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IN THE HIGH COURT OF SINDH AT KARACHI

C. P. No.D-2039 of 2011

Present: **Ghulam Sarwar Korai, and Munib Akhtar, JJ.**

Date of hearing: 30.1.2013

Petitioner : Mr. Anwar Kashif Mumtaz, Advocate.

Respondents : Mr. Chaman Lal, Advocate for respondent Department.
Mr. Jawed Farooqui, DAG.

JUDGMENT

Munib Akhtar, J: The petitioner is an insurance company which is engaged in the life insurance business. On or about 24.5.2011, the petitioner received a notice from the concerned Taxation Officer in respect of Tax Year 2010. According to this notice, the annual report of the petitioner revealed that a certain aggregate sum of money (as specified in the notice) had been paid out to policy holders on maturity of their respective policies. The Taxation Officer expressed the view that on these payments, the petitioner was obligated to withhold tax as per the prescribed amount by reason of section 151(a)(d) of the Income Tax Ordinance, 2001 ("Ordinance") and such withheld tax had to be paid into the State treasury. The notice concluded by stating that since the needful had not been done, the petitioner's representative should appear before the Taxation Officer in order to explain its position. It appears that instead of doing so, the Petitioner filed the present petition whereby it sought declaratory and injunctive relief on various grounds against the notice.

2. Learned counsel for the petitioner stated that in terms of the aforesaid provision relied upon by the Taxation Officer, tax had to be withheld on payment or disbursement of "profit on debt". Learned counsel submitted that, on the face of it, the notice itself indicated that the disbursed aggregate amount on which it was alleged that tax ought to be withheld were payments to the policy holders on maturity of their respective policies. Learned counsel submitted that it was quite obvious that such payments were not by way of "profit on debt" and in this regard referred to the definition of this expression as contained in section 2(46) of the Ordinance. He further submitted that payment on maturity constituted a payment of a capital nature and was therefore even otherwise not liable to the payment of tax and certainly not to any deduction by way of withholding tax. He submitted that the notice was clearly unlawful and ought to be declared as such and the petitioner be granted suitable declaratory and injunctive relief. Learned counsel also relied on a certain order made by CIT (Appeals) in respect of some other case relating to the petitioner that had been in the latter's favor and submitted that the order of the

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aforesaid appellate authority was equally applicable to the facts and circumstances of the present case.

3. Learned counsel for respondent Department strongly contested the case put forward by learned counsel for the petitioner. He submitted that payments on or in relation to life insurance policies were fully covered by the relevant provisions of the Ordinance and any such payments came, in particular, within the scope of section 151(1)(d). The petitioner was obligated to withhold tax at the prescribed rate on such payments and deposit the same in the State treasury. Learned counsel further submitted that the petition was premature inasmuch as the petitioner had adequate alternate remedy under the various provisions of the Ordinance, which had admittedly neither been resorted to nor exhausted and that therefore the petition was liable to be dismissed on this ground alone. Learned counsel also referred to certain case law.

4. We have heard learned counsel as above and examined the petition and the relevant statutory provisions with their assistance. Having considered the matter, we have concluded that it would not be appropriate for us to say anything at the present stage with respect to the merits of the case. The reason is that we find force in the objection raised by learned counsel for the Department that the petitioner has come to Court without exhausting the statutory remedies that are available under the Ordinance. Section 160 of the Ordinance provides that the tax required to be, *inter alia*, withheld on a payment made under section 151 shall be paid to the concerned Commissioner in the prescribed manner and within the prescribed time. Section 161 empowers the Commissioner to take action to recover the amount in terms as therein stated if there has been a failure either to deduct tax or to deposit any deducted tax in the State treasury by the deducting authority. For present purposes it is necessary to note subsection (1A) of section 161 which requires that before passing an order in terms of section 161(1), an opportunity of hearing must be given to the concerned person. In our view, the impugned letter dated 24.5.2011 is in the nature of such an opportunity since clearly the Taxation Officer has called upon the petitioner to explain its position vis-à-vis the stance adopted by the Department with respect to the payments on maturity. It is by now well settled that although the existence of an alternate remedy does not control the existence of the High Courts' jurisdiction under Article 199 of the Constitution but merely regulates it, if the Department (or concerned authority whose action is impugned) has taken appropriate steps in accordance with law by issuance of a notice, then the tax payer ought to resort to the statutory provisions and not come rushing to the High Court immediately under Article 199. Reference in this regard can be made to various Division Bench decisions of this Court such as *ICI Pakistan Limited v. Federation of Pakistan and others* 2006 PTD 778 and *Roche Pakistan Limited v. Deputy Commissioner of Income Tax and others* 2001 PTD 3090. A review of the grounds taken by the petitioner to challenge the notice that was issued indicate that there is nothing therein

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that would take the petitioner's case out of the scope of the afore-cited decisions and the well-established principles that apply in such circumstances. Therefore, we are of the view that this petition is premature and the petitioner should first avail the statutory remedies and if aggrieved by any order made on the basis or as a follow up on the notice, approach the relevant appellate forums as per the hierarchy as given in the Ordinance itself. Of course, as is well known, the matter ultimately culminates in a reference application to the High Court concerned.

5. Before concluding we would note that nothing that has been stated herein should be regarded as being any observation on the merits of the case, with regard to which the petitioner shall be entitled to raise all its grounds, which shall be considered by the Taxation Officer and dealt with by a reasoned order in accordance with law. We would only note that should an order be made that is adverse to the petitioner, then no recovery proceedings shall be initiated against it for a period of 10 days from the date of communication of such order so that the petitioner can, if it so deems appropriate, approach the next higher forum for such relief, if any, to which it may be entitled in accordance with law.

6. In view of what has been stated herein above, we conclude that this Petition is premature and, therefore is liable to be, and hereby is, dismissed as such in *limine* along with listed application.


 JUDGE 22/2/2013

 JUDGE

Karachi:

Shakeel, PS