

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P. No.1154-2017
M/s Askari Bank Limited
Vs.
Federation of Pakistan etc.

W.P. No.1356-2018
M/s Askari Bank Limited
Vs.
Federation of Pakistan etc.

W.P. No.1352-2018
M/s Askari Bank Limited
Vs.
Federation of Pakistan etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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04.10.2022	Hafiz Muhammad Idrees and Syed Farid Ahmad Bukhari, Advocates for petitioner. Barrister Atif Rahim Barki, Advocate for respondent FBR.
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This order shall decide instant writ petition as well as W.P. No.1356-2018 & W.P. No.1352-2018, as common questions are involved.

2. In all writ petitions, the petitioner is aggrieved of show cause notices issued by the respondent Department. In W.P. No.1154-2017, the notice is dated 09.03.2017 for tax year 2015; in W.P. No.1352-2018, it is dated 26.03.2018 for tax year 2016 and in W.P. No.1356-2018, it is also dated 26.03.2018 for tax year 2017; the notices are under section 161 (1A) read with Section 205 of Income Tax Ordinance, 2001 along with Rule 44(4) of Income Tax Rules, 2002. The subject, in all the petitions, is the same i.e.

failure to deduct tax with respect to profits paid on the accounts maintained by Armed Forces.

3. Learned counsel for the petitioner *inter alia* contended that instant petitions pertain to Tax Year 2015 onward, however, in the previous years, similar notices were issued and the matter stood settled up to the level of Appellate Tribunal Inland Revenue, where it has been held that deduction is not to be made, as Armed Forces are part of Federal Government hence exempted from deduction of withholding tax under section 49 of the Income Tax Ordinance, 2001. It was suggested that since the matter, for the past years, has been held to have attained finality, hence same cannot be re-agitated for the subsequent years.

4. On the other hand, learned counsel for the respondent Department, submitted that principle of *resjudicata*, as such, does not apply and decision of Appellate Tribunal Inland Revenue is not really binding on the Department. It was contended that each tax year is a separate year hence notices can be agitated. It was also contended that tax reference has been filed against the findings of Appellate Tribunal, which is pending in this Court.

5. Arguments advanced by learned counsel for the parties have been heard and the documents, placed on record, examined with their able assistance.

6. As noted above, the petitioners are aggrieved of notices issued by the Department for failure to deduct withholding tax on profits paid on the accounts maintained by the Armed Forces.

7. It seems from the documents appended by the petitioner that for the previous tax years, such notices were issued and were challenged and they came up for decision before Appellate Tribunal Inland Revenue, wherein it has been held that under section 49 of the Income Tax Ordinance, 2001, no deduction is to be made since Armed Forces are part of Federal Government.

8. The question as to the decision of Appellate Tribunal Inland Revenue was binding on FBR or the authority, is clear inasmuch as this Court has held in a case reported as PKP Exploration Limited Vs. Federal Board of Revenue (2021 PTD 1644) that under section 132 of the Income Tax Ordinance, 2001, the reasoning of Tribunal in one case can be treated by tax authorities as a persuasive precedent in a subsequent case where subject matter is same or similar. It was added in the said judgment that persuasive quality or cogent reasoning of a decision of Tribunal does not transform it into a legally binding precedent for officials exercising executive or adjudicatory authority under tax statutes.

9. Moreover, this Court was informed that tax reference has been filed against the decision of Appellate Tribunal Inland Revenue which is pending adjudication. The decision of the Appellate Tribunal, on the same question of law for the subsequent years, is not a bar for the Department for proceeding in the matter.

10. The principle of *res judicata* as enshrined in Section 11 of Code of Civil Procedure, 1908 is not applicable in letter inasmuch as the Code of Civil Procedure is not applicable before tax

authorities, however, principles of *res judicata* may be applicable in certain cases only and the extent to which, they are applicable, were laid down in case reported as 'Commissioner of Income Tax Vs. Pakistan Industrial Engineering Agencies Limited' (PLD 1992 Supreme Court 562), wherein the Hon'ble Supreme Court of Pakistan observed that principles of *res judicata* cannot be applied to the cases of assessments under Income Tax Act (the case related to Income Tax Act, 1922) and it was observed that *res judicata* was restricted in following cases:-

"Applicability of principles of res judicata has been restricted as follows:-

A previous decision of an Income Tax Authority will not be a bar in the following cases:

- (i) where the earlier decision is clearly open to some objection;*
- (ii) if it is a decision which is not reached after proper inquiry;*
- (iii) if it is a decision as could not reasonably have been reached on the material before the authority;*
- (iv) it is a decision which suffers from such a defect which fall within the purview of the grounds mentioned in section 100, CPC and liable to correction thereunder in second appeal, if it were a decision of civil Court; and*
- (v) if fresh evidence having a material bearing on the point decided in the previous decision is available"*

The said rationale was based on the earlier decision of the Hon'ble Supreme Court in case reported as Commissioner of Income Tax, East Pakistan, Dacca Vs. Wahiduzzaman' (PLD 1965 Supreme Court 171). Two other decisions, which almost say the same are BP Pakistan Exploration and Production INC. Karachi Vs. Additional Commissioner Inland Revenue Enforcement Collection Division, Karachi (2011 PTD 647) and Rajab Ali Hamani Karachi Vs. Commissioner Income Tax, Karachi (2011 PTD 925) In the

latter case, the Hon'ble Division Bench of Sindh High Court observed that principles of *res judicata* and *estoppel* would not apply to proceedings under the Income Tax Act of 1922, as assessing officer on knowing fact subsequently, could take a decision different that was taken earlier by him or by his predecessor. In case reported as 'M/s Riaz Bottlers Pvt. Ltd. Lahore Vs. Commissioner of Income Tax, Companies Zone-I, Lahore (2008 PTD 877), the Hon'ble Division Bench of Lahore High Court, Lahore recorded the principles mentioned hereinabove, however, in case reported as Sultan Paper Board Mills Ltd. Vs. Federation of Pakistan and others' (1982 PTD 359), a different view was taken. It was held that the petitioner producing the same articles as produced in the previous years and judicial determination made in petitioner's favour up to the level of Income Tax Appellate Tribunal and since there is no change in law, the Central Board of Revenue could not issue instructions contrary without there being any change in law or in nature of product.

11. The sum-total of the above judgments is that principle of *resjudicata* would not apply except in circumstances as quoted in case reported as PLD 1992 Supreme Court 562 supra.

12. In view of above position of law and facts, impugned notices are not subject to challenge in petition under Article 199 of the Constitution, rather inasmuch as the principles which when are applied to make a writ petition maintainable against a notice, are not attracted in the facts and circumstances. The petitioner should contest the notices and put forward its stance in light of the

legal provisions which have already been held to be applicable by the Appellate Tribunal Inland Revenue.

13. For the above reasons, no interference is required in the impugned notices, however, instant petitions are disposed of with an observation that the petitioner may reply to the notices by taking all factual and legal objections to the same, which when agitated, shall be decided by the competent authority in accordance with law.

(AAMER FAROOQ)
JUDGE

Approved for reporting