall not disqualify the taxpayer from claiming tax credit under this section.]

[(3) ***]

(4) Where any credit is allowed under this section and subsequently it is discovered, on the basis of documents or otherwise, by the Commissioner Inland Revenue that any of the [conditions] specified in this section [were] not fulfilled, the credit originally allowed shall be deemed to have been wrongly allowed and the Commissioner Inland Revenue may, notwithstanding anything contained in this Ordinance, re-compute the tax payable by the taxpayer for the relevant year and the provisions of this Ordinance shall, so far as may be, apply accordingly.]

[(5) For the purposes of this section and sections 65B and 65E, an industrial undertaking shall be treated to have been setup on the date on which the industrial undertaking is ready to go into production, whether trial production or commercial production.]

159. Exemption or lower rate certificate. — (1) Where the Commissioner is satisfied that an amount [* * *] to which Division II or III of this Part [or Chapter XII] XII] applies is—

(a) exempt from tax under this Ordinance; or

(b) subject to tax at a rate lower than that specified in the First Schedule,

the Commissioner shall, upon application in writing by the person, issue the person with an exemption or lower rate certificate.

[(1A) The Commissioner shall, upon application from a person whose income is not likely to be chargeable to tax under [* * *] this Ordinance, issue exemption certificate for the profit on debt referred to in clause (c) of sub-section (1) of section 151.]

(2) A person required to collect advance tax under Division II of this Part or deduct tax from a payment under Division III of this Part [or deduct or collect tax under Chapter XII] shall collect or deduct the full amount of tax specified in Division II or III [or Chapter XII], as the case may be, unless there is in force a certificate issued under sub-section (1) relating to the collection or deduction of such tax, in which case the person shall comply with the certificate.

[(3) The Board may, from time to time, by notification in the official Gazette –

(a) amend the rates of withholding tax prescribed under this Ordinance; or

(b) exempt persons, class of persons, goods or class of goods from withholding tax under this Ordinance.]

[(4) All such amendments shall have effect in respect of any tax year beginning on any date before or after the commencement of the financial year in which the notification is issued and shall not be applicable in respect of income on which tax withheld is treated as discharge of final tax liability.

(5) The Board shall place all notifications issued under sub-section (3) in a financial year before both Houses of Majlis-e-Shoora (Parliament).]

7. Perusal of Section 65-D of the Ordinance, 2001, reflects that where a tax payer being a Company formed for establishing and operating a new industrial undertaking sets up a new industrial undertaking , it shall be given a tax credit equal to hundred per cent of the tax payable including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance, on the taxable income arising from such industrial undertaking for a period of five years beginning from the date of setting up or commencement of commercial production, whichever is later. It further provides that this facility is available to industrial undertaking, who are setup from 1st July, 2011 to 30th June, 2016 and such undertakings shall be registered under the Companies Ordinance, 1984 and it further provides that it shall not be established by splitting up or reconstruction or reconstitution of an undertaking already in existence or by transfer of machinery or plant from an industrial undertaking established in Pakistan at any time before Ist July 2011 and such industrial undertaking must be setup with hundred per cent equity, raised through issuance of new shares for cash consideration. Whereas, Section 159 of the Ordinance, 2001 caters to issuance of exemption or lower rate certificate and provides that where the Commissioner is satisfied that an amount to which Division II or III of Part V or Chapter XII applies and is exempt from tax under this Ordinance or subject to tax at a rate lower than that specified in the First Schedule, the

Commissioner shall, upon application in writing by the person issue an exemption or lower rate certificate.

8. The issue in this matter revolves around on the clear reading of the words “tax credit” and “exemption”. A tax credit is an amount of money a taxpayer is able to subtract from taxes owed to the government. The value of a tax credit depends on the nature of the credit, and certain types of tax credits are granted to individuals or businesses in specific locations, classifications or industries. Unlike deductions and exemptions, which reduce the amount of taxable income, tax credits reduce the actual amount of tax owed. <http://www.investopedia.com/terms/t/taxcredit.asp> On the other hand exemption means to be free from, or not subject to, taxation by regulators or government entities. A tax exempt entity can be excused from a single or multiple taxation laws. http://www.investopedia.com/terms/t/tax_exempt.asp. The case of the petitioners is that both these words are analogous and mutually co-related to each other meaning thereby that a person entitled to tax credit under Section 65-D as a matter of right is also entitled for issuance of an exemption certificate as tax credit amounts to exemption as well. On the other hand, the case of the respondents is that Section 159 does not apply to tax credits given under Section 65-D, and it is only applicable in respect of amounts to which Division-II or III of Part V or Chapter-XII applies, and further only to such situations where a person is exempt from tax under this Ordinance. After going through both the provisions as aforesaid, we are of the view that Section 65-D and Section 159 of the Ordinance, 2001 are independent and exclusive in nature, whereas, Section 159 does not cater to tax credit provided under Section 65-D of the Ordinance 2001. It is also a matter of record that when the exemption certificates were refused to petitioners in C.P Nos.5537 and 5808 of 2014, they had not

filed any tax return, whereas, even otherwise in terms of Section 65-D, the respondents have to determine and ascertain that whether or not the petitioner qualifies for entitlement under Section 65-D for claiming hundred per cent tax credit. The benefit under Section 65-D is not a blanket tax credit and there are certain conditions, which are pre-requisite for the petitioners or the tax payers to fulfill before such benefit can be availed by them. Moreover, there is a marked difference in having hundred per cent *tax credit* and *exemption* under the Ordinance. There are provisions in the Ordinance 2001, which in clear terms provides for exemption under the Ordinance from the levy of tax at the import stage or for that matter at the supply stage. In terms of Second Schedule to the Ordinance, 2001, there are certain categories of tax payers, who are directly either exempted from levy of tax or are subject to a lower rate of taxation, but are always subject to issuance of exemption certificate and for which proper categorization has been made in Section 159 *ibid*. In fact reliance on insertion of Section 100C through the Finance Act, whereby, Non Profit Organizations, Trusts or Welfare Institutions, have been allowed tax credit, and a corresponding amendment has been made in Section 159 of the Ordinance, by insertion of clause (c) in sub section (1) goes against the petitioners, as it does not discriminates them inasmuch the same is in respect of an altogether different class of tax payers, but affirms the position that it is a conscious legislative intent that tax credit under section 65D has been left out from the ambit of Section 159 *ibid*, hence not entitled for issuance of an exemption certificate.

9. The legislative intent appears to be clear in this regard and if the intent would have been to give exemption to the petitioners as against tax credit, then it was not required to deal them independently under Section

65-D, burdening them to avail tax credit, rather they would have been directly granted tax exemption under the Ordinance, (See Second Schedule to the Ordinance 2001), wherein, certain category of tax payers have been either exempted or subjected to lower rate of taxation. It is in this context that the present controversy is to be decided and we are of the view that merely for the fact that petitioners claim to be entitled for hundred percent tax credit, they cannot be granted an exemption certificate without even filing of a tax return. Even if a tax return is filed, that has to be scrutinized and ascertained as to whether the petitioners or the tax payers are entitled for any tax credit and further under subsection (4) of Section 65 it has also been provided that if any credit is allowed and subsequently it is discovered that on the basis of documents or otherwise any of the conditions specified in the Section were not fulfilled, the credit originally allowed shall be deemed to have been wrongly allowed and the Commissioner Inland Revenue may re-compute the tax payable by the tax payer and may recover the same by applying the relevant provisions of the Ordinance so far may be applicable.

10. A learned Division Bench of this Court in the case of ***Meezan Islamic Fund and others v. D.G. (WHT) FBR & Others*** (**2016 PTD 1204**) had the occasion to examine the provision of Section 159 of the Ordinance, 2001 viz a viz Clause 47B of Part IV of Second Schedule and a circular issued by FBR requiring all the income funds to obtain exemption certificates notwithstanding the fact that the exemption was directly provided and embodied under clause 47B *ibid*. The judgment authored by the then Hon'ble Chief Justice of this Court Mr. Faisal Arab. J (as his lordship then was and now an Hon'ble Judge of the Apex Court) has dealt with the issue and has been pleased to observe that a person who want to seek benefit under Clause 47B may be such person who is not entitled

for exemption or in the past may have been so entitled but for some reason had lost his entitlement. The relevant finding is as under;

From the above discussion, it is evident that the concession granted under Clause 47B of Part IV to the second Schedule of the Income Tax Ordinance, 2001 cannot be out-rightly availed by the withholder from the withholder on account of the bar contained in Section 159(2) unless the withholder presents a valid exemption certificate issued to him under Section 159(1) of Income Tax Ordinance, 2001. There appears to be a sound logic behind this procedural requirement as the person who want to seek benefit under Clause 47p may be such person who is not entitled to the benefit or in The past may have been so entitled but for some reason had lost his entitlement. Therefore, it has been made mandatory for him under Section 159(2) to first demonstrate to the withholder that he holds a valid exemption certificate. In Clause 47B of Part IV to the second Schedule of the Income Tax Ordinance, 2001 mere mention that the provisions of Sections 150, 151 and 233 shall not apply to certain category of persons does not mean that to avail such concession the provisions of Section 159 have been made inapplicable. On the contrary requirement of obtaining exemption certificate has been made mandatory under Section 159(2) for all payments that fall within the ambit of Division III of Part V of Chapter X or under Chapter XII of the Income Tax Ordinance aid Sections 150, 151 and 233 are part of said Chapters. In the circumstances, the challenge to the impugned Circular dated 12.05.2015 fails. All these 280 petitions are dismissed.

11. Insofar as, reliance on the Judgment of learned Lahore High Court in the case of *Nishat Dairy (Supra)*, we may observe that the same being persuasive in nature and not binding on us and we for the aforesaid discussion are not inclined to agree with the conclusion drawn by the learned Lahore High Court in the said judgment and approved in Intra Court Appeal.

12. In view of hereinabove facts and circumstances of the case on 29.04.2015, we had dismissed all these petitions by means of a short order and these are the reasons thereof.

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