

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

CP D 8569 of 2018

International Brands Limited

vs.

Federation of Pakistan & Others

(And connected matters, particularized in the Schedule¹ hereto.)

Messrs. Jam Zeeshan, Khalid Javed Khan, Farogh Naseem, Ovais Ali Shah, Rashid Anwar, Uzair Qadir Shoro, Umer Akhund, Marium Riaz, Umer Ilyas Khan, Fizzah Bucha, Ameer Haider Khan, Sami-ur-Rehman Khan, Fahad Khan, Ahmed Hussain, Imran Iqbal Khan, Adil Saeed, Salman Aziz, Faiz Durrani, Ghulam Muhammad & Saima Anjum, Advocates for Petitioners.

Messrs. Shahid Ali Qureshi, Huma Sodher, Rana Sakhawat Ali, Ameer Bakhsh Metlo, S. Ahsan Ali Shah, Saad Shafiq Siddiqui, Muhammad Aqeel Qureshi, Tauqeer Ahmed Seehar, Hafeezullah, Fahim Ali, Imtiaz Mansoor Solangi, Sajjad Ali Solangi, Zain Mustafa Soomro, Kashif Nazeer, Manzar Hussain Memon, Irfan Mir Halepota, Faheem Ali, Farha Naz Qazi, Khurram Shehzad, Nadir Hussain Tunio, Bushra Zia for Zubair Qureshi, Ali Tahir Soomro, Tahir Khalil, Barkat Ali Metlo, Imran Ali Metlo, Fayaz Ali Metlo, Arshad Ali Tunio, Muhammad Idrees Rahimoon, Preetam Das, Abdul Mujeeb Zeeshan, Ayaz Sarwar Jamali, M. Taseer Khan Advocates, G.M. Bhutto (Assistant Attorney General), Qazi Ayazuddin (Assistant Attorney General) for the Respondents.

Dates of hearing : 14.02.2023 15.02.2023 16.02.2023
22.02.2023 23.02.2023 27.02.2023
28.02.2023

Date of announcement : 28.02.2023

¹ The Schedule hereto shall be read as an integral constituent hereof.

JUDGMENT

Agha Faisal, J. The issue before us was the withdrawal of exemption from taxation in respect of inter-corporate dividends. It was the petitioners' case that the exemption ought to perpetuate *ad infinitum*, notwithstanding the omission thereof in the statute. The respondents disagreed and argued that the exemption remained valid during its tenancy on the statute book and under no stretch of interpretation could it be construed to perpetuate infinitely, especially since the same had consciously been omitted from the statute.

The present petitions were advocated to the remit delineated *supra*² and dismissed *vide* short order, announced in Court at the conclusion of the final hearing on 28.02.2023. These are the reasons for our short order.

Factual context

2. The benefit of group relief was introduced into the Income Tax Ordinance 2001 ("Ordinance") by insertion of section 59B³ ("59B") therein, *vide* the Finance Act 2004. Through successive amendments the scope of the provision was varied and it remains on the statute book till date. The primary benefit conferred by the provision is surrendering of losses, *inter se* group companies.

3. The Finance Act 2007 introduced Clause 103A⁴ ("103A") to the Second Schedule of the Ordinance and provided an exemption from tax to income derived from inter-corporate dividends subject to certain qualifications stipulated therein. In its original verbiage, Clause 103A extended the exemption to income derived from inter-corporate dividends to companies entitled per sections 59AA or 59B, however, *vide* the Finance Act 2016 the expression "*or section 59B*" was omitted from Clause 103A. Therefore, since the coming into effect of the Finance Act 2016 the benefit of exemption, in respect of inter-corporate dividends, was consciously withdrawn by the

² It merits mention that no other issue was placed / agitated before this Court, irrespective of the pleadings in the respective petitions.

³ 59B. Group relief. (1) Subject to sub-section (2), any company, being a subsidiary or a holding company, may surrender its assessed loss ["as computed in sub-section (1A)"] (excluding capital loss) for the tax year (other than brought forward losses and capital losses), in favour of its holding company or its subsidiary or between another subsidiary of the holding company:

⁴ Any income derived from inter-corporate dividend within the group companies entitled to group taxation under section 59AA or section 59B subject to the condition that return of the group has been filed for the tax year.

Parliament for group companies entitled to group taxation under section 59B of the Ordinance.

4. Petitions were filed; actuated by mere private correspondence of group companies. One group company wrote to another stating its intent to deduct tax and the recipient company predicated its writ petition thereupon. In other instances, show cause notices were issued by the department and instead of submitting to the statutory hierarchy, the petitioners opted to approach this Court directly for adjudication of the issue raised in the respective notices. In either instance *ad interim* orders were obtained on the first dates of hearing and consequently the collection of public revenue was frustrated. These orders subsisted until 28.02.2023, when these petitions, along with all pending applications, were dismissed.

Respective arguments

5. It was the petitioners' case⁵ that the exemption⁶ ought to perpetuate indefinitely for groups that had been formed per section 59B, in order to take benefit of Clause 103A, prior to Finance Act 2016. It was the crux of their argument that by reorganization as holding company / subsidiaries, in the manner contemplated by section 59B, the petitioners had acquired a vested right, being their entitlement to exemption from taxation in respect of inter-corporate dividends, and the vesting of such entitlement may be deemed to be a past and closed transaction so that the withdrawal of the exemption, vide the Finance Act 2016, ought not to have any effect in their instances.

6. It was the Federal Board of Revenue's case⁷ that the Parliament was endowed with the authority to confer and withdraw concessions and no case was made out to extend any exemption post omission thereof from the statute book. The learned counsel argued to demonstrate that while the petitioners enjoyed the exemption during its tenancy, however, no vested right existed to perpetuate the exemption perpetually and that also post clear and conscious withdrawal thereof by the Parliament.

⁵ Articulated by Mr. Jam Zeeshan, Mr. Khalid Jawed Khan, Dr. Farogh Nasim & Mr. Ovais Ali Shah in seriatim; adopted by the remaining learned counsel for the petitioners.

⁶ Granted and subsequently withdrawn per Clause 103A of the Second Schedule to the Ordinance.

⁷ Articulated by Mr. Shahid Ali Qureshi, Dr. Huma Sodher and Mr. Sakhavat Ali; adopted by the remaining learned counsel for the respondents and the learned Assistant Attorney General.

Scope of determination

7. Heard and perused. It is stated that prior to the Finance Act 2016 the petitioners had morphed into groups, per the contemplation of section 59B of the Ordinance, to avail the benefit so conferred. The benefit of the pertinent exemption from taxation to inter-corporate dividends, vide Clause 103A, subsisted with effect from the Finance Act 2007 till the Finance Act 2016. In order to succinctly adjudicate the petitioners' grievance, the question to be determined by us is whether the petitioners had acquired a vested right, entitled to protection as a past and closed transaction, to enjoy exemption from payment on tax on inter-corporate dividends *ad inifinitum*.

Report of the Task Force

8. The first argument articulated on behalf of the petitioners was that the omission of the relevant exemption be dis-applied in the instance of the petitioners on the basis of a report of a task force on review of tax laws on holding companies dated 10.03.2007 ("Report"). The petitioners' counsel insisted that pursuant to inferences drawn therein the omission of the relevant exemption in the statute ought to be disregarded. Respectfully, we do hereby express our inability to subscribe to such a proposition as the Report is at best an expression of opinion of the relevant members and under no circumstances could it be construed to override a statute. Mr. Shahid Ali Qureshi rightly defined the Report, at best, as a policy statement and even then it did not proffer any legislative intent. Even if the Report had been a policy statement, although nothing was placed before us to suggest if it ever was, the same could not be given any lawful sanction unless codified in law.⁸

Package

9. It was next argued that the inclusion of the exemption from payment of inter-corporate dividends was an integral constituent of group relief, provided vide section 59B of the Ordinance, and that the said benefit could not be excised during the tenancy thereof.

10. It is apparent that the concept of group relief was inserted in the Ordinance vide the Finance Act 2004 and subsists till date. The exemption in itself was never a constituent of section 59B of the Ordinance and had been

⁸ *Metco Shipbreakers vs. Pakistan* reported as 1996 MLD 144.

independently conferred vide Clause 103A, subsisting with effect from the Finance Act 2007 till the Finance Act 2016.

11. It is the prerogative of the Parliament to confer and withdraw fiscal benefits, in the interests of the public at large. It is observed that no irrevocable entwining of Clause 103A with section 59B of the Ordinance could be demonstrated before us, hence, the argument that the exemption ought to subsist during tenancy of section 59B found no favor before us.

Discrimination

12. The petitioners claimed that since Clause 103A, in its original form, extended the benefit to qualifying entities under sections 59AA and 59B of the Ordinance, therefore, excising 59B therefrom amounted to discrimination.

13. Section 59AA extends certain benefits to holding companies and hundred percent owned subsidiaries to be taxed as one fiscal unit. Whereas, no concept of one fiscal unit exists in section 59B, wherein benefits including surrendering of losses is offered to qualifying holding / subsidiary companies. Upon the anvil of intelligible differentia⁹ the categorization in each provision is demonstrably mutually exclusive. Therefore, no case for discrimination could be set forth before us.

Curative or remedial legislation

14. Clause 103C¹⁰ was added to the Second Schedule of the Ordinance vide the Finance Act 2019 and omitted therefrom vide the Finance Act 2021. During the subsistence of this provision, inter-corporate dividends were once again given tax exemption. It was the petitioners' contention that the inclusion of Clause 103C amounted to curative / remedial legislation and it ought to afford such exemption to the present litigants, agitating the matter since omission of Clause 103A vide Finance Act 2016.

15. The Supreme Court recently had occasion to revisit the issue of curative / remedial legislation in *Fawad Mukhtar*¹¹ and observed as follows:

"14. Now, the clause was an exemption and, by definition, an exemption has a beneficial effect. But, as correctly pointed out by learned counsel for the

⁹ Per *Muhammad Ali Mazhar J* in *Syed Azam Shah vs. Pakistan* reported as 2022 SCMR 1691; Per *Umar Munib Akhter J* in *CIR Peshawar vs. Tariq Mehmood* reported as 2021 SCMR 440.

¹⁰ Dividend income derived by a company, if the recipient of the dividend, for the tax year is eligible for group relief under section 59B.

¹¹ Per *Munib Akhtar J* in *Fawad Ahmad Mukhtar vs. CIR* reported as 2022 SCMR 454.

department, simply because a statutory provision has a beneficial effect does not mean that it automatically has, or can have, retrospective effect. If this were so, then that would be true for all exemptions, i.e., any exemption added to or inserted in any of the Parts of the Second Schedule could be claimed to have retrospective effect more or less automatically. This can hardly be the correct position in law. Especially in the context of income tax law, it would tend to run counter to the fundamental principle already noted, that each tax year is a separate unit of account and taxation. Of course, the principle is not sacrosanct. It can be overridden by the legislative will. But that must be done either expressly or shown to be the necessary intendment of the provision sought to be applied retrospectively. There is nothing in either Clause 103B or the Finance Act, 2010 that expressly gave it retrospective effect. Therefore the taxpayer-appellants have to show that the clause was necessarily intended to have retrospective effect...

19. It will be seen from the foregoing that Clause 103B did not remedy any defect or cure any ambiguity or resolve any problem as regards enforcement or payment of tax on a dividend in specie, for the simple reason that the postulated problem or deficiency simply did not exist. The matter of recovery or enforcement was crystal clear. There was therefore nothing to which the curative, remedial and/or declaratory principles relied upon could attach, so as to give retrospective effect to Clause 103B. The entire premise of the case sought to be made is, with respect, without any conceptual or legal basis."

16. It has been maintained that remedial and curative legislation is enacted to *correct* existing law, in the interests of the public. Generally, such legislation is enacted to cure defects in common law or to remedy what the Parliament might consider to be a problem in an existing statute. It is apparent that the plea of the petitioners falls under neither category. If mere initiation of litigation is construed to always render any future variation in law as remedial / curative then the entire premise of fiscal legislation may be imperiled. Mr. Shahid Ali Qureshi convincingly demonstrated that the benefit of exemption from taxation in respect of inter-corporate dividends was extended by the Parliament from time to time and the manifest legislative intent was always for the exemption to subsist only for the period for which it was conferred.

Vested right

17. It was concluded by the petitioners' learned counsel that the exemption granted thereto vide Clause 103A had to be construed as a vested right in the nature of being past and closed, therefore, no interference in the enjoyment of the exemption was warranted notwithstanding the omission of the relevant exemption. It was insisted that any *group* constituted in reliance upon the benefit of section 59B of the Ordinance was entitled to the exemption, albeit withdrawn, as de constituting the *group* would entail hardship and expense. The respondents argued that the Parliament grants and withdraws fiscal exemptions upon consideration of national interests and under no circumstances could any such exemption be construed to be indefinite.

18. There is ample authority¹² interpreting the remit of rights, vested rights and past & closed transactions, however, a collative edict in such regard is the Division Bench judgment of this Court in *Shahnawaz*¹³. A past and closed transaction is perhaps the highest pedestal of a right, as recognized by *Shahnawaz*. It is settled law that Parliament is aware of statutory positions and undertakes an amendment to alter the status, existing prior to the amendment having taken place¹⁴. So the Parliament conferred a benefit and subsequently recalled it. The pertinent exemption, vide Clause 103A, was always supplemental to the crux of section 59B and no case has been established before us to consider the alteration of corporate structure to confer any indefinite benefit upon the relevant parties.

19. The petitioners' learned counsel could not demonstrate that Clause 103A conferred any vested right, in the nature of a past and closed transaction, upon the petitioners; to perpetuate even post omission of the benefit from the statute book. In so far as the issue of hardship and extra expense is concerned, it merits little mention that the same ought not to be relied upon to strike down legislation, in the present case being an omission.

Conclusion

20. Section 54 of the Ordinance is clear and it states that no exemption is to be considered in respect of taxation unless provided for in the Ordinance. No exemption in respect of inter-corporate dividends is presently available to the petitioners and while the petitioners availed the benefit of the relevant exemption during its tenancy, however, no case was made out to perpetuate the benefit *ad infinitum* especially post conscious withdrawal of the said benefit by the Parliament.

¹² *Nagina Silk Mills vs. ITO* reported as PLD 1963 SC 322; *East Pakistan vs. Sharafatullah* reported as 1970 PLD SC 514; *CIT vs. EFU Insurance* reported as 1982 PLD SC 247; *G H Shah vs. Chief Land Commissioner* reported as 1983 CLC 1585; *Al Samrez Enterprises vs. Pakistan* reported as 1986 SCMR 1917; *WAPDA vs. Capt. Nazir* reported as 1986 SCMR 96; *Chief Land Commissioner vs. G H Shah* reported as 1988 SCMR 715; *Molasses Trading & Export vs. Pakistan* reported as 1993 SCMR 1905; *Muhammad Hussain vs. Muhammad* reported as 2000 SCMR 367; *Shahnawaz vs. Pakistan* reported as 2011 PTD 1558; *Zila Council Jhelum vs. PTC* reported as PLD 2016 SC 398; *Al Tech Engineers vs. Pakistan* reported as 2017 SCMR 673; *Super Engineering vs. CIR* reported as 2019 SCMR 1111; *H M Extraction vs. FBR* reported as 2019 SCMR 1081; *Anwar Yahya vs. Pakistan* reported as 2017 PTD 1069.

¹³ Per Munib Akhtar J in *Shahnawaz vs. Pakistan* reported as 2011 PTD 1558 ("Shahnawaz").

¹⁴ *Fatima Fertilizer vs. SRB* reported as [(2021) 123 Tax 122 (H.C.Kar.)]; in reliance upon *Pakistan Tobacco vs. Karachi Municipal Corporation* reported as PLD 1967 SC 241; *Chairman District Council vs. Ali Akbar* reported as 1970 SCMR 105; *State Life Insurance Corporation vs. Mercantile Mutual Insurance* reported as 1993 SCMR 1394; *S. Zafar Ejaz vs. Chairman, Steel Mills Corporation* reported as 1998 PLC (C.S.) 777.

21. In view hereof, these petitions were dismissed vide our short order dated 28th February 2023. These are the reasons for our short order. The office is instructed to place a copy hereof in each of the connected petitions.

JUDGE
(22.03.2023)

JUDGE
(22.03.2023)

Schedule

CP D 6686 of 2018 - Y.B Holding (Pvt) Ltd v. Pakistan & Others	CP D 8698 of 2018 - Gul Ahmed Holdings (Pvt) Ltd & Others v. Fed. of Pakistan & Others
CP D 1182 of 2019 - Y.B Holding (Pvt) Ltd v. Fed. of Pakistan & Others	CP D 1476 of 2019 - Searle Pharmaceutical (Pvt) Ltd v. Fed. of Pakistan
CP D 1477 of 2019 - Searle Pharmaceutical (Pvt) Ltd v. Fed. of Pakistan & Others	CP D 1550 of 2019 - Thal Ltd v. Pakistan & Others
CP D 1551 of 2019 - Lucky Holding Ltd v. Pakistan & Others	CP D 1743 of 2019 - Y.B Holding (Pvt) Ltd v. Fed. of Pakistan & Others
CP D 1844 of 2019 - DFL Corp (Pvt) Ltd v. Fed. of Pakistan & Others	CP D 2420 of 2019 - Engro Corp Ltd v. Pakistan & Others
CP D 2421 of 2019 - Engro Crop Ltd v. Pakistan & Others	CP D 3092 of 2019 - Thal Ltd v. Pakistan & Others
CP D 5785 of 2019 - Engro Crop Ltd v. Fed. of Pakistan & Others	CP D 580 of 2019 - Y.B Holding (Pvt) Ltd v. Fed. of Pakistan & Others
CP D 581 of 2019 - Gul Ahmed Textile Mills Ltd v. Fed. of Pakistan and Others	CP D 5954 of 2019 - International Ind. Ltd v. Fed. of Pakistan and Others
CP D 602 of 2019 - International Ind. Ltd v. Fed. of Pakistan & Others	CP D 6534 of 2019 - Thal Ltd v. Pakistan & Others
CP D 6993 of 2019 - Thal Ltd v. Pakistan & Others	CP D 7174 of 2019 - International Brand Ltd v. Fed. of Pakistan & Others
CP D 7266 of 2019 - Engro Corp Ltd v. Fed. of Pakistan & Others	CP D 7267 of 2019 - Engro Corp Ltd v. Fed. of Pakistan & Others
CP D 7415 of 2019 - Gul Ahmed Holdings (Pvt) Ltd & Others v. Fed. of Pakistan & Others	CP D 821 of 2019 - ICI Pakistan Ltd v. Fed. of Pakistan & Others
CP D 2316 of 2020 - Engro Corp Ltd v. Fed. of Pakistan & Others	CP D 2317 of 2020 - Engro Corp Ltd v. Fed. of Pakistan and Others
CP D 2506 of 2020 - Engro Corporation Ltd v. Pakistan & Others	CP D 3659 of 2020 - Y.B Holdings (Pvt) Ltd v. Fed. of Pakistan & Others
CP D 4439 of 2020 - Engro Corporation Ltd v. Fed. of Pakistan & Others	CP D 4440 of 2020 - Engro Corporation Ltd v. Fed. of Pakistan & Others
CP D 5252 of 2020 - Engro Energy Ltd v. Fed. of Pakistan & Others	CP D 5253 of 2020 - Engro Energy Ltd v. Fed. of Pakistan & Others
CP D 5441 of 2020 - Engro Corporation Ltd v. Pakistan & Others	CP D 7126 of 2021 - International Brands Ltd v. Fed. of Pakistan & Others
CP D 7496 of 2021 - International Brands Ltd v. Fed. of Pakistan & Others	CP D 7497 of 2021 - International Brands Ltd v. Fed. of Pakistan & Others
CP D 7498 of 2021 - International Brands Ltd v. Fed. of Pakistan & Others	CP D 1049 of 2022 - Lucky Cement v. Fed. of Pakistan and Others
CP D 1050 of 2022 - Lucky Cement Ltd v. Fed. of Pakistan & Others	CP D 1544 of 2022 - Searle Co. Ltd v. Fed. of Pakistan & Others
CP D 2463 of 2022 - Searle Co. Ltd v. Fed. of Pakistan & Others	CP D 3065 of 2022 - Engro Corp Ltd v. Fed. of Pakistan & Others
CP D 3066 of 2022 - Engro Corp Ltd v. Fed. of Pakistan & Others	CP D 3067 of 2022 - Engro Corp Ltd v. Fed. of Pakistan & Others
CP D 4191 of 2022 - Searle Co. Ltd v. Fed. of Pakistan & Others	CP D 4537 of 2022 - Searle Co. Ltd v. Fed. of Pakistan & Others
CP D 4752 of 2022 - Searle Co. Ltd v. Fed. of Pakistan & Others	CP D 4766 of 2022 - Lucky Cement Ltd v. Fed. of Pakistan & Others
CP D 4917 of 2022 - Engro Corp Ltd v. Fed. of Pakistan & Others	CP D 505 of 2022 - Searle Co. Ltd v. Fed. of Pakistan & Others
CP D 506 of 2022 - Searle Co. Ltd v. Fed. of Pakistan & Others	CP D 5194 of 2022 - Searle Company Ltd v. Fed. of Pakistan & Others
CP D 5195 of 2022 - Searle Company Ltd v. Fed. of Pakistan & Others	CP D 5196 of 2022 - Searle Company Ltd v. Fed. of Pakistan & Others
CP D 5197 of 2022 - Searle Company Ltd v. Fed. of Pakistan & Others	CP D 5262 of 2022 - Lucky Cement Ltd v. Fed. of Pakistan & Others
CP D 5263 of 2022 - Lucky Cement Ltd v. Fed. of Pakistan & Others	CP D 5264 of 2022 - Y.B Holdings (Pvt) Ltd v. Fed. of Pakistan & Others
CP D 5265 of 2022 - Y.B Holdings (Pvt) Ltd v. Fed. of Pakistan & Others	CP D 5490 of 2022 - Engro Corp Ltd v. Province of Sindh & Others

CP D 6668 of 2022 - Thal Ltd v. Fed. of Pakistan & Others	CP D 6716 of 2022 - Engro Corp Ltd v. Fed. of Pakistan & Others
CP D 6717 of 2022 - Engro Corp Ltd v. Fed. of Pakistan & Others	CP D 6895 of 2022 - Searle Co. Ltd v. Fed. of Pakistan & Others
CP D 6896 of 2022 - Searle Co. Ltd VS Fed. of Pakistan and Others	CP D 6897 of 2022 - Searle Co. Ltd v. Fed. of Pakistan & Others
CP D 7061 of 2022 - International Brands Ltd v. Fed. of Pakistan & Others	CP D 7062 of 2022 - Searle Company Ltd v. Fed. of Pakistan & Others
CP D 7421 of 2022 - Engro Corp Ltd v. Pakistan & Others	CP D 7560 of 2022 - ICI Pakistan Ltd v. Fed. of Pakistan & Others
CP D 1088 of 2023 - Searle Co. Ltd v. Fed. of Pakistan & Others	CP D 74 of 2023 - Engro Corp Ltd v. Pakistan & Others