IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE YAHYA AFRIDI

Civil Appeals Nos. 1262 of 2018 and 507 of 2017
(On appeal from the order dated 10.8.2018 & 25.3.2013 passed by the Islamabad High Court, Islamabad in W.P.No.2372 of 2018 and Lahore High Court, Lahore in W.P.31925 of 2012.)

H.M. Extraction Ghee & Oil Industries (Pvt) Ltd. (C.A.1262/18)

Commissioner of Inland Revenue (RTO-VII), Lahore. (C.A.507/17)

...Appellant(s)

vs

Federal Board of Revenue
(CA 1262/18)

Nishat Dairy (Pvt) Ltd. (C.A.507/17)

...Respondent (s)

In C.A.No.1262/2018 :
For the Appellant (s) Ch. Aitzaz Ahsan, Sr. ASC.
Mr. Gohar Ali Khan, ASC.

For the Respondent (s) : Mr. Riaz Hussain Azam, ASC.

In C.A.No.507/2017
For the Appellant (s) Mr. Sarfraz Ahmed Cheema, ASC.
Dr. Tariq Masood, Member Legal.

For the Respondent (s) Mr. Shehryar Kasuri, ASC.

Date of hearing : 13.11.2018

JUDGMENT

Munib Akhtar, J.- These two appeals have been heard together since they raise the same issues with regard to the interpretation and application of sections 65D, 148 and 159 of the Income Tax

Ordinance, 2001 ("2001 Ordinance"). In CA 507/2017 the appellant is the Department. The taxpayer (herein after referred to "Nishat Dairy") claimed a 100% tax credit under s. 65D. It filed a constitutional petition in the Lahore High Court, which was allowed by a learned Single Judge by judgment reported as *Nishat Dairy (Pvt) Ltd. v. Commissioner of Inland Revenue and others* 2013 PTD 1883 (*"Nishat Dairy* case"). Briefly stated, it was held that a tax credit under s. 65D was the same as an exemption, at least for purposes of s. 159. Therefore, since Nishat Dairy was entitled to a tax credit it was entitled also to an exemption certificate under s. 159 in respect of the collection of advance income tax, under s. 148, on its imports of materials and supplies. The Department filed an intra-Court appeal, which was dismissed by a learned Division Bench by judgment dated 18.03.2014. The learned Division Bench agreed fully with the reasoning and conclusion of the learned Single Judge. For purposes of the present judgment it will therefore suffice (without intending any disrespect) to consider only the judgment of the latter. The Department was granted leave to appeal vide order dated 13.04.2017. In the circumstances, the delay in the filing of the appeal is hereby condoned.

2. In the other matter, CA 1262/2018, the appeal is by the taxpayer (herein after referred to as "H.M. Extraction"). The appellant, who filed a constitutional petition in the Islamabad High Court, also claimed a 100% tax credit under s. 65D. The claim was the same: relief against having to pay advance income tax under s. 148 on materials and supplies being imported, for which an exemption certificate was sought under s. 159 on the basis of the tax credit. The taxpayer, inter alia, relied on the judgment of the Lahore High Court. The Department on the other hand, inter alia, relied on an (unreported) judgment of a learned Division Bench of the Sindh High Court, in CP D-256/2014 (titled *Oil World (Pvt) Ltd. v. Federation of Pakistan and others*) and other petitions dated 29.04.2015 in which a contrary view was taken. (We may note that the *Nishat Dairy* case was relied upon by the taxpayers, but the learned Division Bench did not agree with the same.) The learned Single Judge in the Islamabad High Court also did not agree with

the view that had found favor with the Lahore High Court, and *inter alia* concluded that a tax credit and an exemption were not the same thing. It was held that there was no entitlement to the grant of an exemption certificate and that the taxpayer had to pay advance income tax under s. 148. The petition was dismissed. The taxpayer sought leave to appeal in this Court, which was granted vide order dated 17.10.2018.

3. It will be convenient to begin by setting out the relevant statutory provisions. Section 65D, which was added by the Finance Act, 2011, has undergone a number of changes, but it is (quite correctly) not disputed by the Department that insofar as the taxpayers before us are concerned, they are entitled to a 100% tax credit for the duration of the relevant period. Section 65D is therefore set out as so applicable (i.e., as amended by the Finance Act, 2012 and before the changes made by the Finance Act, 2016). The relevant portions are as follows:

> "**65D. Tax credit for newly established industrial undertakings.** — (1) Where a taxpayer being a company formed for establishing and operating a new industrial undertaking including corporate dairy farming sets up a new industrial undertaking including a corporate dairy farm, it shall be given a tax credit equal to hundred percent of the tax payable, including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance, on the taxable income arising from such industrial undertaking for a period of five years beginning from the date of setting up or commencement of commercial production, whichever is later.
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> (2) Tax credit under this section shall be admissible where—
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> (a) the company is incorporated and industrial undertaking is setup between the first day of July, 2011 and 30th day of June, 2016;
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> ... and
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> (d) the industrial undertaking is set up with hundred per cent equity raised through issuance of new shares for cash consideration: ...

[(3) omitted]

(4) Where any credit is allowed under this section and subsequently it is discovered, on the basis of documents or otherwise, by the Commissioner Inland Revenue that any of the conditions specified in this section were not fulfilled, the credit originally allowed shall be deemed to have been wrongly allowed and the Commissioner Inland Revenue may, notwithstanding anything contained in this Ordinance, re-compute the tax payable by the taxpayer for the relevant year and the provisions of this Ordinance shall, so far as may be, apply accordingly.

(5) For the purposes of this section and sections 65B and 65E, an industrial undertaking shall be treated to have been setup on the date on which the industrial undertaking is ready to go into production, whether trial production or commercial production."

Section 148 provided in material part as follows:

"**148. Imports.—** (1) The Collector of Customs shall collect advance tax from every importer of goods on the value of the goods at the rate specified in Part II of the First Schedule.

[The Finance Act, 2015 omitted subsection (2) and inserted subsection (2A)]

(2A) Notwithstanding omission of sub-section (2), any notification issued under the said sub-section and for the time being in force, shall continue to remain in force, unless rescinded by the Board through notification in the official Gazette.;..."

The omitted subsection (2) had provided as follows:

"(2) Nothing contained in sub-section (1) shall apply to any goods or class of goods or persons or class of persons importing such goods or class of goods as may be specified by the Board."

We may note that the FBR had issued SRO 947(I)/2008 dated 05.09.2008 under subsection (2) (read with powers conferred under s. 159(3)(b)). This notification continued to remain in the field at all times relevant for present purposes, by reason of subsection (2A). Finally, s. 159 provided in material part as follows:

> "**159. Exemption or lower rate certificate.**— (1) Where the Commissioner is satisfied that an amount to which Division II ... of this Part ... applies is –
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> (a) exempt from tax under this Ordinance; ...
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> the Commissioner shall, upon application in writing by the person, issue the person with an exemption or lower rate certificate.
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> ...
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> (2) A person required to collect advance tax under Division II of this Part ... shall collect or deduct the full amount of tax specified in Division II ... unless there is in force a certificate issued under sub-section (1) relating to the collection or deduction of such tax, in which case the person shall comply with the certificate. ..."

Section 148 lies in Division II of Part V, in the fourth Division of which s. 159 is located. Hence, the collection of advance income tax in terms of the former comes within the ambit of the latter.

4. The facts in relation to each appeal, as relevant for present purposes, can be stated briefly. The respondent taxpayer in CA 507/2017, Nishat Dairy, was incorporated on 28.10.2011 and set up a corporate dairy farm sometime thereafter such that it came within the ambit of s. 65D. It therefore claimed an entitlement to 100% tax credit for a period of five years, and this is not denied or disputed by the Department. For purposes of its business the taxpayer periodically imported livestock, cattle feed, calf milk replacer and other supplies. It applied for an exemption certificate under s. 159 in respect of the advance collection of income tax under s. 148 on the basis of the 100% tax credit. This was denied, which led to the litigation in the Lahore High Court summarized above. The appellant taxpayer in the other appeal, CA 1262/2018, was incorporated on 19.06.2013 and thereafter set up a plant for the extraction of edible oil from oil seeds and for

manufacturing of vegetable ghee and cooking oil. The plant went into trial production on 23.10.2014. On such basis the taxpayer claimed 100% tax credit under s. 65D for a period of five years. Again, this is not disputed or denied by the Department. For purposes of its business the appellant needed to import raw material and supplies more or less on a continuous basis. It also applied for an exemption certificate under s. 159 for purposes of advance income tax collected under s. 148. This was (ultimately) denied, and the subsequent litigation in the Islamabad High Court has been summarized above.

5. At the commencement of the hearing, learned counsel for the taxpayers were invited to argue first, with learned counsel appearing in CA 1262/2018 taking the lead. Learned counsel submitted that s. 65D was inserted to attract new investment, and the scheme of 100% tax credit was introduced accordingly. Learned counsel went through the section in some detail to highlight the intent and purpose behind its enactment. It was submitted that the appellant was fully compliant with its requirements at all material times and continued to remain so. Learned counsel submitted that the appellant needed to continuously make imports of raw materials and supplies for the operation of its plant. Since the appellant was entitled to a 100% tax credit, there was no tax liability that applied in relation to its income. Thus, the question for any advance collection of tax under s. 148 did not arise. The appellant was therefore fully entitled to an exemption certificate under s. 159 since that was only a procedural mechanism to ensure that the appellant obtained the benefit of the substantive relief to which it was entitled under s. 65D. It was submitted that initially exemption certificates were issued to the appellant, up to the Tax Year 2017. It was only thereafter that the certificate was refused, which eventually forced the appellant to file the petition before the Islamabad High Court. The basis taken for the refusal was that the matter of the appellant's entitlement to the tax credit could only be determined at the end of a tax year and after the return had been filed, and not at any time prior thereto.

Learned counsel submitted that the impugned judgment of the High Court was incorrect in law. The relief to which the appellant was entitled under s. 65D was established and had crystallized when it initially fulfilled the conditions thereof, and remained available in full for the entire five years. It could not be taken away or affected by any subsequent amendments in the section. Learned counsel submitted that the appellant's right to the exemption certificate was duly recognized for three years and only denied thereafter. The Department could not deny rights that had become vested in the appellant. It was submitted that the well known principle of promissory estoppel was also applicable in the facts and circumstances of the appellant's case. Reference was made to certain case law in this regard. It was prayed that the appeal be allowed. Learned counsel for the respondent taxpayer in CA 507/2017 adopted these submissions and submitted that the entire matter had been correctly dealt with by the Lahore High Court. It was prayed that the Department's appeal be dismissed.

6. Learned counsel for the Department, ably assisted by the learned Member (Legal) FBR (who was also allowed to make submissions) submitted that the view taken by the Islamabad High Court was correct and to be preferred over that which found favor with the Lahore High Court. It was submitted that there was a clear difference between a tax credit on the one hand and an exemption on the other, and the Lahore High Court erroneously elided the two when holding that they were but two sides of the same coin. It was further submitted that the Collector was duty bound to collect advance income tax under s. 148, and could be held liable himself if he failed to do so. It was only if a valid and operational certificate, or other exemption from the provision, was available that the tax was not to be so collected. The exemption certificate under s. 159 was only in relation to exemptions and not tax credits. It was further submitted that the entitlement or otherwise to the tax credit could only be determined in accordance with the relevant provisions of the Ordinance and not otherwise. That meant that the refund of any excess amount collected under

s. 148 was possible only when the return was filed and not in the ad hoc manner as claimed by the taxpayers. It was prayed accordingly.

7. We have heard learned counsel as above and considered the record. Two questions fall for determination: firstly, what is the nature of a tax credit on the one hand and an exemption on the other? Secondly, what is meant by the word "exempt" as used in s. 159(1)(a)? In the *Nishat Dairy* case, the learned Lahore High Court, after referring to certain dictionaries, held as under (pp. 1890-1; emphasis in original):

> "10. ... The primary difference between tax credit and tax exemption is that tax credit reduces the amount of tax to be paid by the taxpayer, while tax exemption reduces the amount of annual income that can be taxed. Hence, while tax credit reduces the payability of tax due, tax exemption first reduces the quantum of total income and as a consequence reduces the payability of tax due, both leading to the same result of reducing the tax liability of the taxpayer. Therefore, tax credit and tax exemption work on opposite sides of the same equation. At the end of day, both the incentives/methodologies reduce and "exempt" the tax liability of the taxpayer."

After examining s. 159 in some detail in order to determine its scope, purpose and effect, it was observed as follows (pg. 1894; emphasis in original):

> "16. From the above discussion it is now clear that *tax exemption* and *tax credit* are two sides of the same coin, at least when it comes to Section 159(1) of the Ordinance. Both these taxation tools reduce the tax liability of the taxpayer. The facility under Section 159(1) is to relieve the taxpayer from the burden of paying advance tax or withholding tax when at the end of the tax year the taxpayer is not likely to pay tax to this extent."

The Islamabad High Court felt unable to agree. It was observed as follows:

> "11. Even otherwise, I am unable to bring myself in agreement with the argument of learned counsel for the Petitioner and the reasoning rendered in [the *Nishat Dairy* case] that "Tax Credit" and "Tax Exemption" are one and the same after insertion of Sub-Section 1A ibid. The Income Tax Ordinance, 2001, does not provide definition of Tax Credit but has an entire chapter on it which is different from Tax Exemptions and Concessions."

We may note that the reference to "Sub-Section 1A" was to a subsection that was added to s. 65D by the Finance Act, 2016. That Finance Act also amended subsection (1), altering the amount of tax credit to which the taxpayer is entitled from 100% to that computed in terms of the formula contained in subsection (1A). As noted above, it was (quite correctly) not disputed before us by the Department that both the taxpayers in these appeals were entitled to a tax credit of 100% for the duration of the relevant five years. In other words, the subsequent amendments to s. 65D, as made by the Finance Act 2016, were irrelevant for present purposes. Therefore, with respect, the learned High Court erred in referring to the same. Nonetheless, a reading of the impugned judgment as a whole leaves one in no doubt that the High Court did not accept the reasoning of the Lahore High Court vis-à-vis tax credits and exemptions.

8. We begin by noting that consideration of the nature of a tax credit on the one hand and an exemption on the other needs to be carried out conceptually and on the plane of principle. Now, in *Whitney v. IR Commissioners* (1926) 10 TC 88, in a well known passage that has stood the test of time, Lord Dunedin spelt out the three stages of a tax (at the broadest plane) in the following terms:

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a

> person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

For purposes of the question now before us, the three stages may be restated as follows: leviable (declaration of liability), payable (assessment) and recoverable. It is well established that an exemption inserts itself between the first two stages, i.e., between what is leviable and what is payable. In our view, a tax credit inserts itself between the second and the third stages, i.e., between what is payable and what is recoverable. It is perhaps for this reason that the learned Lahore High Court observed that an exemption and a tax credit are two sides of the same coin, the "coin" being the stage of assessment or what is payable. With respect, we are unable to agree. In our view, there is a conceptual difference between the two, and (as we will see) it is all the more pronounced in the case of income tax. If there is an exemption in the field then the second stage may not be reached at all (i.e., the tax may not be payable) if the exemption is whole. Of course, it may be reached partially if that be the nature of the exemption. On the other hand, in the case of a tax credit the second stage must necessarily always be reached, and that too in full. It is only then that the credit manifests itself by interposing between what is payable (i.e., the assessment) and what is recoverable. This interposition may be complete (if the tax credit is 100%) or partial. Thus, the second stage of "assessment" (i.e., "payable") cannot be the "coin" of which an exemption on the one hand and a tax credit on the other are the two "sides". Put differently, in a fiscal statute there must always be the first stage: that can be affected by neither an exemption nor a tax credit. An exemption operates on, and in relation to, the second stage: that stage may not be reached at all, or only partially. A tax credit does not bear on the second stage. Once that stage is reached, and crossed, then the tax credit is manifested, thereby blocking (as the case may be, either in whole or in part) the third stage. Or, to put the matter in Lord Dunedin's terminology an exemption may eliminate the need for an assessment altogether (if it is whole) or reduce it by the relevant amount if it is partial. A tax credit on the other hand has no bearing on the assessment. It comes into operation after assessment and when the question of recovery arises. In our view, this is a basic conceptual difference. It also has a certain consequence in income tax law, to which we now turn.

9. The learned Lahore High Court observed in para 10 of the *Nishat Dairy* case that a "tax exemption reduces the amount of annual income that can be taxed". This is certainly correct and that is, generally, the effect of an exemption. But, if we may respectfully note, on the conceptual plane it is only a partial description of how an exemption may operate in income tax law. The reason is that income tax law has had two concepts since the beginning (i.e., the Income Tax Act, 1922): "total income" and "taxable income" (the exact terminology varying across the decades and over different statutes). Total income, as the term implies, is the totality of the income of the taxpayer. The taxable income is that which can be brought to tax. The two can be the same, but if there is an exemption the latter will be less than the former. However, the amount of tax payable is determined not only by reference to the amount of income that can be taxed, but also by the applicable rate of taxation. And under the principles of income tax law, the determination of the rate may be with reference to either the total income or the taxable income. As is at once obvious, this can have a material effect on the amount of tax payable. The position has been explained in *Kanga and Palkhiwala's The Law and Practice of Income Tax* since the early editions of the work, which were in relation to the Income Tax Act, 1922. The latest edition (10^{th}, 2014), which is in relation to the (Indian) Income Tax Act, 1961, puts the matter as follows (pp. 163-4; emphasis supplied):

> "Exemption granted under the Act is of two kinds. Certain incomes are exempt from charge and are also excluded from the assessee's total income.... Certain other incomes are exempted from income-tax but they are to be included in the assessee's total income.... Thus income which may itself be exempt

> from tax may yet form part of the assessee's 'total income'. ...
>
> The effect of including exempted income in the assessee's total income is mainly twofold. *First, the rate of tax payable by the assessee is determined with reference to the total income and therefore exempted income which is included in the total income would affect the rate of tax applicable to the chargeable portion of the total income*. Secondly, in several cases calculations have to be made with reference to the total income; and income which is exempted from tax but included in the total income is to be taken into consideration for this purpose. ...
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> Where the Act grants exemption from tax in respect of a certain sum, that sum does not form part of the total income unless there is some other provision in the Act making it includible in the total income. In *CIT v. Raiji* [17 ITR 180], Chagla CJ said, with reference to the 1922 Act:
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> > 'The scheme is that wherever one finds an exemption or exclusion from payment of tax, the exemption or exclusion also operates for the purpose of computing the total income. Not only is the sum not liable to tax, but it is also not to form part of the total income for the purpose of determining the rate. When the legislature intends that certain sums, although not liable to tax, should be included in the total income, it expressly so provides....'"

Section 10 of the 2001 Ordinance, as amended by the Finance Act, 2012, provides as follows:

> "**10. Total Income.—** The total income of a person for a tax year shall be the sum of the —
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> (a) person's income under all heads of income for the year; and
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> (b) person's income exempt from tax under any of the provisions of this Ordinance."

10. It will be seen from the foregoing that while an exemption always reduces the amount of income that can be taxed, it may or may not affect also the rate applicable, depending on whether that is determinable on the basis of taxable income or total income. Of

course, in the 2001 Ordinance the rate is determined by the taxable income. But it must be kept in mind that we are here considering the matter on the conceptual plane, and must therefore be guided by the principles of income tax law as they have crystallized over the decades. A tax credit on the other hand has no such effect, even in principle. It has no bearing on, or relevance for, the rate of taxation. This, in our view, is another basic difference which serves to confirm that an exemption and a tax credit are not, essentially, one and the same thing. They are conceptually distinct.

11. Notwithstanding the above, it must be recognized that in practical terms there is no difference in the effect of a complete exemption from tax on the one hand and a 100% tax credit on the other. The final outcome is that zero tax is payable or recoverable. The situation at hand is of course of a 100% tax credit. It seems (if we may say so with respect) that in the *Nishat Dairy* case the learned High Court concerned itself, not unreasonably and perhaps *sub silentio*, only with a situation of a complete exemption from tax. However, on the plane of principle such a situation ought to be regarded only as a special case. The equation between the effect of a tax credit and an exemption that would practically exist in such a situation cannot, with respect, affect the conceptual analysis, which must necessarily be carried out in more general terms, so as to take into account the other possibilities as well.

12. It follows from the above that we are, with respect, unable to agree with the learned Lahore High Court. We agree with the conclusion of the Islamabad High Court though for the reasons and on the basis of the analysis as set out herein above, and not otherwise. The first question posed in para 7 above must therefore be answered in favor of the Department and against the taxpayers.

13. We turn to the second question. In our view, whenever the term “exempt” (or any of its variations) appears in a fiscal statute, then it is not inappropriate to begin consideration of the relevant

provision by assuming that the term is used therein in the sense described above. In the end of course the point in issue has to be resolved, inter alia, on the basis of the relevant rules of interpretation including, in particular, those that apply specifically in relation to fiscal statutes. And the final conclusion may be that the term is not being used in the sense described above. Now, as is only to be expected, “exempt” and its variations appear a great many times in the 2001 Ordinance. In many places it is clearly used in the sense described above. However, that is not always so. For example, in what might be regarded as a “root” provision, s. 53, it appears twice in the first subsection (in clauses (a) and (d) thereof). This subsection deals with the four parts into which the Second Schedule is divided, and the clauses just mentioned relate to the first and the fourth parts respectively. Quite obviously, in relation to the first part (clause (a)) it is used in the sense described above. However, in clause (d), which relates to the fourth part (which “exempts” income or classes of income, or persons or classes of persons from the operation of any provision of the 2001 Ordinance) it is clearly not being used in that sense. Hence the second question, notwithstanding our conclusion in relation to the first: in what sense is the term used in s. 159(1)(a)? More particularly, can it be regarded as including a tax credit?

14. Section 159 applies in respect of amounts that come under Divisions II and III of Part V (of Chapter X) and Chapter XII. A consideration of the provisions therein contained indicate that as used in clause (a) of subsection (1), “exempt” bears the meaning and is deployed in the sense described above. That sense is conceptually different from a tax credit. It therefore follows that in our view, since clause (a) of subsection (1) does not apply to a tax credit, no exemption certificate can be issued under s. 159 in respect of the latter. The second question must therefore also be answered against the taxpayers and in favor of the Department. (Whether “exempt” is also used in s. 159(1)(a) in the sense of clause (d) of subsection (1) of s. 53 (i.e., in relation to the fourth

part of the Second Schedule) is a matter we leave open for future consideration, since it does not arise here.)

15. The foregoing conclusion is bolstered also by the insertion of a new clause (c) in subsection (1) of s. 159 by the Finance Act, 2014. This provides for the grant of an exemption certificate when there is a 100% tax credit under s. 100C (which applies to non-profit organizations, trusts or welfare institutions). This specific inclusion in respect of a particular tax credit is also an indication of the legislative intent, i.e., that under s. 159(1)(a), “exempt” does not include a tax credit.

16. During the course of submissions, learned counsel for H.M. Extraction sought to rely on the fact that this appellant was in fact granted exemption certificates for more than one tax year and was only thereafter denied the same. In our view, the earlier grants cannot stand in the way of a correct application of the law, on its true and proper interpretation. Learned counsel, responding to an apprehension expressed by the learned Member (Legal) FBR, also submitted that if perchance there were ever any misuse or abuse of the facility of the exemption certificate (which possibility was of course strongly denied as a matter of fact) then appropriate action could always be taken under subsection (4) of s. 65D. In our view, with respect, this submission (which even otherwise is only hypothetical in the facts and circumstances before us) cannot affect the legal analysis necessary to resolve the present controversy, and the conclusions arrived at above.

17. Learned counsel for H.M. Extraction also submitted that over the years a huge sum of money (running into several crores of rupees) had accumulated in favor of this appellant with the Department on account of the collection of advance income tax under s. 148. The whole of this amount was liable to be refunded because of the 100% tax credit, but the same had not been done which put a huge and entirely unjustifiable strain on the finances of the appellant. The Department did not seriously contest that the

appellant was entitled to a refund of all the sums collected under s. 148 but submitted that the same had to be done in accordance with the procedures laid down in the 2001 Ordinance. To this, learned counsel for the appellant responded that his instructions were that refund claims had been properly filed but were simply not being processed.

18. The foregoing aspect of the matter has indeed caused us grave concern. The legal position may be what it is and as described above, but one consequence is that the State does seem to have gathered, and accumulated, sums to which it is (at least on the record before us) not entitled. In other words it has been enriched, even if temporarily, in an unfair manner at the expense of the taxpayer. (This is not, we may clarify, a reference to the well known doctrine of unjust enrichment which, strictly speaking, may not be applicable here.) We are reminded here of what was said by this Court in *Pfizer Laboratories Ltd. v. Federation of Pakistan and others* PLD 1998 SC 64 ("*Pfizer* case"). The facts there were that the taxpayer had made payments of tax which it was not obliged to on account of an exemption. Its claim for a refund was however rejected as being barred by limitation. After considering a number of cases it was, inter alia, observed as follows (pg. 89; emphasis supplied):

> "10. The above resume of the case-law of Indian, English and Pakistani jurisdictions indicates that the latest judicial trend is to *deprecate and to discourage* withholding of a citizen's money by a public functionary on the plea of limitation or on any other technical plea if it was not legally payable by him...."

The continued retention of the advance income tax collected from the taxpayers before us can, it seems to us, not unfairly be characterized as the "withholding of a citizen's money by a public functionary on ... [a] technical plea", when, practically speaking, there never was any (ultimate) liability to pay tax.

19. In the *Pfizer* case, it was possible for this Court to remand the matter to the concerned authority for reconsideration of the

taxpayer's claim. Here, we have been unable to conclude that the 2001 Ordinance offers a similar or equivalent solution to what does appear to be a genuine practical grievance. However, it seems to us that the following directions can, and ought to, be given: (1) in respect of the tax years already concluded, if the taxpayer has filed its return and, as on the date of this judgment, no amendment (or other similar) proceedings have been launched or are pending in respect of such return, then the amounts collected under s. 148 must be refunded in full within 30 days of the date hereof and an appropriate report filed with the Office of this Court; and (2) in respect of the present (and future, if applicable) tax year(s) (or any past tax year in respect of which a return has not yet been filed), if no amendment (or other similar) proceedings are launched within 120 days of the filing of the relevant return, then the amounts collected under s. 148 must be likewise refunded within 30 days thereof. A failure to abide by these directions may result in suitable action being taken against the concerned Member FBR and Commissioner Inland Revenue.

20. In view of the foregoing discussion, the verdict in this Court must be in favor of the Department and against the taxpayers. Accordingly, but without prejudice to the directions given in the last preceding para, CA 507/2017 is allowed and the judgments in the High Court are set aside, whereas CA 1262/2018 is dismissed. There will be no order as to costs.

Judge

Judge

Judge

Announced in open Court today, May 15, 2019 at Islamabad.

Judge

APPROVED FOR REPORTING