

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

W.P. No. 2169 of 2015

Fauji Fertilizer Company Limited-Employees Gratuity Fund

Versus

Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others

Petitioners By : M/s Naveed A. Andrabi, Ayyaz Shaukat, Hassan Kamran Bashir, Ehtisham Mahmud, Hyder Ali Khan and Ch. Naeem Ul Haq, Advocates in respective petitions.

Respondents By : Malik Muhammad Siddique Awan, Ummarah Maqsood, Saeed Ahmed Zaidi, Syed Ishfaq Hussain Naqvi, Muhammad Javaid Iqbal Malik, Hafiz Muhammad Idrees, Muhammad Mohsin Nazir, Hafiz Munawar Iqbal and Riaz Hussain Azam, Advocates in respective petitions.

Date of hearing : 27.02.2017.

AAMER FAROOQ, J. - This judgment shall decide the instant petition as well as the petitions mentioned in the schedule appended at pages No. 11 & 12, as common questions of law and facts are involved.

2. The petitioners, in all the petitions, are approved Gratuity/Provident Funds under the Income Tax Ordinance, 1979/ Income Tax Ordinance, 2001 by the competent authority. The income of the petitioners is exempted from tax under clause 57(3) of Part 1 of schedule 2 to the Income Tax Ordinance, 2001 (the Ordinance). The petitioners also claim exemption from deduction of advance tax under clause 47B of Part 2 of schedule 2 to the Ordinance. They are aggrieved of Letter/Circular dated 12.5.2015, whereby clause 47B ibid has been interpreted and a direction was made to the Commissioners Inland Revenue to apply Section 159 of the Ordinance. Based on the above circular/directions, the Banks with whom the

petitioners are maintaining accounts have required the petitioners to provide the exemption certificates, in case they wish that no advance tax be deducted from the profits that are paid on the funds maintained with them.

3. The learned counsel for the petitioner in the instant petition, inter alia, contended that exemptions and concessions admissible under the Ordinance are provided in Second Schedule to the Ordinance. In this behalf, it was contended that under section 53(1)(a), exemption is provided from tax under the Ordinance; section 53(1)(b) provides concession in the rates of tax payable under the Ordinance; section 53(1)(c) allows reduction in the tax liability and under section 53(1)(d) exemption is provided from the operation of any provision of the Ordinance. It was further contended that under Part IV of Schedule II certificates of exemption from payment of tax have been issued, therefore, the petitioner is not liable to pay any tax vis-a-vis the income derived from the fund. It was further contended that clause 47B in Part II of Second Schedule to the Ordinance makes certain provisions of the Ordinance including section 151 not applicable in case of the petitioners, hence they are not liable to deduction of advance tax/withholding tax in respect of the profits paid to them. The learned counsel also contended that bare perusal of the clause 47B ibid shows that by operation of law the provisions of Ordinance are excluded and no further permission or exemption is required from the Tax Department; that requirement of obtaining exemption certificate from deduction of advance tax is clearly beyond the mandate of law. In support of his contentions, the learned counsel placed reliance on cases reported as **(1999 PTD 1892), (1993 SCMR 139), (2005 PTD 246) and (2002 PTD 720).**

4. The learned counsel for the petitioner in Writ Petition No. 37/2016, inter alia, contended that the petitioners in each case, are Trustees of Approved/Recognized Provident Funds, Gratuity Funds or Pension Funds (Funds) and the income of each fund is exempted from tax under Clause 57 of Part I of the Second Schedule to the Ordinance; that in order to avail exemption from the

advance tax provisions of the Ordinance by virtue of Clause 57 or an entry in Part I of the Second Schedule, a Fund/Person would be required to submit an application under section 159 of the Ordinance to the Commissioner Inland Revenue; that in addition to the exemption from total income under clause 57, clause 47B of Part IV of the Second Schedule provides the petitioners a specific exemption from withholding of advance tax under Sections 37A, 150, 151 and 233 of the Ordinance; that by virtue of clause 47B the funds are exempted from deduction of tax at source on their dividends under Section 150, profit on debt under section 151, Brokerage and Commission under Section 233 and Capital Gains Tax under Section 37A as the operation of these provisions in respect of the Funds has been ousted. The learned counsel elaborated the scheme of tax exemptions and concessions as are provided in Section 53 of the Ordinance and enumerated in Second Schedule. It was further contended that section 159 is not applicable in the case of the petitioners as Clause 47B clearly excludes the operation of specific sections and does not require the petitioners to obtain certificates in this behalf. It was further contended that the interpretation rendered to clause 47B by the respondents renders it a nullity. The learned counsel placed reliance on cases reported as **"Commissioner of Income Tax versus Habib Sugar Mills Limited"** (1993 PTD 343), **"Call Tell and another versus Federation of Pakistan and others** (2005 PTD 833) and **"Collector of Sales Tax and Central Excise (Enforcement) and another versus Messrs Mega Tech (Private) Limited"** (2005 SCMR 1166). The learned Counsel further submitted that the judgments rendered by the Honorable Sindh High Court and Peshawar High Court are not binding on this Court.

5. The other learned Counsels for the petitioners adopted the arguments of the learned counsels for the petitioners in the above petitions.

6. The learned Counsels for the respondents, inter alia, contended that the issue raised in the instant petitions already stand decided by the Hon'ble Sindh High Court in case reported as **"Meezan Islamic Fund and others versus DG (WHT)**

FBR and others” (2016 PTD 1204) and **“Messrs Cherat Packaging Ltd., Staff Provident Fund and Gratuity, Peshawar versus Federation of Pakistan through Secretary Finance and Economic Affairs, Revenue Division, Islamabad and 9 others.”** (2016 PTD 2257). It was further contended that the impugned Circular/instructions does not give rise to any cause of action to the petitioners; that the mechanism for obtaining exemption certificates has been devised to ensure there is no misuse of the concessions awarded.

7. Arguments heard and record perused with able assistance of the learned counsels for the parties.

8. The petitioners are approved Gratuity and Pension Funds and are aggrieved of Letter/Circular dated 12.5.2015, whereby the Department while interpreting clause 47B of Part IV of Second Schedule to the Ordinance has made applicable Section 159 *ibid*; consequently the Petitioners have to obtain exemption certificates from the Inland Revenue for exemption from deduction of Advance Tax. For ease of convenience the relevant portion of the impugned Letter is reproduced below:-

“It has been learnt by this office that some of the field offices are not issuing specific exemptions in the cases falling within the ambit of subject mentioned provisions on the pretext that statutory exemption under clause (47B) of Part IV of the second schedule is already available to them. Legal position in this case is that any person required to withhold Income Tax may only allow exemption if a valid exemption certificate under Section 159(1) of the Income Tax Ordinance, 2001 issued by the concerned Commissioner of Inland Revenue is produced before him by the withholder.”

9. The provisions which are essential to understand the scheme of law for the purpose of controversy raised in the instant petitions are Sections 53, 150, 151, 159 as well as Clause 47B of Part IV of Second Schedule to the Ordinance. For the ease of convenience, the above mentioned relevant provisions are reproduced below:-

"Section 53(1):

The income or classes of income or persons or classes of persons specified in the Second Schedule shall be;

- a) Exempt from tax under this Ordinance subject to any conditions and to the extent specified therein;
- b) Subject to tax under this Ordinance at such rates which are less than the rates specified in the Second First Schedule as are specified therein;
- c) Allowed a reduction in tax liability under this Ordinance, subject to any conditions and to the extent specified therein; or
- d) Exempted from the operation of any provisions of the Ordinance, subject to any conditions and to the extent specified therein.

Section 151(1):- Where--

- b) A banking company or financial institution pays any profit on a debt, being an account or deposit maintained with the company or institution;
- d) A banking company or a financial institution, a company referred to in sub clause (i) and (ii) of clause (b) of subsection (2) of section 80, or a finance society pays any profit on any bond, certificate, debenture, security or instrument of any kind (other than a loan agreement between a borrower and a banking company or a development finance institution) to any person other than financial institution

the payer of the profit shall deduct tax at the rate specified.....

Section 159:

- (1) Where the Commissioner is satisfied that an amount to which Division II or III of this Part or Chapter XII applies is--
 - a) exempt from tax under this Ordinance; or
 - b) subject to tax at a rate lower than that specified in the First Schedule, or
 - c) is subject to hundred percent tax credit under Section 100,

the Commissioner, shall upon application in writing by the person, issue the person with an exemption or lower rate certificate.

- (2) A person required to collect advance tax under Division II of this Part or deduct tax from a payment under Division III of this part or deduct or collect tax under Chapter XII shall collect or deduct full amount of the tax specified in

Division II or III or Chapter XII as the case may be, 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.

Clause 47B

The provisions of Sections 150, 151, 233 and Part I Division VII of the First Schedule shall not apply to any person making payment to National Investment Unit Trust, or a collective investment scheme or a modarba or Approved Pension Fund or an Approved Income Payment Plan or a REIT Scheme or a Private Equity and Venture Capital or a recognized Provident Fund or an approved superannuation fund or an approved gratuity fund."

The combined reading of the above provisions shows that Section 53 of the Ordinance deals with the exemptions, reduced rates of taxes and exclusion of certain provisions of the Ordinance; Section 151 for the requirement of deduction of advance tax from payment of profit at the rates prescribed; Section 159 *ibid* for the issuance of the exemption certificate where applicable and the requirement to deduct the advance tax on payment of profits by a financial institution unless there is an exemption certificate(159(2) and finally clause 47B excludes the deduction of advance tax on payment of profit as provided in Section 151 with respect to *inter alia*, provident and superannuation funds.

10. The letter impugned before this Court also came under challenge before the Sindh High Court and Peshawar High Court. In the case reported as "**Meezan Islamic Fund and others** versus **DG (WHT) FBR and others**" (2016 PTD 1204), the learned Division Bench of Sindh High Court observed as follows:-

"It can be seen that clause 47B of Part IV to the second schedule of the Income Tax Ordinance, 2001 grants statutory exemption to certain categories of entities whose payments are covered under the provision of sections 150, 151 and 233 of the Income Tax Ordinance. These payments are not liable to advance tax deduction. Clause 47B by itself, however, is not sufficient to avoid deductions. There is Section 159(2) which provides that a person who is required to make advance tax deductions from the payments that are covered under Division III of Part V of Chapter X or under Chapter XII, which include payments that

are covered under Sections 150, 151 and 233, then it is obligatory on him to deduct withholding tax unless the withholder presents a valid exemption certificate issued under subsection 1 of section 159. As it is made obligatory upon the withholder under section 159(2) to make advance tax deduction from any payment that falls within the ambit of Division III of Part V of Chapter X as well as under Chapter XII, which includes Sections 150, 151 and 233, hence unless a valid exemption certificate issued under subsection 1 of Section 159 is presented to him, he will deduct withholding tax. It is only upon presentation of exemption certificate issued under Section 159(1) that the withholder stands discharged from its obligations to make advance tax deductions. It is an admitted position that provisions of Sections 150, 151 and 233 fall within Division III of Part V of Chapter X and Chapter XII and for such payments, requirement of obtaining exemption certificate first has been specifically made mandatory under Section 159(2) before concession under Clause 47B is availed.

From the above, it is evident that in view of the provisions of Section 159(2) it is not left to the withholder to decide not to make advance tax deductions even when a person to whom he has to make payment claims that he is entitled to the exemption under Clause 47B of Part IV to the second schedule of the Income Tax Ordinance, 2001. The withholder is not to form his own opinion that a person's case falls within the ambit of clause 47B unless a valid exemption certificate issued under section 159(1) is presented. Even the person whose payments are otherwise liable for advance tax deduction under Section 150, 151 and 233 cannot insist that he be extended the benefit of Clause 47B in absence of exemption certificate in the face of the provisions of Section 159(2). The entitlement of concession under Clause 47B can therefore be availed only when exemption certificate is presented to the withholder and upon such presentation the obligation of the withholder to deduct advance tax as provided under Section 159(2) stands discharged. This was exactly the reason for issuing the impugned Circular dated 12.5.2015 which states Legal position in this case is that any person required to withhold Income Tax may only allow exemption if a valid exemption certificate under Section 159(1) of the Income Tax Ordinance, 2001 issued by the concerned Commissioner of Inland Revenue is produced before him by the withholder. Thus the impugned circular refers to the provisions of Section 159 of the Income Tax Ordinance which creates statutory obligation upon withholder to deduct advance tax from the payments falling under sections 150, 151 and 233 unless the requisite exemption certificate is presented to it. It is only upon such presentation, the mandate of the certificate is to be complied with.

From the above discussion it is evident that the concession granted under clause 47B of Part IV to the Second Schedule of the Income Tax Ordinance, 2001 cannot be out rightly availed by the

withholdee from the withholder on account of the bar contained in section 159(2) unless the withholdee presents a valid exemption certificate issued to him under Section 159(1) of Income Tax Ordinance, 2001. There appears to be a sound logic behind this procedural requirement as the person who wants to seek benefit under Clause 47B may be such person who is not entitled to the benefit or in the past may have so entitled but for some reason had lost his entitlement. Therefore, it has been made mandatory for him under Section 159(2) to first demonstrate to the withholder that he holds a valid exemption certificate. In clause 47B of Part IV to the Second Schedule of the Income Tax Ordinance, 2001 mere mention that the provisions of Sections 150, 151 and 233 shall not apply to certain category of persons does not mean that to avail such concession the provisions of Section 159 have been made inapplicable. On the contrary requirement of obtaining exemption certificate has been made mandatory under Section 159(2) for all payments that fall within the ambit of Division III of Part V of Chapter X or under Chapter XII of the Income Tax Ordinance and Sections 150, 151 and 233 are part of said Chapters."

11. Similarly the Hon'ble Peshawar High Court in case reported as "**Messrs Cherat Packaging Ltd., Staff Provident Fund and Gratuity, Peshawar** versus **Federation of Pakistan through Secretary Finance and Economic Affairs, Revenue Division, Islamabad and 9 others.**" (2016 PTD 2257), interpreted the issue in hand in the following manner:-

"To sum up it is noted that section 151 read with sub clause 2 of Section 159 of the Ordinance, commands the 'payer', who while acting as withholding agent on behalf of the Revenue, to deduct taxes at source at the time of making payment to persons. In case, the contention of the petitioners is accepted by this Court, then in effect a complete immunity would be given to all funds, who claim to be validly approved under the Ordinance. In this regard it is noted that once the Commissioner grants such an approval/recognition certificate to a fund under the enabling provisions of Schedule VI of the Ordinance, then it can only be inferred with, as and when the same is revoke. This being the position, allowing persons to seek immunity from the operation of section 151 *ibid*, on the basis of such certificate with its period of validity stated therein would leave much room for its abuse. In this regard Sindh High Court has very correctly highlighted the rational for seeking exemption certificate in Atlas Income Fund case (*supra*) wherein it was held that:-

"there appears to be a sound logic behind this procedural requirement as the person who wants to seek benefit under

clause 47B may be such person who is not entitled to benefit or in the past may have been so entitled but for some reason had lost his entitlement"

It appears that the legislature in its wisdom, in order to ensure that the exemption granted to the tax payer is not abused, has provided that the requirement to obtain and produce the exemption certificate to the payer by the person, who seeks to claim the benefits of the exemption from payment of income tax at source under section 151 read with subsection 2 of section 159 of the Ordinance.

It is for this reason that, while reviewing cases relating to fiscal matters, the provisions concerning the procedure or the tax recovery mechanism provided in the Ordinance are to be strictly construed in favor of the revenue and not the subject."

12. Both the decisions dismissed the petitions filed by the Trusts and the interpretation rendered in the impugned Circular/Letter was held to be valid. This Court concurs with the decisions mentioned above and fails to find any reason or justification on the basis of which the referred judgments are not to be followed.

13. Undoubtedly under Clause 47B the application of Sections 150, 151 and 233 is excluded in case of Trusts and Pension Funds etc., however, Section 159(2) is not excluded. Section 159(1) specifically provides that where the Commissioner is satisfied that the income falling in Division II or III (which includes Sections 150 and 151 of the Ordinance, as they fall in Division III) is exempted from payment of tax, he may grant a certificate to such effect. The legislature by laying down the requirement of obtaining exemption certificate where the income is exempted has not taken away the exemption but rather has provided a mechanism to ensure that exemption is not misused in any way. Similarly under Section 159(2) of the Ordinance the person who is required to deduct advance tax under Division II or III shall do so while making payment to the person entitled to receive the same unless the payee produces exemption certificate duly issued under Section 159(1) *ibid*. The plain reading of Section 159(2) shows that the payee has to provide a certificate specifically covering exempting deduction of the advance tax and cannot claim immunity from deduction on the basis of Clause 47B or any other provision by asserting exemption due to operation of law.

14. For the foregoing reasons, the instant petition as well as all the petitions mentioned in the schedule attached herewith are without merit and are accordingly **dismissed.**

(AAMER FAROOQ)
JUDGE

Announced in Open Court on /05/2017.

JUDGE

M.Shah/.

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SCHEDULE

LIST OF PETITIONS CONNECTED WITH WRIT PETITION No. 2169/2015

S.No.	Case No.	Title
1	W.P. No. 2170/2015	Fauji Fertilizer Company Limited-Management Staff Pension Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
2	W.P. No. 2171/2015	Fauji Fertilizer Company Limited-Provident Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
3	W.P. No. 2274/2015	Pak Telecom Mobile Limited (PTML)- Employees Provident Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
4	W.P. No. 2275/2015	Pak Telecom Mobile Limited (PTML)- Employees Gratuity Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
5	W.P. No. 2359/2015	CMPak Limited-Staff Provident Fund (Formerly Paktel Limited-Employees Provident Fund) Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and another
6	W.P. No. 2375/2015	Fauji Fertilizer Bin Qasim Limited-Provident Fund Trust Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
7	W.P. No. 2376/2015	Fauji Fertilizer Bin Qasim Limited- Employees Gratuity Fund Trust Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
8	W.P. No. 2574/2015	Pakistan Tobacco Company Limited-Employees Gratuity Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
9	W.P. No. 2575/2015	Pakistan Tobacco Company Limited-Management Provident Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
10	W.P. No. 2576/2015	Pakistan Tobacco Company Limited-Employees Provident Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others

11	W.P. No. 2577/2015	Pakistan Tobacco Company Limited-Defined Contribution Pension Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
12	W.P. No. 2578/2015	Pakistan Tobacco Company Limited-Staff Pension Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
13	W.P. No. 2779/2015	Pakistan Services Limited-Employees Provident Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
14	W.P. No. 2812/2015	Hashwani Hotels Limited-Employees Provident Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
15	W.P. No. 3737/2015	Chairman, State Engineering Corporation Management Pension Fund (SEC MPF) Versus Director General (WHT) and others
16	W.P. No. 37/2016	Hub Power Company Limited-Staff Gratuity Fund and others Versus Pakistan through Secretary Finance and others
17	W.P. No. 2516/2016	Pakistan Telecommunication Company Limited- Employees Gratuity Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others
18	W.P. No. 2517/2016	Pakistan Telecommunication Company Limited- Employees General Provident Fund Versus Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad and others