

Form No: HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P. No.20679/2023.

Manzurul Haq

Versus Federation of Pakistan, etc.

S.No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary
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27.10.2023. M/s Mian Ashiq Hussain, Muhammad Arshad and Najia Noreen Maitla, Advocates for petitioner.
Mirza Nasar Ahmad, Addl. Attorney General.
Mr. Ahmad Pervaiz, Advocate for CIR.
Mr. Muhammad Bilal Munir, Advocate for FBR
Mr. Muhammad Adil Chattha, Advocate for respondent No.3.

In essence, constitutionality of the first proviso to Division-VII of Part-1 of First Schedule to the Income Tax Ordinance, 2001 Ordinance – inserted through section 5(53) of the Finance Act, 2022 – is subject matter of challenge [Impugned amendment].

2. Source of grievance is against chargeability to tax, under section 37A of the Ordinance, 2001, capital gains accrued *inter alia* upon disposal of the securities during Tax Year 2023. Case pleaded is that securities were acquired in the year 2011, which were retained for over one year, hence, disposal thereof, after retaining those for over one year, cannot be subjected to capital gains since by virtue of *proviso* to sub-section (1) of section 37A of the Ordinance, 2001, sub-

section (1) of section 37A of the Ordinance, 2001 was made inapplicable, notwithstanding the omission of the *proviso* lately through Finance Act 2014. Reliance is placed on the case reported as "Anwar Yahya and 3 others Vs. Federation of Pakistan through Secretary and 4 others" (2017 PTD 1069). Adds that rights accrued, upon holding of securities for over one year, by virtue of the *proviso*, cannot be withdrawn by netting long-held securities since 2011. Further submits that impugned amendment is contrary to the objective of encouraging long-term investments. And classification carried out in the context of time of acquisition of shares and rates applicable, *vis-à-vis* holding period(s) prescribed are discriminatory, which fails test of intelligible differentia. Referred the cases of "Commissioner Inland Revenue Vs. Federation of Pakistan, etc. (Civil Appeal No. 930 and 931 of 2017), "Dr. Muhammad Anwar Kurd and 2 others Vs. The State through Regional Accountability Bureau, Quetta" (2011 SCMR 1560), "D.S Nakara and others Vs. Union of India" (1983 Supreme Court 305), "Mohabat Khan and 77 others Vs. Road Transport Board N.W.F.P, Peshawar through its Chairman and 4 others" (1993 SCMR 833), "Pakistan through Chairman FBR and others Vs. Hazrat Hussain and others" (2018 SCMR 939), "Collector of Customs Model Customs Collectorate,

Peshawar Vs. Waseef Ullah and another” (Civil Petitions No. 389, 696 to 742 of 2022), “Sapphire Textile Mills Limited Vs. Federation of Pakistan and others” (CPD 8233 of 2019).

3. Conversely, learned Addl. Attorney General submits that the case of Anwar Yahya and 3 others. (supra) is distinguishable on facts and law, as discussed and applied therein. Submits that no vested right could be claimed against the statute, which right, before maturing into a past and closed transaction, could be withdrawn by legislature, which was done in this case. Submits that no case of discrimination otherwise arises in the context of the classification of the timing of purchase of securities and period of retention thereof. Learned counsel placed reliance on decisions reported as “MESSRS ARMY WELFARE SUGAR MILLS LTD. and others. Vs. FEDERATION OF PAKISTAN and others.” (1992 SCMR 1652), “MOLASSES TRADING & EXPORT (Pvt.) LIMITED. VS. FEDERATION OF PAKISTAN and others.” (1993 SCMR 1905), “YAR MUHAMMAD and 4 others. Vs. SECRETARY, FINANCE DEPARTMENT, GOVERNMENT OF PUNJAB and others.” (2011 SCMR 1537), “SHAHNAWAZ (PVT.) LTD. through Director Finance. Vs. PAKISTAN through the Secretary Ministry of Finance Government of Pakistan, Islamabad and another.” (2011 PTD 1558) and “COMMISSIONER

INLAND REVENUE ZONE-II, RTO, HYDERABAD. VS.
MESSRs JAMSHORO POWER COMPANY LTD.” (2017
PTD 237).

Learned counsel appearing for respondent No.2 – FBR - endorsed submissions made by Addl. Attorney General. Further submits that no case of discrimination is made out and reference, in this behalf, is made to paragraph 17 in case reported as “D.G. KHAN CEMENT COMPANY LIMITED through CHIEF FINANCIAL OFFICER and another. Vs. THE FEDERATION OF PAKISTAN through SECRETARY REVENUE, ISLAMABAD and 3 others.” (2020 PTD 1186). Learned counsel further places reliance on the case reported as “FAWAD AHMAD MUKHTAR and others. Vs. COMMISSIONER INLAND REVENUE (ZONE-II), REGIONAL TAX OFFICE, MULTAN and another.” (2022 PTD 454) - latter decision is referred on the point that each tax year is a separate unit of account and taxation, and law, to be applied thereto, shall be in the context of relevant tax year.

4. Heard.

5. Primarily, questions that surface for determination are whether impugned amendment had the effect of consuming / withdrawing vested rights claimed, whether ratio settled in the case of

Anwar Yahya and 3 others. (supra) is attracted, and whether any manifest discrimination has prejudiced the petitioner.

6. There is no cavil that rights claimed, those based on past and closed transaction(s) and others regarding unconsummated / inchoate transaction(s) manifest distinctive features. The crucial question is when did the alleged rights claimed, if so available at all, becomes past and closed transaction, or when those rights become irrevocable, even going beyond the realm of exercise of legislative powers. Petitioner's claim that rights claimed accrued at the time of acquisition of securities and retention thereof for over one year, and same are still claimable by virtue of *proviso* to sub-section (1) of section 37A of the Ordinance, 2001. And conversely, department's claim is that question of applicability of section 37A of the Ordinance, 2001 would be the date of disposal of securities, and by then impugned amendment was in place, effective and enforceable.

Evidently, securities were acquired in the year 2011 and sold during Tax Year 2023, and amendment was introduced through Finance Act

2022. Apparently, petitioner fails to underpin significance of omission of *proviso* to subsection (1) of section 37A of Ordinance, 2001 through Finance Act 2014. Petitioner's sole reliance is upon the ratio settled in the case of Anwar Yahya and 3 others. (supra). Upon conscientious perusal of the case referred, I opine that said decision has no application here, which case had interpreted the then section 37A in the context of *proviso thereto* – period before the amendments made by virtue of Finance Act 2014 and Finance Act 2015. There is another significant distinction. In the case of Anwar Yahya and 3 others. (supra), claim of vested right was claimed on alleged representations made in Division VII of Part-1 of First Schedule to the Ordinance, 2001 regarding rates of tax till the tax year 2016 – fact noted in the paragraph 3 of the judgment. No such representation or promise allegedly extended was identified by the petitioner. There is no cavil that '*proviso*' provided scaffolding for the reasoning of the decision in the case of Anwar Yahya and 3 others. (supra), but said *proviso* was omitted through the Finance Act 2014, hence, no protection could be claimed retrospectively. The

controversy is not regarding withdrawal of vested rights but it is for the petitioner to demonstrate that how protection of *proviso* could be extended, after being omitted from the statute book. For facility of understanding, it is expedient to reproduce the then section 37A and *proviso*, as interpreted in the case of Anwar Yahya and 3 others. (*supra*), which reads as,

37A. Capital gain on sale of securities. – (1) The capital gain arising on or after the first day of July 2010, from disposal of securities held for a period of less than a year, other than a gain that is exempt from tax under this Ordinance], shall be chargeable to tax at the rates specified in Division VII of Part I of the First Schedule:

Provided that this section shall not apply if the securities are held for a period of more than a year

And it is expedient to reproduce text of section 37A, at the time of disposal of securities – during tax year 2023-, which reads as,

37A. Capital gain on sale of securities. – (1) The capital gain arising on or after the first day of July 2010, from disposal of securities, other than a gain that is exempt from tax under this Ordinance, shall be chargeable to tax at the rates specified in Division VII of Part I of the First Schedule:

7. It is evident that no protection was available to the petitioner at the time of disposal of the securities – a triggering point for the determination of tax under section 37A of the

Ordinance, 2001. In absence of the *proviso* to section 37A – omitted since 2014 – no question of inapplicability of section 37A arises. Learned counsel for the petitioner failed to show any statutory representation / promissory estoppel, allegedly extended before amendment was introduced in Division VII. No question of availability, let alone accrual of vested right, is made out. No inconsistency between section 37A of the Ordinance, 2001 and impugned amendment is found, since *proviso* to sub-section (1) of section 37A was earlier *omitted* through Finance Act 2014, and even the expression “**held for a period of less than a year**” appearing in section 37A of the Ordinance stood omitted through Finance Act 2015. It is reiterated that at the time of leviability of tax, for the purposes of gain tax accrued, no protection was available to support claim of any exemption or concession, whatsoever. Case of *Anwar Yahya and 3 others (supra)* is not applicable.

8. I now take up the objection against the constitutionality of first proviso to Division II. For reference and facility, Table qua rate of tax with impugned proviso is reproduced hereunder,

Division VII		
The rate of tax to be paid under section 37A shall be as follows:-		
Sr. No.	Holding Period	Rate of Tax for Tax year 2023 and onwards.
1	Where the holding period does not exceed one year	15%
2	Where the holding period exceeds one year but does not exceed two years	12.5%
3	Where the holding period exceeds two years but does not exceed three years	10%
4	Where the holding period exceeds three years but does not exceed four years	7.5%
5	Where the holding period exceeds four years but does not exceed five years.	5.0%
6	Where the holding period exceeds five years but does not exceed six years.	2.5%
7	Where the holding period exceeds six years	0%
8	Future commodity contracts entered into by members of Pakistan Mercantile Exchange	5%

Provided that for securities except at S. No.8 of the table,

- (i) The reduced rates of tax on capital gain arising on disposal shall apply where the securities are acquired on or after the first day of July, 2022; and
- (ii) the rate of 12.5% tax shall be charged on capital gain arising on disposal where the securities are acquired on or before the 30th day of June, 2022 irrespective of holding period of such securities:

9. In terms of the proviso, added through the Finance Act 2022, the criterion for availing benefit of zero percent of rate of tax was made permissible, where holding period exceeds six years but condition of acquisition of securities on or after first day of July 2002 was imposed. The period of holding of securities and date of acquisition for availing benefit of zero

percent tax was prescribed. No vested right could be claimed against the right of the legislature to tax, when neither any vested right had conclusively accrued, nor subject matter transaction graduated to achieve status of a past and closed transaction.

10. I find the plea of discrimination misconceived. Different rates of tax were provided against variously prescribed periods of holdings of securities, where each of the category manifest diverse periods. Such was the pattern of rates prescribed for different period of holdings since addition of section 37A from 2010. Provisioning of different slabs for retention of securities is not a novel or discriminatory practice. Categorization of slabs for holdings and prescribing rate of tax for each slab meets the criterion of providing intelligible differentia, distinguishing classes of securities held and varied retention period prescribed in the context of concession in rate of tax. Element of commonness amongst each category of securities held, root cause of discrimination, is conspicuous by its absence. Though there is no occasion to comment on the rational and efficacy of the policy, still *ex-facie* offering of discounted rates of tax regarding securities acquired on or after first day of July 2022 in fact encourages and incentivize the investment. This satisfies the test of proximity between rationality and

objective intended to be achieved— encouraging roll-over of securities / investment. Right to claim zero percent of tax on the securities acquired in 2011 cannot be recognized or granted perpetually. There is no cavil that legislature is otherwise competent to tax capital gains by changing the benchmark requirements, in absence of any promise made [which promise based on *proviso* to sub-section (1) of section 37A was omitted since 2014, — save past and closed transactions. Judgements referred are authorities decided in the context of the facts involved in each of those cases, which, in the context of facts involved, are distinguishable. No case for interference is made out.

11. Petition is found devoid of merits and same is, hereby, dismissed.

**(ASIM HAFEEZ)
JUDGE**

Intiaz Nasir

Signed on 30th November 2023.

Approved for reporting.