ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No. 719 / 2015 a/w
SUIT No. 1436 / 2016

DATE	ORDER WITH SIGNATURE OF JUDGE

SUIT NO. 719 / 2015

For hearing of CMA No. 6897/2015.

SUIT NO. 1436 / 2016

For hearing of CMA No. 9542/2016.

12.12.2019.

Mr. Hussain Ali Almani Advocate for Plaintiffs.
Mr. Osman A. Hadi Assistant Attorney General.
Mr. Gazain Zafar Magsi Advocate for Defendant (NCC).
Mr. Ameer Bakhsh Metlo Advocate for FBR
in Suit No. 1436/2016.
Mr. Shahid Ali Qureshi along with Mr. Saleem-ul-Haq
Advocate for Defendant in Suit No. 719/2015.

In both these Suits the Plaintiff's case is that no Capital Gain Tax is payable under Section 37-A of the Income Tax Ordinance, 2001 ("2001 Ordinance") pursuant to the sale transactions of shares entered into by the Plaintiffs. Though on the last date of hearing, learned Counsel for the Plaintiffs had made extensive arguments; however, while doing so he had relied upon a judgment passed by a learned Division Bench of this Court in the case of ***Khalid Mansoor V. Federal Board of Revenue and 3 others*** **(2016 PTD 1813)** and after going through the said Judgment, this Court was of the view that in the present facts and circumstances of these cases the judgment fully applies to the Plaintiffs case. As an indulgence, the Defendants Counsel were given time and to come prepared and satisfy as to why the said judgment is not applicable to the Plaintiffs case in hand. Today, both learned Counsel for the

Defendants / Department have conceded that insofar as the peculiar facts of these cases are concerned, the judgment has been passed on somewhat identical facts and therefore, the same would apply. However, at the same time, both learned Counsel have also argued that the view taken by the learned Division Bench is incorrect and is against the provisions of the 2001 Ordinance, therefore, this Court may pass an independent judgment / order.

I have heard all the learned Counsel and perused the record. The precise case of the Plaintiffs is to the effect that they were holding shares of Engro Fertilizer Limited (being a wholly owned subsidiary of the Plaintiff), which was at the relevant time, not a listed Company / Public Company; but thereafter, it was listed on the Stock Exchange on 17.01.2014. Subsequently, the Plaintiff in Suit No.719 of 2015 (in 2015) showed intention of selling 7% of such shares to a select group of Investors, and in Suit No.1436 of 2016 (in 2016) 24% in the same manner. Since the transaction of sale of shares of a Public Company is to be routed through Defendant No. 2, i.e. National Clearing Company of Pakistan Limited, they on such sale of shares, made an attempt to deduct capital gain tax as prescribed under Section 37-A of the 2001 Ordinance read with Section 100(B) and Division VII of Part I of the 1st Schedule to the 2001 Ordinance. The Plaintiffs being aggrieved filed these Suits before this Court and were granted ad-interim orders on 4.5.2015 and 7.6.2016 respectively whereby NCCL was restrained from deducting any such tax upon furnishing Bank Guarantees to the Nazir of this Court of the amount equivalent to the Capital Gain Tax being demanded from them.

In terms of Section 37-A of the 2001 Ordinance, a Capital Gain Tax is payable on disposal of securities and the period for holding such

securities as well as the applicability of the rates and exemption if any, is relatable to the holding period of such security. Sub-Section (2) of Section 37-A provides the holding period of a security for the purpose of Capital Gain Tax, whereas, Sub-Section (3) thereof states that security means share of a public company, whereas, a public company is defined in s.2(47) (b) and means a company whose shares were traded on a registered stock exchange in Pakistan. The learned Division Bench in the cited case of ***Khalid Mansoor (Supra)*** has dealt with that almost identical facts which have been recorded in Para 5 of the said Judgment, whereas, the findings are given in Paras 9 & 10. It would be advantageous to refer to such portion of the aforesaid judgment which reads as under:-

> "5. Learned counsel for the petitioner submitted that the petitioner owned a number of shares in Engro Powergen Qadirpur Ltd., (herein after referred to as the "Company"). The said shares were acquired some time in 2011. At that time the Company was not listed but subsequently it obtained a listing on the Karachi Stock Exchange. This was sometime in October, 2014. Since the shares had been listed, they were held by the petitioner in the relevant account maintained on the electronic system that is used for such purposes. The petitioner disposed off his shares through a broker (pro forma respondent No.4) in January 2015. Learned counsel for the petitioner emphasized that the petitioner had held the shares continuously from 2011 till disposal. It was submitted that much to the petitioner's surprise the respondent No.2, applying section 37A read with section 100B and the Eighth Schedule to the petitioner's transaction, deducted an amount of Rs.1,617,977/- from the sale proceeds received on the disposal of the shares. This was the tax payable in terms of section 37A at the relevant rate set out in Division VII. Learned counsel submitted that in the facts and circumstances of the petitioner's case, the disposal was not liable to the payment of any tax in terms of section 37A and that the deduction was contrary to law. Suitable relief was prayed for accordingly.
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> 9. As noted at the outset, section 37A is a charging provision since it imposes a tax on capital gains made on the disposal of securities. The rules of interpretation applicable to charging provisions in fiscal statutes are well established and no reference to earlier case law is necessary. It is fundamental to this branch of the law that the charging provision is to be construed strictly and literally, and in favour of the taxpayer and against the Revenue. Furthermore, if two interpretations are reasonably available when construing a charging provision, the one more favorable to the taxpayer is to be adopted. All this is trite law, and during the course of the hearing learned counsel for FBR, quite properly, did not either dispute these principles or challenge their applicability to section 37A. When the section is examined, for present purposes the crucial part is subsection (2). This determines the "holding period" which in turn determines the rate to be applied to the capital gains made on the disposal of the security. What is of crucial importance is to note that, as is clear from the subsection, the "holding period" is with reference to a "security" and not otherwise. Now, the latter term has been given a specific meaning for purposes of section 37A. This is contained in subsection (3) and has already been

> alluded to above. Having considered the matter, in our view, for the charge in section 37A to be complete, and thus the tax levied in terms thereof to be payable, the instrument in question (here shares of the Company) must be a "security" for the entire "holding period". In other words, the relevant instrument must be (i) a "security" on the date on which it was acquired, and (ii) a "security" on the date on which it is disposed off. Both of these conditions must be met and applicable for the charge to be complete. Since "security" has a specific meaning for purposes of section 37A, this means that the instrument in question must be a "security", as defined, on both the dates. As presently relevant, this meant that the shares of the company ought to have been listed on a stock exchange on the date on which the petitioner acquired the same and the date on which he disposed them off. Both of these conditions had to be met for there to be a "holding period" within the meaning of subsection (2) and, therefore, a valid levy in terms of section 37A. In our view, this conclusion follows necessarily from the relevant principles of interpretation. Subsection (2) has to be read and applied literally, and the "holding period" determined accordingly. The term "security" as used therein can only have, and be given, its defined meaning. Furthermore, and in any case, even if section 37A were susceptible to any other (reasonable) interpretation as might bring the petitioner within the four corners thereof, any such interpretation would have to give way to the interpretation more favorable to the taxpayer, again on the basis of the principles noted above.
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> 10. Now, it is not in dispute that on the date on which the petitioner acquired the shares of the Company, it was not listed on any stock exchange. This fact is also confirmed by the undisputed position of the petitioner as a member of the Company on the date on which its shares first got listed on the Karachi Stock Exchange. Quite obviously, all such persons had to have become members of the Company on a date prior to the date of the listing, and it is irrelevant for present purposes what that date was for any particular member. Thus, one of the necessary conditions for there to be a "holding period" within the meaning of subsection (2) was missing. If there was, in law, no "holding period", there could be no levy of tax in terms of section 37A. Therefore, as a matter of law, the petitioner was not liable to the payment of any tax in terms of the section on the disposal of the shares in question. It follows that the deduction made by respondent No.2, acting in terms of the provisions noted above, was contrary to law and is liable to be set aside. The petitioner is entitled to relief accordingly."

After going through the above findings of the learned Division Bench, I am of the view, that notwithstanding the period for which the securities were held by the Plaintiffs in these cases, the pivotal question is as to whether the shares in question are covered by the definition of security as provided in Sub-Section (2) of Section 37-A read with s. 2(47) (b) ibid. The learned Division bench has come to a conclusion that the relevant instrument must be a security on the date it was acquired and must also be a security on the date on which it is disposed of and both these conditions must be met and applicable for the charge to be completed. In these listed Suits it does not seems to be in dispute that the shares of company being sold by the Plaintiffs, at the relevant time

were not of a public company; hence, not a security as when they were acquired; notwithstanding that though when sold, they were of a public Company. However, as decided in the aforesaid judgment, the provisions of s.37A are not attracted in sale of such shares, whereas, as of now, there are very clear directions to NCCPL in Para 11 of the said judgment which are to be followed by them in such cases.

In view of hereinabove facts and circumstances, following legal issues are settled for adjudication in terms of Order 14 Rule 2 CPC:-

1) Whether the Plaintiffs are liable to paying Capital Gain Tax on sale of shares in question?

2) What should the Decree be?"

Issue No. 1 is answered in negative, whereas, the Suits are decreed to the effect that the transaction of sale of shares in question is not liable to capital gain tax under s.37A of the 2001 Ordinance, whereas, Nazir of this Court is directed to discharge the Bank Guarantees furnished by the Plaintiffs in both these cases pursuant to passing of ad-interim orders dated 04.05.2015 in Suit No.719/2015 and 07.06.2016 in Suit No.1436/2016.

Suit(s) are decreed accordingly. Office is directed to prepare decree.

J U D G E

ARSHAD/