

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.229 of 2017

[Agha Khan Fund For Economic Development S.A *versus* Pakistan and 3 others]

Date of hearing : 20.05.2022.

Plaintiff : Agha Khan Fund For Economic Development S.A, through M/s. Hamza Waheed and Sami-ur-Rehman Khan, Advocates.

Defendant No.2 : Commissioner Inland Revenue, through Mr. Muhammad Aqeel Qureshi, Advocate.

Defendants No.1,3&4 : Nemo.

JUDGMENT

Muhammad Faisal Kamal Alam, J: Through this *Lis*, Plaintiff has challenged the Notice dated 16.01.2017 (“**Impugned Notice**”), purportedly, issued under Section 4B of the Income Tax Ordinance, 2001 (“**Income Tax Law**”). Plaint contains the following prayer clause_

- (a) *Declare that Section 4B and Division IIA in Part I to the First Schedule 7 inserted into the Income Tax Ordinance, 2001 through Finance Act 2015 and amended through Finance Act 2016 are ultra vires the Constitution, has been passed without lawful authority and is of no legal effect.*
- (b) *Declare that the Impugned Notice dated 16.01.2017 (ANNEX G) and Impugned Order dated 25.01.2017 (ANNEX I) are mala fide and ultra vires the Ordinance, the DTT & also the Constitution.*
- (c) *Declare that the Plaintiff is not liable to pay Super Tax under Section 4B of the Ordinance in respect of dividend income earned from companies in which its shareholding exceeds 20%.*
- (d) *Pending disposal of this suit, Suspend the Impugned Order dated 25.01.2017 (ANNEX I).*
- (e) *Grant a Permanent Injunction prohibiting the Defendants from taking any adverse action against the Plaintiff.*

(f) Grant any other relief this Honourable Court may deem fit and proper in the circumstances of the case.

(g) Grant cost of the suit.

2. It is averred in the plaint, that Plaintiff is an International Development Agency for promoting entrepreneurship, operating globally. It has an staff strength of over 47 thousand. All profits earned by the Plaintiff are reinvested in further development projects. Plaintiff was incorporated in Switzerland on 17.12.1984 and is a non-resident for the purpose of income tax as per Section 81 of the Income Tax Law. In terms of Section 107 of the Income Tax Law, Pakistan and Switzerland signed a Convention for the avoidance of double taxation, which is recognized in the Notification dated 20.12.2008 issued by Defendant No.1. The said Notification along with Copy of the Convention between Pakistan and Switzerland (DTT), are filed with the plaint as Annexure 'B' (Pages-39 to 69).

3. It is contended that for the purposes of tax, the Plaintiff holds 51.00% equity in Habib Bank Limited ("HBL"), 57.88% equity in Jubilee Life Insurance Company Limited ("JLI"), 72.90% equity in Tourism Promotion Services (Pakistan) Limited ("TPSL"), and 14.05% equity in Jubilee General Insurance Company Limited ("JGI"). The Plaintiff also holds 99.63% equity in Industrial Promotion Services (Pakistan) Limited ("IPSL"). Since, IPSL does not issue any dividend(s), hence, is irrelevant for present dispute. Further contended that through Finance Act 2015, Section 4B was inserted in the Income Tax Law through which a Super Tax was imposed for Rehabilitation of Temporarily Displaced Persons for such Tax Year. The rate of Super Tax was mentioned in Division IIA of Part I of the First Schedule, which is 3% for all persons with a taxable income of more than 500 million and 4% for all Banking Companies irrespective of

the taxable income. Section 4B(2) sub-para (i) subsequently included 'dividend' within the definition of income. Plaintiff paid / cleared its tax liability for the tax year 2016, in accordance with the provisions of the Income Tax Law and DTT (*ibid*).

4. On 16.01.2017, the Defendant No.3 issued a Show Cause Notice to amend the Assessment of the Plaintiff under Section 122(9) of the Income Tax Law, whereby demand for Super Tax amounting to Rs.339,631,131 has been raised on the basis that the Plaintiff has earned Dividend Income in Pakistan (Annexure-G). The Plaintiff was directed to submit its objection(s)/submissions in respect of such issue on or before 24.01.2017.

5. The request to extend the time for submitting a reply was turned down by Defendants, followed by the *ex parte* Order dated 25.01.2017 (*Annexure-I, with the plaint*), amending the Assessment Order under Section 122(5)(a) of the Income Tax Law; consequently, a demand is raised for payment of Rs.339,631,131/- against the Plaintiff towards super tax liability for the tax year 2016. The above Show Cause Notice and the said amended order are impugned in the present proceeding.

6. The legal team of Plaintiff, M/s. Hamza Waheed and Sami-ur-Rehman Khan, Advocates, have argued that the impugned notice and the *ex parte* amended order is violative of law, particularly, provisions of DTT, as Plaintiff is not liable to pay the Super Tax. Further stated that already these issues have been decided by this Court in a judgment reported in **2021 P T D 885** [*The Commissioner Inland Revenue, Zone-IV, Corporate Regional Tax Office, Karachi and others versus Messrs MSC Switzerland Geneva and others*].

7. Contended that although in the above judgment handed down on number of Income Tax References and Constitution Petitions, including the

one filed by present Plaintiff, the controversy has been settled, yet the Defendants have not followed the judgment, which proves their *mala fide* and colourable exercise of authority.

8. Despite many opportunities, no Written Statement is filed on behalf of Defendants. On 14.03.2019, Court settled the following legal Issues_

1. *Whether Super Tax imposed Under Section 4B of the Income Tax Ordinance, 2001 is covered by Article 2 of the Double Taxation Treaty between Pakistan & Switzerland?*
2. *Whether the Plaintiff is liable to pay Super Tax on its Dividend Income in view of Article 10(2) of the Double Taxation Treaty between Pakistan and Switzerland read with Section 107(2) of the Income Tax Ordinance, 2001?*
3. *What should the decree be?*

9. Mr. Muhammad Aqeel Qureshi, learned counsel for Defendant No.2, has argued and defended the impugned Show Cause Notice and the Order. Crux of his arguments is, that Plaintiff has not been taxed twice, because the present demand is with regard to imposition of Super Tax under Section 4B of the Income Tax Law (*ibid*), which was never paid by Plaintiff at the place of its incorporation, that is, Switzerland. Further argued that the above reported judgment is not applicable to the facts of present case.

10. Arguments heard, record perused and above case law is considered.

11. The learned Division Bench has handed down the judgment after going through the provisions of DTT and case law developed on the issue. It is held that provisions of Treaty, which are statutorily recognized in terms of Section 107 of the Income Tax Law (*ibid*), has been given preference and would prevail over the provisions of the Income Tax Law. In Paragraph-9 of the above judgment, question of imposition of Super Tax has been specifically dealt with and the contention of the Department /

present Defendants, has been discarded. The relevant *ratio decidendi* is reproduced herein under_

“13. It is imperative to denote that we have been assisted with no cogent rationale to consider super tax, under consideration herein, being at any variance to the nature of existing taxes mentioned in the Treaty. Even upon independent assessment of the character of super tax, as levied presently, we find it to be prima facie identical / substantially similar to the existing levies expounded in the Treaty. Therefore, the case of present tax payers is clearly clinched per Article 2(3) of the Treaty.

14. In view of the binding pronouncements holding super tax to be a tax on income coupled with our finding that the present levy is identical / substantially similar to the levies existing at the time that the Treaty was entered into, we are of the considered view that tax-payers, who are otherwise qualified and fall within double taxation treaties between Pakistan and respective foreign countries are either exempt or, wherever applicable, liable to pay super tax at reduced rate(s) in terms of their respective treaties; hence, we had determined these references and petitions vide our short order dated 31.03.2021. These are the reasons for our aforementioned short order.”

12. In view of the above, the legal Issues are answered as follows_

ISSUE NO.1:

13. In affirmative.

ISSUE NO.2:

14. As determined by the above Judgment.

ISSUE NO.3:

15. The conclusion of the above is that both impugned Show Cause Notice as well as the Amended Assessment Order, are set aside. To this extent, this *Lis* is decreed.

16. Parties to bear their own cost.

Judge

Karachi.

Dated: 11.01.2023.

Riaz / P.S.