

**Judgment Sheet**

**IN THE LAHORE HIGH COURT, LAHORE  
JUDICIAL DEPARTMENT**

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**W.P. No.79632/2022**

**Kashf Foundation through its Chief Executive  
Versus**

**Chief Commissioner Inland Revenue, LTU,  
Federal Board of Revenue and two others.**

**JUDGMENT**

<b>Date of hearing:</b>	<b>27.12.2023</b>
<b>Petitioner by:</b>	M/s Shehzad Butt, Mehak Zafar, Ibrahim Shahbaz, Khurram Shahbaz, Asfand Yar Waheed and Sara Majeed, Advocates for petitioner.
<b>Respondents by:</b>	Ch. Imtiaz Elahi, Deputy Attorney General. Ch. Muhammad Zafar Iqbal and Osama Zafar, Advocates for respondents No.1 & 2. Mr. Bilal Munir, Advocate for respondent No.3 – FBR.

**ASIM HAFEEZ J.** Petitioner, through instant constitutional petition, challenges the order of 19.09.2018, by Respondent No.2 [Commissioner (IR)] and order of dismissal of petitioner's appeal dated 03.10.2022, by respondent No.1 [Chief Commissioner (IR) LTU], which affirmed order of respondent No.2, whereby approval extended to the petitioner as Non-Profit-Organization (NPO), was withdrawn in exercise of powers under Rule 217 of the Income Tax Rules 2002 (Rules, 2002). It is pertinent to mention that respondent No.1 decided appeal, preferred by the petitioner, pursuant to the orders of this Court of 24.11.2021, whereby while allowing constitutional petition bearing W.P No.26250 of 2020 direction was given to respondent No.1 to decide appeal on merits, instead of

remanding it to respondent No.2. Earlier respondent No.1 had remanded the matter to respondent No.2 through order of 24.04.2020.

2. Controversy circumambulates determination of alleged entitlement of the petitioner, claiming NPO status, apparently withdrawn in terms of the decisions assailed. Various reasons were cited for withdrawal, primary being the key allegation that assets of petitioner entity were employed in a manner to confer private benefit / personal gain to another person, focusing a loan transaction of July 2008, whereby loan amounting to Rs.180.500 Million was extended by the petitioner to its associated concern, i.e., Kashf Holdings (Pvt) Limited, offered on uncompetitive and concessional rate of mark-up – different from what has been offered to customers otherwise. This doling of benefit was categorized as transaction, inverse of an arm's length transaction. Petitioner has approached this court, invoking constitutional jurisdiction, seeking declaration of invalidity against the decisions on the premise that provisions of law, relevant for the purposes of present purposes, were not interpreted lawfully and, additionally that allegation of private benefit conferred was unsubstantiated.

3. Learned counsel for petitioner submits that NPO status was withdrawn on erroneous assumptions, allegedly declaring that private benefit was bagged by an individual, but no specific instance was indicated, showing doling out of alleged benefit. Adds that no direct evidence of alleged benefit was established. Argues that nature, objective and context of transaction under reference was misconstrued. Further submits that Petitioner entity, at relevant time, was functioning in terms of section 42 of the erstwhile Companies Ordinance, 1984, as guarantee / non-profit company, enjoying privileges and abiding by the limitations prescribed in law. It is explained that loan of Rs.18.500 Million was granted to Kashf Holdings (Pvt)

Limited to facilitate investment in Kashf Microfinance Bank, and intended objective was achieved whereby much needed funds were channeled for meeting the Minimum Capital Requirements by Kashf Microfinance Bank, and in return petitioner acquired substantial influence over the affairs of Kashf Microfinance Bank (Now operational as FINCA) – wherein, at material times, the petitioner and Kashf Holdings (Pvt) Limited jointly held over 51% of shares. Adds that direct investment by petitioner in Kashf Microfinance Bank could have had not provided such firm corporate footing that was achieved through the debtor entity - Kashf Holdings (Pvt) Limited. Learned counsel argues that no dubiousness was established qua the transaction, which otherwise fulfills all legal and regulatory requirements. Adds that allegation of extending benefit by offering loan at subsidized rate of return / Mark-up – is misconceived, who drew parallel to a transaction, where loan was extended to Kashf Holdings (Pvt) Limited by another entity – Acumen – on similar terms, as agreed between the petitioner and Kashf Holdings (Pvt) Limited. Further submits that transaction undertaken was not in breach of any objective defined in Memorandum of Association of petitioner, one of which objective was to expand microfinancing base to uplift financial status of the distressed segment of the society. Adds that no violation of Rule 217 of the Rules, 2002 was committed, and questions that how a transaction could be branded as failing to meet test of an arm's length transaction, when no irregularity was identified, and nor any complaint was registered with or by the Regulator or the State Bank of Pakistan. Adds that petitioner is entitled for grant of approval and privileges extended in law, when requisite conditions, prescribed in law, under sections 2(36), 2(11A), 108, and clause 75 of Part-1 of Second Schedule to the Ordinance, 2001, are fully met. Lastly emphasized that order impugned was passed without application of mind and same is devoid of any plausible reasoning.

4. Conversely, learned counsels appearing for the respondents submit that transaction of loan was designed to extend personal benefit to another person, having had meaningful representation in the petitioner entity and who, contemporaneously, held 99% shares of Kashf Holdings (Pvt) Limited – that is 799,900 shares out of 800,000 issued shares. Learned counsels referred to various clauses of the Shareholder's Agreement to unveil beneficial terms. Adds that no plausible justification was extended that why loan, at concessionary rate, was extended to Kashf Holdings (Pvt) Limited when said amount could be offered on better rate of return. Explains that justification offered to allege benefits of routing funds to Kashf Microfinance Bank, through Kashf Holdings (Pvt) Limited, is an attempt to camouflage private benefits extended.

5. In rebuttal, learned counsel for the petitioner submits that purpose of routing funds through Kashf Holdings (Pvt) Limited was to have had majority shareholding of Kashf Microfinance Bank and accumulative shareholding of petitioner and Kashf Holdings (Pvt) Limited was over 51%, which makes Kashf Holdings (Pvt) Limited, a holding company of Kashf Microfinance Bank. Learned counsel provided shareholding pattern of Kashf Holdings (Pvt) Limited and Kashf Microfinance Bank, along with copies of Form-A. Case advocated, in brief, was that petitioner is entitled to grant / issuance of NPO status, when requirements of law were met, and no specific details were provided or indicated in the impugned order to substantiate that loan transaction fails to meet test of an arm's length transaction. Petitioner has also placed on record copies of orders of amended assessments carried out under section 122(5A) of the Ordinance, 2001, for the Tax years 2019, 2020, and 2021, to apprise that in due course assessments were amended and benefit of NPO status was not extended.

6. **Heard. Available record perused.**

7. The scope, context and reach of instant proceedings is to examine if any illegality was committed by respondents No.1 and 2, while withdrawing approval under Rule 217 of the Rules, 2002, and while doing so to unravel the transaction for the purposes of ascertaining due compliance of requisite requirements for claiming NPO status. Notably claim of advantages accrued or benefits realized by the petitioner, if any, as consequence of commercial transactions with Kashf Holdings (Pvt) Limited was not the subject matter or scope of instant proceedings, except to the extent that whether said transactions were source of conferring private benefit to another person in the context of scope of section 2(36) of the Ordinance, 2001.

8. There is no cavil that petitioner functioned under section 42 of the erstwhile Companies Ordinance, 1984, and carried charitable and not for profits activities still, in the context of provisions of Ordinance, 2001, petitioner was essentially obligated to fulfil conditionalities and requirements prescribed under section 2(36) of the Ordinance, 2001 and those prescribed under Chapter XVII of the Rules 2002. Simplicitor the protection and privileges available under section 42 of erstwhile Companies Ordinance 1984 would not entitle the petitioner to *per se* claim NPO status under the Ordinance, 2001. It is expedient to reproduce section 2(36) of the Ordinance, 2001 and relevant sub-clauses of Rule 217 and Rule 213 (2)(a) of the Rules, 2002, which read as,

*“Section 2 (36) “non-profit organization” means any person other than an individual, which is —*

*(a) established for religious, educational, charitable, welfare purposes for general public], or for the promotion of an amateur sport;*

*(b) formed and registered by or under any law as a non-profit organization;*

(c) approved by the Commissioner for specified period, on an application made by such person in the prescribed form and manner, accompanied by the prescribed documents and, on requisition, such other documents as may be required by the Commissioner;

and none of the assets of such person confers, or may confer, a private benefit to any other person;”

**Rule 217. Power to withdraw approval** - (1) The Commissioner may, at any time, withdraw approval granted under rule 212, if he is satisfied that-

(a) the constitution, memorandum and articles of association, trust deed, rules and regulations or bye-laws, as the case may be, specifying the aims and objects of the organization do(es) not provide for prohibiting the making of any changes in the constitution, memorandum and articles of association, trust deed, rules, regulations and bye-laws without prior approval of the Commissioner;

(b) the organization has-

(i) been or is being used for personal gain of any particular person or a group of persons as specified in clause (a) of sub-rule (2) of rule 213

.....

**Rule 213(2).** The Commissioner may refuse to approve the organization if the Commissioner is satisfied that the organization –

(a) has been or is being used for personal gain of any particular person or a group of persons;

[Emphasis supplied]

9. Controversy engrossed calls for determining the scope and reach of limitation prescribed in terms of section 2(36) of the Ordinance, 2001 in the context that whether assets of the petitioner became source of conferring any private benefit unto Kashf Holdings (Pvt) Limited or shareholders thereof, either realized on the spot or realizable at any given point of time. Petitioner had enjoyed NPO status but later withdrawn, on allegation of failing to meet requisite conditions. Rule 217 of Rules, 2002 extends powers to the Commissioner to refuse approval if satisfied that organization has or is being used for personal gains of any particular person or a group of persons. Petitioner is a non-profit entity. And Kashf Holdings (Pvt) Limited is a for-profit entity, solely working for the interests of the shareholders. Textual reading of section 2(36) of the Ordinance does not suggest

immediately realizable benefit but also includes deferred benefits, realized in due course. The expression '*may confer*' needs sharper focus. There is another aspect of the matter. Relevant provision of law does not quantify any limit or threshold of the benefit, which, for the purposes of section 2(36) of the Ordinance, 2001, simply has to be a benefit attributable and accruing out of assets of not-for-profit entity.

10. For determining the scope and limits of sections 2(36) of the Ordinance, 2001 and Rule 217(1)(b) of the Rules, 2002, primarily two transactions, closely connected and contextually connected with the underlying controversy, need unraveling. First relates to the transaction of acquisition of shares of Kashf Holdings (Pvt) Limited and second, concerning transaction of loan of Rs.180.500 Million. Other than the context of this case, there is no cavil that raising of share capital, through issuance of new shares, of a company was a permissible commercial mechanism. And in the context of this case the capital raised, through issuance of new shares of Kashf Holdings (Pvt) Limited, was statedly channeled to ensure economic sustenance of Kashf Microfinance Bank – meeting condition of minimum capital requirement. Various persons and entities have acquired new shares, upon execution of Shareholder's Agreement, against the consideration paid, and as far as those incoming members are concerned there is no issue, except one of the contributories thereof, i.e., the petitioner [claimed to be a not-for-profit entity]. It is evident from perusal of terms of Shareholder's Agreement of 31.07.2008 that 2,051,283 new shares of Kashf Holdings (Pvt) Limited were issued against consideration of Rs.152,600,070/- . Out of which Rs.63,000,000/- was paid by the petitioner for acquisition of 900,000 shares of Kashf Holdings (Pvt) Limited, whereby the transactional value of each share was fixed at Rs.70 - evidencing premium of Rs.60 against each share of Kashf Holdings (Pvt) Limited

when the face value of each share was Rs.10. An increase of 7 times the value of shares. It manifests a capital gain for Kashf Holdings (Pvt) Limited, *inter alia* raising capital interest of the shareholders. It is reiterated that incidence of gain need not be realized on the spot but gain otherwise deferred to a realizable event in future, is still a benefit-cum-gain. This demonstrates a seed sown and fruit to be reaped, scenario.

11. Fundamental question is whether acquisition of shares of Kashf Holdings (Pvt) Limited was beneficial for the petitioner or does the transaction tantamount to conferring private benefit unto Kashf Holdings (Pvt) Limited, and realizable by its shareholders – expression *any other person* in section 2(36) of the Ordinance, 2001, *inter alia* suggests reference to a natural person or a company as the case may be [Person is defined in section 80 of the Ordinance, 2001]. Before threadbare discussion qua the effect of transaction of acquisition of shares of Kashf Holdings (Pvt) Limited, it is appropriate to give details of another transaction, made basis for refusal to accord NPO status.

Petitioner, in July 2008, extended loan of Rs.180.500 Million to Kashf Holdings (Pvt) Limited, on reduced mark-up – Marked-up price was Rs.357,687,440. Loan was for the term of 10 years and repayment were to start from September 2013 to May 2018. Notably, loan was restructured in the year 2013 and repayment timelines were changed. There is no denial that petitioner encountered impairment loss of Rs.56.99 Million, as a consequence of repeated restructurings. During arguments, when questioned, it was informed that loan was again restructured in 2019 and still payable. It is evident from record that approval for grant of loan to Kashf Holdings (Pvt) Limited and decision to acquire shares of Kashf Holdings (Pvt) Limited, was taken in Extraordinary General Meeting of the

petitioner, carried out on 26.04.2008 – at which point in time Ms. Roshaneh Zafar was shown as Chief Executive, Director and Member of the Petitioner, though she recused herself from participation in the meeting but still her father and brother attended the meeting and voted in favour of the decision to extend loan to and acquire shares of Kashf Holdings (Pvt) Limited. It is not disputed that at that point in time, Ms. Roshaneh Zafar held 99% of shareholding in Kashf Holdings (Pvt) Limited – having 799,900 shares out of total issued shares of 800,000/- and 100 shares were held in the name of Mr. Amir Rasul – as consequence of Shareholder's Agreement, percentage of shares of Ms. Roshaneh Zafar was 26.8%.

12. Undoubtedly, inflow of liquidity in Kashf Holdings (Pvt) Limited, partly by way of loan transaction on subsidized rate of return and partly through spending of Rs.63.000 Million for acquisition of shares of an associated undertaking, has had improved the financial position of Kashf Holdings (Pvt) Limited – acquisition of shares by other incoming shareholders, other than the petitioner, is not the domain of present proceedings. And, evidently, this uplifting of economic outlook of Kashf Holdings (Pvt) Limited was practically demonstrated, when shares at Rs.70 were offered to the incoming members – though having face value of Rs.10. Kashf Holdings (Pvt) Limited is a private limited entity and not a listed company, therefore market forces will not determine the price of the shares. This phenomenal raise in share price was not explained - nothing is disclosed that what were those peculiar factors that contributed towards 7 times increase in the share price. This *per se* indicated huge gains in terms of capital and interests of the shareholders, which gain, when coupled with the facility of loan at concessional rate and repeatedly done restructuring, offered a double treat.

13. Now let's deal with the converse argument pleaded to undermine the evident benefits / gains. Petitioner banked on the shareholding pattern of Kashf Microfinance Bank, who claimed that jointly the petitioner and Kashf Holdings (Pvt) Limited held over 51% of shares of Kashf Microfinance Bank, which extends conspicuous benefits to the petitioner, in terms of having controlling influence in Kashf Microfinance Bank. It is evident that this stand was consistently iterated by the petitioner before the authorities, claiming that transactions suspected had in fact offered petitioner's management control of Kashf Microfinance Bank, in wake of petitioner's holding of 30.2% shareholding of Kashf Holdings (Pvt) Limited coupled with 26.8% of shares of Ms. Roshaneh Zafar. This mantra of having corporate control, allegedly by dint of routing funds for acquisition of shares of Kashf Holdings (Pvt) Limited, instead of acquiring shares of Kashf Microfinance Bank, fell flat when, lately, the shareholding of Kashf Holdings (Pvt) Limited in Kashf Microfinance Bank was reduced from 51%, to 8.08%. Hence, the argument proves to be a self-inflicted injury. This off-loading of shares does constitute a benefit realizable event. There is no claim that shares sold were priced below Rs.10.

14. Grant of loan to Kashf Holdings (Pvt) Limited, a private and for-profit entity *per se* is a tangible benefit, bagged by the debtor entity. Learned counsel strenuously argued on the purpose of the loan and petitioner's perceived control over the management / affairs of Kashf Microfinance Bank but failed to appreciate innate economic benefit offered through finance at concessional mark-up and effect of often restructurings.

15. Despite sheltering commercial arrangements, under various tiers, reality cannot be camouflaged, and undeniably the financial position of Kashf Holdings

(Pvt) Limited firmed up as consequence of subject matter transactions, which resulted in benefits to Kashf Holdings (Pvt) Limited and the shareholders, conspicuous thereof being Ms. Roshaneh Zafar, who held 26.8% shares in Kashf Holdings (Pvt) Limited and other meaningful influence on the petitioner, at all material times. What is important is the relationship of the shareholders with a for-profit entity - Kashf Holdings (Pvt.) Limited – and the context of assets of the petitioner. For all intent and purposes benefit accrued to an associated entity is a benefit attributable to the shareholders. The fundamental question is not ascertainment of legality or otherwise of the transactions or probing their success in commercial terms or searching for proportionate advantage for the petitioner – a claimed non-profit company - but the factum of apparent private benefit conferred or intended to be conferred, notwithstanding the time of realization thereof. It is pertinent to mention that, in simple terms, restructuring of loan is source of continuing benefit / gain for Kashf Holdings (Pvt) Limited. Effect of impairment of loss can be downplayed for the purposes of apportionment but factum of diminishing value of assets of the petitioner cannot be denied – which situation inversely enabled the associated entity to realize benefits at the expense of non-profit entity.

Petitioner submitted written submissions, after the conclusion of the hearing, when case was kept for orders. Written submissions are examined and improvements in the oral submissions are notable, nonetheless, those submissions are considered, along with the case-law cited therein and found not persuasive enough to extend benefit of compliance of requisite requirements under the relevant provisions of law, referred hereinabove. Petitioner emphasized that transaction of loan was intended to pursue, well-defined, welfare purpose, that is establishment of Microfinance Bank and in achieving such an objective, if any

incidental or ancillary benefit is, unintentionally extended to any person, it will not change the character of the petitioner, being a NPO entity. Following cases, from our and foreign jurisdiction, were referred to support contentions, reported as

Jaipur Charitable Trust V. Commissioner of Income-Tax (1981 127 ITR 620 Delhi), Hamdard Laboratories India And....V. Assistant Director of Income Tax, Commissioner of Income-Tax V. Andhra Chamber of Commerce (1965 AIR 1281), Commissioner of Taxation V. Word Investments Limited (2007 FCAFC 71; 164 FCR 194), Congregational Union of NSW V. Thistlethwayte [(1952) 87 CLR 375] and Stratton V. Simpson [(1970) 125 CLR 138]. Justifications, for off-loading of shares in Microfinance Bank, were iterated. Effect of impairment loss was explained as inconsequential incident. It is emphasized that decision of transfer of customer's portfolio to Kashf Microfinance Bank [Now FINCA] was solely a welfare orientated action, primarily driven by the financial constraints and circumstances. Reliance is placed on following case-law, Treat Corporation Ltd. V. ELMAC Ltd. (2011 YLR 2825), Ahmad Khan Bhatti V. Masooda Fatimia (PLD 1981 Kar. 398), Pak Arab Fertilizers V. Dawood Herculis (PLD 2015 Sindh 142) and Shariq ul Haq and others V. PIA [2018 PLC (C.S) 975].

It is reiterated, at the expense of taxing the judgement, that section 2(36) of the Ordinance, 2001 and Rule 217(1)(b) of the Rules, 2002 are misconstrued, and effect thereof, in context of the facts of the case, was underappreciated. Court is in fact invited to invoke the principle of '*CASUS OMISSUS*' and to add or read in the provisions of law, without appreciating the age-old principle of interpreting tax statutes that 'there is no room for intendment'. Petitioner claimed certain exemptions, privileges attached to and otherwise available to organizations, qualified for NPO status, without appreciating that the conditions, effect of limiting

such exemptions and privileges to any NPO regime, require strict application and enforcement. Petitioner is unworthy and not entitled of availing such exemptions or privileges, in the wake of the transactions transacted, having the effect of conferring private benefit, attributable and realized, between two points in time. Despite all the commercial prudence applied to justify the transactions, the reality of conferring private benefits could neither be effaced nor belittled, while appreciating the effect of underpriced loan, injection of equity by the petitioner, upon purchase of shares of Kashf Holdings (Pvt) Limited, at premium price – seven times the face value of shares. And then was the decision of off-loading of shares of Microfinance Bank, which not only discredited the arguments made before this Court – whereby it was projected that transactions in question were intended to secure a firm corporate footing for the petitioner in Microfinance Bank –, but, evidently, manifested reaping of private benefit(s) – which decision was the last straw that broke the camel's back. Judgments referred are distinguishable on facts and effect thereof have no bearing qua peculiar features of this case.

16. Learned counsels for petitioner have not disputed the transactions but focused on purported benefit, accrued or accruable to the petitioner, without appreciating that commercial success of the transactions is not the bone of contention, but real issue is whether assets of the petitioner were employed in a fashion to confer private benefit or not. The argument attributing commercial success to the transactions is in fact acknowledgment of collateral benefit to another person by virtue of exclusive utilization of the assets of the petitioner and allegations become more sinister when the beneficiary is an associated entity – the end does not justify the means. Learned counsels emphasized on the effectiveness and broad sweep of the microfinance banking. There is no denial of advantages of

Grameen Bank Model – [aka – Microfinance Banking] – provided in garb thereof no private benefit or economic gain is extended.

17. In aforesaid circumstances, mischief intended to be remedied through the limitations prescribed under section 2(36) of the Ordinance, 2001 and Rule 217(1)(b) of Rules, 2002 is traced and correctly targeted.

18. Hence, no illegality or apparent errors are found in the orders impugned and no jurisdictional defect manifests in exercise of powers available under Rule 217(1)(b) of the Rules, 2002. Instant constitutional petition is meritless and same is, hereby, dismissed, with no order as to the costs.

**(ASIM HAFEEZ)  
JUDGE**

\*Imran\*

**APPROVED FOR REPORTING**

**JUDGE**

Signed on \_\_\_\_\_