

Form No.HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE.  
JUDICIAL DEPARTMENT

W.P No.38612/2015

D.G Khan Cement Co. Ltd. etc Vs Federation of Pakistan etc

Sr. No. of Order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge and that of parties or counsel where necessary
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22.12.2015 Mr. Imtiaz Rasheed Siddiqui and Mr. Shehryar Kasuri, Advocates for the petitioners/applicants.  
Mr. Nasar Ahmad, D.A.G.  
Mr. Sarfraz Ahmad Cheema, Advocate for FBR.

C.M No.2 of 2015

This is an application for the grant of interim relief *pendente lite*.

2. The main petition lays a challenge to the insertion of section 4B in the Income Tax Ordinance, 2001 by the Finance Act, 2015. Section 4B is an imposition in the nature of 'super tax' for rehabilitation of temporarily displaced persons.

3. The learned counsel for the applicant submits that the power to tax is a sovereign power and the Government is well within its right to levy taxes to raise revenue for general purposes and the power to tax is within the Federal Government's enumerated powers. However, according to the learned counsel,

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the Federal Government possesses only limited powers and cannot travel beyond the mandate given to it under the Constitution of Islamic Republic of Pakistan, 1973. In a nub, the learned counsel submits that when a tax is levied for a particular purpose, it becomes a Cess for all intents and purposes and is not part of the federal consolidated fund but the revenue from that tax is to be kept in a separate account. The learned counsel contends that the petitioner has a good prima facie case and the petitioner is likely to succeed in the challenge which has been laid in the instant petition. He also states that it would cause a great deal of inconvenience for the petitioner to seek a refund in case the petition succeeds and, therefore, it would be expedient and more convenient that the recovery of the tax as an interim measure ought to be stayed.

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4. The learned D.A.G as well as learned counsel for Federal Board of Revenue (FBR) have strenuously opposed the grant of the interim relief pending the determination of the question of constitutionality of section 4B of the Ordinance, 2001. The primary submission of the learned D.A.G is predicated on the

general principle that a provision of a statute would remain valid until it is struck down.

5. On the threshold, it may be stated that the learned counsel for the applicant has relied upon the ingredients vouched by respectable authority with regard to the grant of temporary injunction in support of the instant application. These are prima facie case, balance of convenience and irreparable loss. Having relied upon these ingredients, the onus clearly lies with the petitioner to justify the grant of the interim relief.

6. To begin the discussion, it will be borne in mind that we are here concerned that the constitutionality of section 4B of the Ordinance, 2001. The provision of a statute will remain valid for all intents and purposes unless "the lack of constitutional authority to pass the act in question is clearly demonstrated". *United States v. Harris*, 106 US 629, 635 (1883). It is also equally well established that "there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits". *Marbury v. Madison*, 1 Cranch 137, 176 (1803). The principle that up till a law is finally held to be *ultra vires* for any reason, it

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should have its normal operation has been settled by the superior courts of our country. If any authority is required, refer to Federation of Pakistan v. Aitezaz Ahsan (PLD 1989 Supreme Court 61). Therefore, there is a strong presumption of constitutionality of an act of the parliament until it is struck down by the courts. It inevitably follows that prima facie case does not exist in favour of the petitioner at the present moment. It may be that the petitioner company may have a better reading of the law in question ultimately but that stage has yet to arrive and until the matter is heard fully and a determination is handed down by this Court, the law remains in operation and is applicable for all purposes.

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7. The next aspect is with regard to the balance of convenience or inconvenience caused to the petitioner company. In this regard, it will be pertinent to state that the annual income tax returns are due to be filed by 31.12.2015. Any order in the nature of interim relief at this stage would mean that the tax imposed by section 4B will not be deposited by the petitioner company and by other companies in similar position for an order of this nature in the instant case will spawn a series of litigation by other companies

similarly placed and the effect would be that the entire revenue to be collected by the Government and the FBR under the head of 'super tax' will go abegging. The learned counsel for the applicant submits that it is expedient for the levy to be stayed at this stage rather than for the petitioner to run through the vortex of seeking refunds. However, this can hardly form a valid ground for the grant of injunction and does not tilt the balance of convenience in favour of the petitioner. If these scales are to be balanced then more inconvenience will be caused to the Government than to the petitioner and the inconvenience to the petitioner can be dealt with and taken care of at the time of the passing of the final judgment in case the petitioner does succeed in the challenge. However, the entire budgetary allocation and other financial and revenue matters of the Federal Government will fall into disarray in case an interim relief is granted.

8. The third ingredient regarding the irreparable loss is also not attracted in the present case. Clearly, in case the petitions succeed, the petitioners will be entitled to refund of the tax deposited in terms of section 4B of the Ordinance, 2001 and, therefore, nothing turns on this aspect as well.

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9. Another aspect which is at the heart of the determination to be made on the issue of interim relief is that it has been settled and vouched by the superior courts that a provision remains valid and operative until it is struck down finally by the Courts. In case an interim relief in any form is granted at this stage, that will be tantamount to circumventing the mandate of the principle laid down by the superior courts. This cannot be countenanced. Two principles would come into play. Firstly, the maxim that what cannot be done directly cannot also be done indirectly is fully applicable in this case. Also it has consistently been held by the superior courts that an interim relief which amounts to the grant of the final relief cannot be granted by the Courts. However, the primary basis for the refusal of the relief remains the same. It is that by way of interim relief, no concession can be granted which will result in the suspension of the operation of a provision of law.

10. The learned counsel for the applicant has relied upon the order passed by the High Court of Sindh in suits No.2211, 2181, 2182 and 2183 of 2005 in which the following relief has been granted:-

*"In view of the above, the plaintiff may file its tax return manually within the due date. In*

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*case of any deficiency in the said tax return, the defendants will be at liberty to act strictly in accordance with law. However, in case of any deficiency therein on account of non-payment of the impugned super tax, no coercive action shall be taken against the plaintiff till the next date. By consent, adjourned to 04.12.2015."*

II. The learned counsel for the petitioner requests that the same relief be granted to the petitioner company as this would promote consistency and comity in the decisions rendered by the different High Courts. However, I am not inclined to follow the view taken by the High Court of Sindh for the reasons which have been spelt out hereinabove. The relief granted by the High Court of Sindh effectively renders the provisions of section 4B of the Ordinance, 2001 as redundant and inoperative. These shall run counter to the rule laid down by the superior courts.

12. The learned D.A.G has brought to the notice of this Court an interim order passed by the Supreme Court of Pakistan in CP No.1796 of 2013. The Supreme Court of Pakistan suspended the operation of the interim order passed by the High Court of Sindh in a matter laying a challenge to the provisions of Income Support Levy Act, 2013. The High Court of Sindh had in its order passed a similar order as has been passed in the order relied upon by the learned

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counsel for the petitioner and had permitted the filing of the returns of income manually.

13. In view of the above, this application for the grant of interim relief is without any merit and is, therefore, dismissed.

Main Case

14. The reply to the petition has not been filed by the Federal Government or by the other respondents including the FBR. It is directed that the reply be filed before the next date of hearing with an advance copy to the learned counsel for the petitioner. The matter is now adjourned for final hearing for 27.01.2016.

(SHAHID KARIM)  
JUDGE

\*  
Rafaqat Ali

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