

**IN THE HIGH COURT OF SINDH, KARACHI**  
**Constitution Petition Nos.D-3073 & 3074 of 2021**

Date

Order with signature of Judge

**Present: Mr. Justice Muhammad Junaid Ghaffar  
Mr. Justice Mohammad Abdur Rahman**

**PETITIONERS** : **United Refrigeration Industries Limited &**  
**(in both Petitions)** **Dawlance (Private) Limited**  
**Through Mr. Ali Almani along with Mr.Furquan**  
**Mushtaq, Advocate.**

**RESPONDENT NO.2** : **Commissioner Inland Revenue, Legal Zone,**  
**(in both Petitions)** **Large Taxpayer Office, Karachi**  
**Through Mr. Faheem Ali Memon, Advocate**  
**AND Mr. Qaim Ali Memon, Advocate.**

**RESPONDENT** : **Through Mr. Faheem Raza Khuhro,**  
**Advocate.**

**FEDERATION OF** : **Through Mr. Kashif Nazeer, Assistant**  
**PAKISTAN** **Attorney General.**

**Date of Hearing** : **06.09.2024**

**Date of Judgment** : **03.10.2024**

**J U D G M E N T**

**Muhammad Junaid Ghaffar, J:** In both these Petitions an identical issue is involved, whereas the relief sought is also the same, hence both these Petitions are being decided through this common judgment. The prayers of the Petitioners read as follows:-

- i. Declare Impugned Notice I dated 06.01.2020 and Impugned Notice II dated 10.02.2020 are illegal and without jurisdiction.*
- ii. Pending disposal of the petition, suspend the Impugned Notices and restraining the Respondents from, directly or indirectly, through their officers, servants or assigns, taking any adverse action against the Petitioner on the basis of the Impugned Notice I dated 06.01.2020 and Impugned Notice II dated 10.02.2020.*
- iii. Grant such other relief as this Honourable Court deems just and proper in the facts and circumstances of this case.*

*iv. Grant costs.*

2. Learned counsel appearing on behalf of the Petitioners has contended that the impugned notices for conducting audit of the Petitioners' tax affairs for Tax Year 2019 are illegal, without lawful authority and jurisdiction. According to him, it is not in dispute that both the Petitioners were selected for audit in one of the last three preceding tax years, whereby, audit was conducted; Show Cause Notices were issued and amended assessment orders were also passed. Per learned counsel, on 01.07.2018 Clause 105 was added to Part IV of the Second Schedule to the Income Tax Ordinance 2001, ("**Ordinance**") pursuant to which, provisions of sections 177 and 214C are not applicable to a person whose income tax affairs have been audited in any of the preceding three tax years. He has further contended that though, Commissioner can still select a person under section 177 for audit; however, it can only be done with the approval of the Board, whereas in the case of the Petitioners no approval of the Board has been obtained. Therefore, per learned Counsel pursuant to Clause 105 *ibid*, the tax affairs of the Petitioners cannot be selected for audit either under section 177 or 214C of the Ordinance; hence the impugned notices are illegal, without lawful authority and jurisdiction. As to placing reliance on Clause 72B of Part IV of the Second Schedule to the Ordinance by the Respondents learned Counsel has contended that Clause 105 *ibid*, overrides Clause 72B being special in nature and, therefore, Petitioners cannot be audited through issuance of impugned notices. He has further contended that since Clause 105 grants a benefit for a specified period, it constitutes a vested right which subsists; hence, cannot be withdrawn unilaterally. He has lastly argued that when there is a conflict between a general provision and a special provision in a statute, the special provision i.e. Clause 105, *ibid*, will prevail in the instant case. In support of his contention, he has placed

reliance on various reported cases<sup>1</sup> and has prayed that the impugned notices be set-aside.

3. On the other hand, learned counsel appearing on behalf of Respondent No.2 has opposed the Petitions on the ground that notwithstanding the fact that the Petitioners have been selected for audit in one of the last three preceding tax years, at the time of issuance of notice, Clause 105, *ibid*, stands omitted, therefore, no right can be claimed by the Petitioners in terms of Clause 105. He has further contended that for the present purposes, the Petitioners have not been selected under section 177 or section 214C of the Ordinance, inasmuch as Clause 72B is applicable, as the Petitioners had claimed exemption from deduction of advance tax at import stage under section 148 of the Ordinance and pursuant to the third proviso of Clause 72B, their tax affairs are to be audited notwithstanding clause 105, *ibid*. Per learned counsel, since a privilege of a special provision was granted to the Petitioners by way of an exemption certificate from deduction of advance tax on imports, therefore, to examine as to whether such exemption was properly availed or not, an inbuilt mechanism has been provided under Clause 72B of the Part IV of the Second Schedule to the Ordinance, which provides for selection in an automatic manner, therefore, the impugned notices are valid and justified. He has lastly argued that before filing of these Petitions and obtaining restraining orders, Petitioners had participated by

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<sup>1</sup> *Kurdistan Trading Corporation v. C.I.R.* [2014 PTD 339]; *Allied Engineering Services v. Commissioner Income Tax* [2015 PTD 2562]; *Shahnawaz v. Pakistan* [2011 PTD 1558]; *Justice Qazi Faez Isa v. President of Pakistan* [PLD 2022 SC 119]; *Anwar Yahya v. Pakistan* [2017 PTD 1069]; *Commissioner Inland Revenue v. Olympia Chemicals* [2021 PTD 1512]; *D.G. Khan Cement v. Federation of Pakistan* [2004 SCMR 456]; *Kamaluddin Qureshi v. Ali International* [PLD 2009 SC 367]; *Dr. Tariq Iqbal and others v. Government of Khyber Pakhunkhwa and others* [2019 PLC (CS) 821]; *Saif-ur-Rehman v. Additional District Judge, Toba Tek Singh and others* [2018 SCMR 1885]; *The State v. Zia-ur-Rahman* [PLD 1973 SC 49]; *State of Gujarat v. Patel* [AIR 1979 SC 1098]; *Golden Oraphies v. Director of Vigilance* [1993 SCMR 1635]; *Anand Reddi v. The State of Andhra Pradesh* [AIR 1959 AP 144]; *Kewal Vadhera v. Lakshmi Narain Bansal* [AIR 1985 Delhi 472]; *Sayed Muhammad Ali Shah Bokhari v. Chief Administrator of Auqaf, Punjab* [PLD 1972 Lahore 416]; and *Sahibzada Sharafuddin v. Town Committee* [1984 CLC 1517].

responding to the impugned audit notices; hence they are not entitled for exercise of any discretion in their favour. He has placed reliance on certain reported cases<sup>2</sup> and has prayed for dismissal of these Petitions with costs.

4. Heard learned counsel for the parties and perused the record. Record reflects that both the Petitioners are industrial units and are engaged in imports from abroad for their manufacturing facilities. They had approached the concerned Commissioners and requested for issuance of exemption certificates from deduction of tax at import stage which otherwise is to be deducted in terms of section 148 of the Ordinance, on rates prescribed in Part II of the First Schedule in respect of goods classified in Part I to III of the Twelfth Schedule to the Ordinance. By virtue of clause 72B of Part IV of the Second Schedule the Petitioners were exempted from deduction of such tax on their imports. For the present purposes, they have impugned identical but different notices issued to them on the same date i.e. 6.1.2020 & 10.2.2020 for conducting audit in terms of the 3<sup>rd</sup> proviso to clause 72B *ibid*. Before proceeding further, it would be advantageous to refer to the relevant provisions in consideration i.e. Clauses 105 and 72B (both omitted vide Finance Acts, 2019 & 2020 respectively) of Part IV of the Second Schedule to the Ordinance which reads as under: -

- “(103) .....
- (104) .....
- (105) The provisions of section 177 and 214C shall not apply to a person whose income tax affairs have been audited in any of the preceding three tax years:

Provided that the Commissioner may select a person under section 177 for audit, with approval of the Board.”;

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<sup>2</sup> Azee Securities (Pvt.) Ltd. v. Federation of Pakistan [2019 PTD 903] and Messrs Celandgene Pharmaceutical International [2022 PTD 1464].

and

**"[(72B)** The provisions of section 148 shall not apply to an industrial undertaking if the tax liability for the current tax year, on the basis of determined tax liability for any of the preceding two tax years, whichever is the higher, has been paid [in the manner as may be prescribed] and a certificate to this effect is issued by the concerned Commissioner.]

*[Provided that the certificate shall only be issued by the Commissioner if an application for the said certificate is filed before the Commissioner, in the manner and after fulfilling the conditions as specified by notification in the official Gazette, issued by the Board for the purpose of this clause [:]]*

*[Provided further that the quantity of raw material to be imported which is sought to be exempted from tax under section 148 shall not exceed [125] per cent of the quantity of raw material imported and consumed during the previous tax year:*

**Provided also that the Commissioner shall conduct audit of taxpayer's accounts during the financial year in which the certificate is issued in respect of consumption, production and sales of the latest tax year for which return has been filed and the taxpayer shall be treated to have been selected for audit under section 214C:**

*Provided also if the taxpayer fails to present accounts or documents to the Commissioner or the officer authorized by the Commissioner, the Commissioner shall, by an order in writing, cancel the certificate issued and shall proceed to recover the tax not collected under section 148 for the period prior to such cancellation and all the provisions of the Ordinance shall apply accordingly [:]]*

*[Provided also that exemption certificate shall not be issued to an industrial undertaking importing raw materials, specified in sub-section (8) of section 148.]*

*[Provided further that the Commissioner shall be deemed to have issued the exemption certificate in cases where the certificate is automatically processed and issued by IRIS upon expiry of prescribed time period:*

*Provided also that the Commissioner may modify or cancel the certificate issued automatically by IRIS on the basis of reasons to be recorded in writing after providing an opportunity of being heard.]"*

5. From perusal of Clause 105 inserted vide Finance Act, 2018 (w.e.f. 01.07.2018) it reflects that a sort of a special privilege has been granted to the taxpayers from being selected for audit under section 177 or 214C, if their tax affairs have been audited in any of the last three preceding tax years. There is one exception to this i.e. the Commissioner can still select a person for audit under section 177, if he takes an approval from the Board for such

purpose. As to the Petitioners before us and based on the facts available on record, there is no dispute that both the Petitioners have been audited in one of the last three preceding tax years, whereas the Commissioner has not taken any approval from the Board. However, when the impugned notices are examined, it appears that the same have not been issued either in terms of section 177 or section 214C *ibid* but have been issued while exercising powers under the third proviso to clause 72B of Part IV of the Second Schedule to the Ordinance. As already noted, both the Petitioners are enjoying exemption from deduction of advance tax chargeable under section 148 of the Ordinance pursuant to Clause 72B. Clause 72B provides that provisions of section 148 shall not apply to an industrial undertaking if the tax liability for the current tax year, on the basis of determined tax liability for any of the preceding two tax years, whichever is the higher, has been paid and a certificate to this effect is issued by the concerned Commissioner. The third proviso, which is relevant for the present purposes, provides that the Commissioner shall conduct audit of taxpayer's accounts during the financial year in which the certificate is issued in respect of consumption, production and sales of the latest tax year for which return has been filed and the ***taxpayer shall be treated to have been selected for audit under section 214C*** of the Ordinance. This proviso in the given facts and circumstances of the Petitioner's case, who are enjoying a special exemption from payment of advance tax at import stage is most crucial and relevant insofar as the protection or privilege / exemption from audit clause 105 *ibid* is concerned. In our considered view, clause 105 is general in nature applicable to all taxpayers who have been audited in any of the last three preceding tax years, as against the argument of the Petitioners' Counsel that it is a special provision and will have an overriding effect. In fact, in our considered view, in the case of the Petitioners, Clause 72B is special in nature and will override clause 105, *ibid*. This is for the reason because the Petitioners are

enjoying a special privilege and are exempt from deduction of advance tax at import stage. This is pursuant to issuance of certificate of exemption, which is dependent upon fulfilling certain requirements, including an audit as to the consumption, production and sales so made by the Petitioners while enjoying the said exemption. The selection for audit in fact is inbuilt in clause 72B and has no nexus with clause 105, *ibid*, which only applies to taxpayers, who have not been issued any exemption certificate from deduction of advance tax at import stage. It is not a case of either, selection under section 177 or Section 214C of the Ordinance; rather it is a case of ***deemed selection***. As soon as the Petitioners applied for availing such benefit and were issued exemption certificate(s) under clause 72B of the Ordinance, they stood selected automatically as it was a condition precedent for issuance of an exemption certificate. Petitioners cannot, at the same time avail an exemption from deduction of tax at import stage under clause 72B for which they are required to be mandatorily audited; and then also claim exemption / protection under clause 105 *ibid* from being selected for audit. Their selection for audit is mandatory and inbuilt within clause 72B; hence, they have no protection or exemption from being audited pursuant to clause 105 *ibid*. In fact, their audit in one of the three preceding tax years has got nothing to do with the protection from audit as specified in clause 105 as they are otherwise required to be audited for availing an exemption certificate from deduction of advance tax at import stage. If the contention of the Petitioners is accepted, then conduct of audit in terms of clause 72B would amount to redundancy which per settled law cannot be attributed to the legislature.

6. As to reconciling a special and general provision of law, it would suffice to observe that in the present case apparently there is no such need; however, for the sake of clarity we may observe that insofar as the Petitioners are concerned, it is clause 72B

which will have an overriding effect by virtue of Petitioners request and issuance of an exemption certificate in respect of advance tax at import stage. Lastly, we need not attend to the argument of the Respondents Counsel that vide Finance Act, 2019, clause 105 stands omitted and impugned notices have been issued thereafter, hence, no vested has accrued, as in the instant matter, even if this clause had not been omitted, for the above reasons it is not applicable to the Petitioners.

7. In view of hereinabove facts and circumstances of these cases, no case for indulgence is made out; hence both the petitions are hereby ***dismissed*** along with pending application(s).

**Dated: 03.10.2024**

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\*Farhan/PS\*