

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.969 of 2016 A/W
Suit Nos. 1432, 1658, 2756 of 2016 & 255 of 2017

Order with signature of Judge

Suit No.969 of 2016

For hearing of CMA No.11593 of 2019.

Suit No.1432 of 2016

For hearing of CMA No.11592 of 2019.

Suit No.1658 of 2016

For hearing of CMA No.11591 of 2019.

Suit No. 2756 of 2016

Suit No.255 of 2017

For hearing of CMA No.1400 of 2017.

18.12.2019

Mr. Anas Makhdoom along with Mr. Ahmed Farhaj, advocate for the Plaintiff in Suit Nos. 969, 1658 & 1432 of 2016.

Mr. Muhammad Mushtaq, advocate for the Plaintiff in Suit No.2756 of 2016.

Dr. Shahnawaz Memon, advocate for the Defendant in Suit No.255 of 2017.

Mr. Javed Hussain, advocate holds brief for Mrs. Masooda Siraj, advocate for Defendant.

Mr. Mirwais Khan, advocate holds brief for Mr. Sohail Muzaffar, advocate for the Defendant.

Mr. Kashif Nazeer, advocate for the Defendant in Suit No.969 of 2016.

Mr. Saleem-ul-Haq, advocate holds brief for Mr. Amjad Javed Hashmi, advocate for Defendant.

Mirza Nadeem Taqi, advocate for Defendant in Suit No.2756 of 2016.

Mr. Osman H. Hadi, Assistant Attorney General.

Mr. Anam-ul-Haq Safdar, Appraising Officer, MCC-East.

In all listed Suit(s) there is one common issue, in that the Plaintiffs were aggrieved by the action of Defendants / Commissioner Inland Revenue concerned, whereby, issuance of exemption certificate(s) in terms of Section 65D of the Income Tax Ordinance, 2001 read with Section 148 and 159 ibid further read with SRO 947(I)/2008 dated 5.9.2008 was refused on the ground that in case of *tax credit* under Section 65D no exemption certificate can be granted. On 29.4.2016 in Suit No.969/2016, 27.1.2017 in Suit No.255/2017, 17.1.2017 in Suit No.2756/2016, 10.6.2016 in

Suit No.1432/2016 and 22.7.2016 in Suit No.1658/2016, by way of ad-interim order(s), the consignment(s) imported by the Plaintiffs were allowed release against furnishing of Bank Guarantees of the disputed amount to the Nazir of this Court. Thereafter, except in Suit No.255/2017, on 29.10.2018, such Bank Guarantees were ordered to be encashed to the extent of 50% of the disputed amount in compliance of the Judgment of the Hon'ble Supreme Court in the case reported as ***Searle Solutions (Pvt) Limited and other v Federation of Pakistan & Others*** (2018 SCMR 1444).

It appears that the controversy went before the Hon'ble Supreme Court pursuant to a judgment of the Lahore High Court as well as the learned Islamabad High Court which now stands decided in the case reported as ***H. M. Extraction Ghee & Oil Industries (Pvt) Ltd V. Federal board of Revenue*** (2019 SCMR 1081).

After passing of such judgment, the Plaintiffs in some Suits have filed their applications for return and or discharge of Bank Guarantees, with further prayers that Department be directed to refund / adjust their excess paid tax pursuant to filing of their annual returns.

All Learned Counsel for the Plaintiffs today submit that though the Hon'ble Supreme Court has concurred with the view of the Department; however, at the same time since subsequently Tax Returns have been filed and it is the case of the Plaintiffs as well as tax payers that the amount already paid is an excess of their liability; hence, the same has to be refunded. Copies of returns have also been filed in some cases and reliance has been placed on Para Nos. 18 & 19 of the said judgment for seeking disposal of these matters in view thereof. Para 18 and 19 reads as under:-

“18. The foregoing aspect of the matter has indeed caused us grave concern. The legal position may be what it is and as described above, but one consequence is that the State does seem to have gathered, and accumulated, sums to which it is (at least on the record before us) not entitled. In other words it has been enriched, even if temporarily, in an unfair manner at the expense of the taxpayer. (This is not, we may clarify, a reference to the well-known doctrine of unjust enrichment which, strictly speaking, may not be applicable here.) We are reminded here of what was said by this Court in *Pfizer Laboratories Ltd. v. Federation of Pakistan and others* PLD 1998 SC 64 (“Pfizer case”). The facts there were that the taxpayer had made payments of tax which it was not obliged to on account of an exemption. Its claim for a refund was however rejected as being barred by limitation. After considering a number of cases it was, inter alia, observed as follows (pg. 89; emphasis supplied):

“10. The above resume of the case-law of Indian, English and Pakistani jurisdictions indicates that the latest judicial trend is to *deprecate and to discourage* withholding of a citizen’s money by a public functionary on the plea of limitation or on any other technical plea if it was not legally payable by him....”

The continued retention of the advance income tax collected from the taxpayers before us can, it seems to us, not unfairly be characterized as the “withholding of a citizen’s money by a public functionary on ... [a] technical plea”, when, practically speaking, there never was any (ultimate) liability to pay tax.

19. In the Pfizer case, it was possible for this Court to remand the matter to the concerned authority for reconsideration of the taxpayer’s claim. Here, we have been unable to conclude that the 2001 Ordinance offers a similar or equivalent solution to what does appear to be a genuine practical grievance. However, it seems to us that the following directions can, and ought to, be given: (1) in respect of the tax years already concluded, if the taxpayer has filed its return and, as on the date of this judgment, no amendment (or other similar) proceedings have been launched or are pending in respect of such return, then the amounts collected under s. 148 must be refunded in full within 30 days of the date hereof and an appropriate report filed with the Office of this Court; and (2) in respect of the present (and future, if applicable) tax year(s) (or any past tax year in respect of which a return has not yet been filed), if no amendment (or other similar) proceedings are launched within 120 days of the filing of the relevant return, then the amounts collected under s. 148 must be likewise refunded within 30 days thereof. A failure to abide by these directions may result in suitable action being taken against the concerned Member FBR and Commissioner Inland Revenue.”

After issuance of notices of the applications filed in various Suits, today counter affidavit has been filed in Suit No.2756/2016 by the Inland Revenue department wherein the contention of the Plaintiff to the extent of return and or discharge of Bank Guarantee has been endorsed, whereas, in respect of excess or refundable amount it is stated that such refund and or adjustment has already been allowed by them in respect of other tax years.

Similarly, counter affidavit has also been filed by the Customs department and it is stated that matter pertains to the Inland Revenue department insofar as return of Bank Guarantee or refund is concerned.

In view of hereinabove facts and circumstances of this case, since the controversy has been decided by the Hon'ble Supreme Court; therefore, all these matters are disposed of in terms of the said judgment and the concerned Commissioner Inland Revenue shall act accordingly more specifically as per Paras 18 & 19 of the said judgment, whereas, Nazir of this Court is directed to discharge and or release the pending Bank Guarantees to the Plaintiff(s) in accordance with rules.

J U D G E