

THE HIGH COURT OF SINDH, KARACHI

Before:

Mr. Justice Adnan Iqbal Chaudhry.

- Suit No.1717 of 2015 : The Searle Company Limited and 05 others versus Federation of Pakistan and others.
- Suit No.2600 of 2015 : Feroz 1888 Mills Limited versus Federation of Pakistan and others.
- Suit No.2439 of 2016 : General Tyre & Rubber Co., of Pakistan Limited versus Federation of Pakistan and others.
- Suit No.2573 of 2016 : JS Global Capital Limited versus Federation of Pakistan and others.
- For the Plaintiffs : M/s. Abdul Ahad, Uzair Qadir Shoro and Hamza Waheed, Advocates.
- For the Defendants : M/s. Syed Mohsin Imam Wasti [Defendant 3 in Suit No.2573/2016] and Khilji Bilal, Assistant Attorney General for Pakistan alongwith Mr. Mansoor Ahmed, MIS Officer, FBR.
- Date of hearing : 11-04-2022
- Date of decision : 11-04-2022

JUDGMENT

Adnan Iqbal Chaudhry J. - All these Plaintiffs pray for a declaration that section 5A of the Income Tax Ordinance, 2001, as inserted through section 5(3) of the Finance Act 2015, is *ultra vires* the Constitution of Pakistan. In addition, the Plaintiffs also pray for consequential relief.

2. On 07-05-2019 the following issues were settled in these suits :-

- (1) *Whether the amounts maintained in the free reserves of public companies constitute income within the meaning of Entry No. 47, Fourth Schedule of the Constitution ?*

(2) *Whether Section 5A of the Income Tax Ordinance, 2001 as inserted through Section 5(3) of the Finance Act, 2015 is ultra vires the provisions of the Constitution of Pakistan, 1973 ?*

(3) *What should the decree be ?*

3. While these suits were pending, the legal question framed as issue No.2 above has been answered in the affirmative by a learned Division Bench of this Court in *Sapphire Textile Mills Ltd. versus Federation of Pakistan* (2021 PTD 971) to hold that:

“i. It is hereby declared that insertion of Section 5A of the Income Tax Ordinance 2001, including amendments thereto from time to time, does not fall within the parameters delineated per Article 73 of the Constitution of Pakistan, 1973, hence, the provision impugned is found to be *ultra vires* of the Constitution, and is hereby struck down.

ii As a consequence, any show-cause / demand notices or constituents thereof, seeking enforcement of section 5A of the Income Tax Ordinance, 2001, are hereby set aside.”

Given the aforesaid, learned counsel for the Plaintiffs confine the relief in their respective suits to a similar declaration along with a consequential injunction and drop all other relief.

4. On a query, learned counsel inform that the Hon’ble Supreme Court has granted leave to appeal against the judgment in *Sapphire Textile*, but that such appeal has yet to be decided. However, it is settled law that a leave-granting order simpliciter passed by the Supreme Court is not precedent under Article 189 of the Constitution as it does not make an enunciation of law.¹ Therefore, thus far, the judgment delivered in *Sapphire Textile supra* by a learned Division Bench of this Court is binding on this single Bench. Resultantly, the suits are similarly decreed as follows:

(a) It is hereby declared that insertion of section 5A of the Income Tax Ordinance 2001, including amendments thereto from time to time, does not fall within the parameters delineated per Article 73 of the Constitution of Pakistan, 1973, hence, the

¹ *Muhammad Tariq Badar v. National Bank of Pakistan* (2013 SCMR 314).

provision impugned is found to be *ultra vires* of the Constitution of Pakistan.

- (b) The defendants are restrained from taking any action against the Plaintiffs on the basis of section 5A of the Income Tax Ordinance, 2001.

SHABAN&SADAM

JUDGE