

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.T.R.No.88/2009

M/s Oil and Gas Regulatory Authority

Versus

Commissioner of Income Tax, Islamabad

Date of Hearing: 19.12.2018

Petitioners by: Hafiz Munawar Iqbal and Imran Rasool, Advocates in I.T.R.Nos.45, 46, 47, 48 and 49/2012 and I.T.R.No.88/2009
Mr. Shahid Iqbal, Advocate in I.T.R.Nos.79, 80, 82, 84, 87 and 88/2009, I.T.R.Nos.144, 146, 147 and 148/2011
Mr. Saeed Ahmed Zaidi Advocate in I.T.R.Nos.32, 33, 34 and 35/2012
Mr. Tariq Rashid, Advocate in I.T.R.Nos.79, 80, 82, 84 and 87/2009
Mr. Atif Waheed Advocate in I.T.R. Nos.55, 56 & 57/2012 and 60/2012

Respondents by: Mr. Muhammad Abu Bakar, Advocate for respondent/Z.T.B.L. in I.T.R.Nos.45, 46, 47 and 48/2012, I.T.R.Nos.144, 146, 147, 148/2011 and I.T.R.No.49/2012
Syed Tauqeer Bukhari and Syed Tansoor Bukhari, Advocates for respondent/D.H.A. in I.T.R.Nos.32, 33, 34 and 35/2012
Mr. Babar Bilal and Ch. Abdul Khalique Thind, Advocates.

PI process for placement of legal wing in FBR website

14-12-18

(S.A.R.)

MIANGUL HASSAN AURANGZEB, J:- Through this judgment,

we propose to answer income tax reference Nos.79, 80, 82, 84, 87 & 88/2009, 32, 33, 34, 35, 45, 46, 47, 48, 49 & 60/2012, 144, 146, 147, & 148/2011, 55, 56 & 57/2015 since they entail a common questions of law i.e. whether entities established under the provisions of statutes would be exempt from the payment of tax under section 49(1) to (3) of the Income Tax Ordinance, 2001 ("the 2001 Ordinance"); and whether section 49(4) inserted through the Finance Act, 2007, could be given retrospective effect. Indeed, these were the only two questions pressed by the petitioners/applicants. The statutory bodies seeking such an exemption place reliance on sections 49(1) to (3) of the 2001 Ordinance which runs thus;

49. Federal government, Provincial Government, and Local Government income: (1)The income of the Federal Government shall be exempt from tax under this Ordinance.

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(2). *The income of a Provincial Government or a Local Government in Pakistan shall be exempt from tax under this Ordinance, other than income chargeable under the head "Income from Business" derived by a Provincial Government or Local Government from a business carried on outside its jurisdictional area;*

(3) *subject to sub-section (2), any payment received by the Federal Government, a provincial government or a Local Government shall not be liable to any collection or deduction of advance tax."*

2. The exemption from payment of income tax is being sought by (1) (National Electric Power Regulatory Authority) established under the provisions of the Regulations of Generation, Transmission and Distribution of Electric Power Act, 1997, (2) Zarai Taraqati Bank Limited earlier established under the provisions of the Agriculture Development Bank of Pakistan (Re-organization and Conversion) Ordinance, 2002, and subsequently, registered under the provisions of the Companies Ordinance, 1984, (3) the Defence Housing Authority established under the provisions of the Defence Housing Authority Islamabad Act, 2013, and (4) Oil and Gas Regulatory Authority established under the provisions of Oil and Gas Regulatory Authority Ordinance, 2002.

3. There is no provision in any of the statutes establishing the above-named entities exempting them from the payment of tax under the provisions of the 2001 Ordinance. The said entities can also not be termed as "local authorities". We hold this on the strength of the law laid down by the Hon'ble Supreme Court in the case of Deputy Managing Director, National Bank of Pakistan Vs. Atta ul Haq (PLD 1965 SC 201) to the following effect:-

"The conclusion that the National Bank of Pakistan is a "local authority" in East Pakistan is one with which, speaking with respect, we find it entirely impossible to agree. The expression "local authority" has been used in statutory phraseology in the Indian sub-continent for a great many years, and is always understood to mean an authority which is entrusted with the administration of a local fund. Local authorities are bodies exercising within limited territories included in a Province, powers which belong to the Province, but which by statute are delegated to the local authority. A local authority is ordinarily charged with functions of self-Government, and has power of

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making bye-laws, of imposing taxation, and of maintaining and administering a local fund."

4. The Division Bench of this Court, vide judgment dated 18.05.2009, passed in Tax Reference No.160/2008, titled Pakistan Telecommunication Authority Vs. Commissioner Income Tax, Coys Zone Islamabad, held that the Pakistan Telecommunication Authority, was not entitled to the exemption from payment of income tax under section 49 of the 2001 Ordinance. In the said judgment, the term "*local authority*" was interpreted in the following terms:-

"Bracketing "Local Authority" with Provincial Government and using the phrase "outside its jurisdictional area" makes the intention of the legislature clear that the local authorities, which exercise the governmental powers within its jurisdictional area have been exempt from income tax. We are therefore, of the confirmed opinion that the Pakistan Telecommunication Authority is not a local authority within the meaning of Section 49(2) of the Ordinance."

5. The question whether the Securities and Exchange Commission of Pakistan was entitled to the exemption from the payment of income tax under section 49 of the 2001 Ordinance, was definitively answered by the Division Bench of this Court in income tax reference No.26/2010 titled "Securities and Exchange Commission of Pakistan Vs. Commissioner of Income Tax (Audit), LTU, Islamabad.", in the following terms:-

"Having considered the respective contentions, it is observed that the petitioner is creature of Federal Government through the womb of Securities and Exchange Commission of Pakistan, Act, 1997 & it has the identity independent to that of Federal Government, who is the creation of the Constitution. There is no cavil to the fact that Federal Government controls SECP but this fact by itself does not crown it to the pedestal of being Federal Government itself. The Government constituted SECP as a Body Corporate and it has framed its own rules under the provisions of Securities and Exchange Commission of Pakistan, Act, 1997. Its employees are the subject of its regulations and not to the Civil Servants Act, 1973. For the aforesaid reasons, the petitioner has failed to convince the court that SECP is Federal Government or has been discharging the functions of the Federal Government. It is held that the Federal Government delegated some of its functions and powers about the regulation of the companies and corporations to the SECP for the sole purpose of better control & administration but it is not the Federal Government by itself. Resultantly the reference No.1 is answered in negative."

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17 JAN 2019

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6. Article 165 of the Constitution has consistently been interpreted to make the income or property of the Federal Government liable to taxation under an Act of Parliament unless specifically exempted from the operation of such an Act. The income or property of the Federal Government is not liable to taxation under any Act of the Provincial Assembly. As mentioned above, none of the statutes establishing the entities/bodies, seeking exemption from the payment of income tax, contain any provision exempting such bodies from the payment of income tax. Section 4 of the 2001 Ordinance provides *inter-alia* that income tax shall be imposed for each tax year on every "person" who has taxable income for the year. The meaning of the term "person" is given in section 80(1) of the 2001 Ordinance and includes "the Federal Government". This is the charging section which makes the Federal Government liable to pay income tax in terms of section 4 of the 2001 Ordinance. However, section 4 begins with the words "Subject to this Ordinance". Section 4 is, therefore, subject to section 49(1) of the 2001 Ordinance, which exempts the income of the Federal Government from tax under the said Ordinance. Section 49(2) of the 2001 Ordinance also exempts the income of the Provincial Government or a Local Government from income tax. Through the Finance Act, 2008, the term "local government" substituted "local authority" in Section 49(2). Since we are of the view that the said bodies/entities do not come within the meaning of "local government" or "local authority" they cannot claim exemption from the payment of income tax under section 49(1) to (3) of the 2001 Ordinance.

Furthermore, Article 165-A of the Constitution is reproduced in "Schedule-A" hereto. The Division Bench of this Court in the case of Pakistan Telecommunication Authority Vs. the Commissioner of Income Tax, Coys Zone Islamabad (*supra*) interpreted Article 165-A of the Constitution in the following terms:-

"Through Article 165-A, it was declared that the income of a corporation, company or other body or institution,

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17 JAN 2019

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established by or under a Federal or Provincial law or an existing law or a corporation, company or other body or institution owned or controlled either directly or indirectly by the Federal Government or a Provincial Government, shall be liable to tax under any Act of the Parliament, regardless of the ultimate destination of such income. The purpose achieved through this article was that any income of a corporation, company or other body or institution established by or under a Federal law or a provincial law or an existing law or a corporation, company or other body or institution owned or controlled either directly or indirectly by the Federal Government or Provincial Government may not be taken to be exempt from levy and recovery of tax on the ground that ultimate destination of such income is the Federal consolidated fund or the Provincial consolidated fund."

8. After answering the first question in the above terms, the question whether section 49(4) of the 2001 Ordinance can be given retrospective effect, becomes academic. Even in the judgment dated 18.05.2009 (*supra*), the Division Bench of this Court had observed that section 49(4) was a declaratory legislation meant to achieve the purpose which had already been achieved by Article 165-A of the Constitution. It was also observed in the said judgment that there was no necessity to add section 49(4) in the 2001 Ordinance, and that the same was added as an abundant caution. The mere fact that section 49(4) was inserted in the Income Tax Act through the Finance Act, 2007, this by itself did not mean or imply that prior to the said insertion, the above-named entities/bodies were exempt from the payment of income tax. In order to claim exemption from the payment of income tax, the body/entity claiming such an exemption has to be either "federal government", "provincial government", "local government" (earlier "local authority"). Be that as it may, the question whether section 49(4) of the 2001 Ordinance could be given retrospective effect has also been answered by this Court in the case of "Securities and Exchange Commission of Pakistan vs. Commissioner of Income Tax (Audit), L.T.U. Islamabad (*supra*), wherein it has been held that section 49(4) could not be given retrospective effect. For the purposes of clarity, section 49(4) is reproduced in "Schedule-B" hereto,

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"SCHEDULE-A"

"165A. Power of Majlis-e-Shoora (Parliament) to impose tax on the income of certain corporations, etc. (1) For the removal of doubt, it is hereby declared that Majlis-e-Shoora (Parliament) has, and shall be deemed always to have had, the power to make a law to provide for the levy and recovery of a tax on the income of a corporation, company or other body or institution established by or under a Federal law or a Provincial law or an existing law or a corporation, company or other body or institution owned or controlled, either directly or indirectly, by the Federal Government or a Provincial Government, regardless of the ultimate destination of such income. (2) All orders made, proceedings taken and acts done by any authority or person, which were made, taken or done, or purported to have been made, taken or done, before the commencement of the Constitution (Amendment) Order 1985, in exercise of the powers derived from any law referred to in clause (1), or in execution of any orders made by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court or tribunal, including the Supreme Court and a High Court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court, including the Supreme Court and a High Court, on any ground whatsoever. (3) Every judgment or order of any court or tribunal, including the Supreme Court and a High Court, which is repugnant to the provisions of clause (1) or clause (2) shall be, and shall be deemed always to have been, void and of no effect whatsoever."

"SCHEDULE-B"

49. (4) Exemption under this section shall not be available in the case of a corporation, company, a regulatory authority, a development authority, other body or institution established by or under a Federal law or a Provincial law or an existing law or a corporation, company a regulatory authority, a development authority or other body or institution set up, owned and controlled, either directly or indirectly, by the Federal Government or a Provincial Government, regardless of the ultimate destination of such income as laid down in Article 165A of the Constitution of Islamic Republic of Pakistan.

Provided that the income from sale of spectrum licenses by Pakistan telecommunication authority on behalf of the Federal Government after the first day of March 2014 shall be treated as income of the Federal Government and not of the Pakistan Telecommunication Authority.


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9. We answer the references in question in terms that although section 49(4) does not have retrospective effect, but since the above-mentioned bodies seeking exemption from the payment of tax under section 49(1) to (3) of the 2001 Ordinance cannot be termed as "federal government", "provincial government", "local authority" or "local body", they cannot be considered as entitled to the exemption from the payment of income tax.

10. For what has been discussed above, these references are answered in negative.


(CHIEF JUSTICE)


(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 14/01/2019


(CHIEF JUSTICE)


(JUDGE)

APPROVED FOR REPORTING

Qamar Khan

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BEFORE THE ISLAMABAD HIGH COURT AT ISLAMABAD

ITR 88/2009 Pet 88

Tax Reference No. 145 of 2009 / HC

Oil and Gas Regulatory Authority Islamabad

...Petitioner

Versus

The Commissioner of Income Tax, Large Taxpayer Unit, Islamabad

For Private

17 JAN 2019
Respondent

Tax reference under section 133(1) of the Income Tax Ordinance, 2001 arising out of order of the Income Tax Appellate Tribunal of Pakistan recorded as ITA No.537(IB) of 2008 (Tax year 2003) and passed on 31st March, 2009

The Applicant state as follows:-

1. That the appeal noted above was decided by the Lahore Bench of the Income Tax Appellate Tribunal on 31st March, 2009.
2. That the order under sub-section (3) of section 132 of the Income Tax Ordinance, 2001 was served on the applicant on 21st April, 2009.
3. That the facts which are admitted and/or found by the Tribunal, the determination of the Tribunal and the question(s) of law which arises out of its order have been truly stated in the attached statement of the case.
4. That the following questions of law arise out of the order of the Tribunal:-



Filed today after 09.30 AM

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Islamabad High Court