

2016 P T D 1204**[Sindh High Court]****Before Faisal Arab, C.J. and Muhammad Iqbal Kalhoro, JJ****MEEZAN ISLAMIC FUND and others****Versus****D.G. (WHT) FBR and others**

Const. P. Nos. D-3195, 2340, 2341, 2710, 2755, 2882, 2941, 2942, 2943, 2944, 3140, 3146, 3196, 3197, 3198, 3199, 3200, 3201, 3202, 3203, 3324, 3328, 3329, 3399, 3438 to 3455, 3548 to 3612, 3629, 3687, 3693, 3695 to 3705, 3744, 3752, 3836, 3837, 4043, 4089, to 4095, 4142 to 4149, 4208 to 4215, 4230 to 4233, 4246 to 4249, 4307 to 4312, 4314 to 4320, 4387 to 4392, 4508, 4534 to 4537, 4632, 4633, 4782 to 4784, 4820 to 4822, 4870 to 4875, 4911 to 4918, 4925, 4950, to 4955, 5011 to 5014, 5033 to 5037, 5061 to 5065, 5180, 5269, 5270, 5326, 5327, 5339, 5347, 5348, 5349, 5399 to 5406, 6052, 6667, 6668, 6672, 6673, 6203 to 6205, 6223, 6224, 6233, 6313, 6314 to 6356, 6378, 6379, 6452, 6484, 6805, 6806, 6177, 5842, 7001, 7002, 6955 to 6963, 7134, and 7135 to 7140 of 2015, decided on 2nd December, 2015.

Income Tax Ordinance (XLIX of 2001)---

----Ss.150, 151, 233---Second Sched. Part IV, Cl. 47B---Federal Board of Revenue Circular No.I(43)DG(WHT)/2008-Vol.11-66 dated 12.05.2015---Deduction/collection of advance tax---Exemption or lower rate certificate---Mandatory nature of requirement of obtaining an exemption certificate under section 159(2) of the Income Tax Ordinance, 2001---Petitioners impugned Federal Board of Revenue Circular No.1(43)DG(WHT)/2008-Vol. 11-66 dated 12.05.2015 which required that a valid exemption certificate be first obtained prior to availing benefit of Clause 47B of Part IV of Second Schedule to the Income Tax Ordinance, 2001---Validity---Under section 150,151 and 233 of the Income Tax Ordinance, 2001 every person making certain specified kinds of payments was required to first deduct withholding tax however, to avail some concession / exemption from the same by the person receiving said payment, an exemption certificate was required to be obtained under section 159 of the Income Tax Ordinance, 2001 ----Clause 47B of Part IV of the Second Schedule to the Income Tax Ordinance, 2001 granted statutory exemption to certain categories of entities whose payments were covered under section 150,151 and 233 of the Income Tax Ordinance, 2001 and such payments were not liable to advance tax deduction---Clause 47B of Part IV of the Second Schedule to the Income Tax Ordinance, 2001 itself however was not sufficient to avoid such deduction of tax and section 159(2) of the Income Tax Ordinance, 2001 provided that a person who was required to make advance tax deduction from payments that were covered under Ss. 150, 151 and 233 of the Income Tax Ordinance, 2001 then it was obligatory upon such person to deduct withholding / advance tax unless the other party presented a valid exemption certificate issued under S. 159(1) of the Income Tax Ordinance, 2001---Only upon the presentation of such an exemption certificate, the withholder stood discharged from its obligation to make advance tax

deduction and such exemption certificate first had been made mandatory specifically under S. 159(2) of the Income Tax Ordinance, 2001 before the concession of Clause 47B of Part IV of the Second Schedule to the Income Tax Ordinance, 2001 was availed High Court observed that in view of provisions of S. 159(2) of the Income Tax Ordinance, 2001 it was not left to the withholder to decide not to make advance tax deductions even when a person to whom he had to make payment claimed that he was entitled to the exemption under Clause 47B of Part IV of the second schedule to the Income Tax Ordinance, 2001 and the withholder was not to form his own opinion that a person's case fell within such exemption unless a valid exemption certificate issued under S. 159(2) of the Income Tax Ordinance, 2001 was presented ---Impugned Circular by the FBR thus referred to said S.159(2) of the Income Tax Ordinance, 2001 which created a statutory obligation upon the withholder to deduct advance tax for the relevant payments unless requisite exemption certificate was presented---Constitutional petitions were dismissed, in circumstances.

Naveed Andrabi, Usman and Ammar Athar Saeed for Petitioners (in C.P. No.3195/2015).

Salahuddin Ahmed for Petitioners (in C.P. No. D-4392/2015).

Ms. Lubna Pervaiz for Petitioners (in C.Ps. Nos. D-5180 and 6233 of 2015).

Emad-ul-Hasan for Petitioners (in C.Ps. No. D-5061 to 5065, 5842 and 6484/2015).

Jamshuid Malik for Petitioners (in C.Ps. Nos. D-6313 and 6314/2015).

Farhan A. Jaffri for Petitioner.

M. Ageel Qureshi for Petitioners (in C.Ps. Nos. D4192, 4314, 4230,4568, 4208, 4782, 4314, 4315, 4782, 4508, 4230 of 2015).

Javed Asghar Rana for Petitioner (in C.P. No. 6177/2015).

Hyder Ali Khan and Sami-ur-Rehman for Petitioners (in C.Ps. Nos. D-6052, 4925, 5839, 4043 and 5488/2015).

Umar Shoaib Pirzada for Petitioner (in C.P. No. D-4089/2015).

Amjad Javed Hashmi for the Department.

Irshad-ur-Rahman for the Department.

M. Aslam Butt, D.A.G.

Syed Noman Zahid for Respondent No. 6 (in C.Ps. Nos. D-5283 to 5287/2015).

Abid Hussain for Respondent No. 5 (in C.P. No. D-4392/2015).

Obaidullah for Respondent No. 7 (in C.Ps. Nos. D-5901, 5902 and 5904/2015).

Naveed Ali for Respondents M/s. Bank Al- Habib and Noble Computers.

Ms. Naheed A. Shahid, Advocate.

Naveedul Haq, for HBL Assets Management Mr. Jailer Raza, Advocate.

Ghulam Murtaza for Douche Bank.

Mr. Ijaz Ahmed, Advocate.

Ms Sanam Imtiaz, Advocate.

Khursheed Ahmed and Shiraz Saleem ur Rehman,

Ghulam Murtaza Malik for Respondents (in C.Ps. Nos. 4534, 4535, 4536/2015).

Fazl-e-Rabi for Petitioner (in C.Ps. Nos. D-6805, 6806, 6667, 6668/2015).

M. Imtiaz Agha, Advocate.

Shiraz Saleem ur Rahman for BSO, ABL.

Shah Nawaz Khan Jamaal, Managerial Executive (Legal) National Refinery Ltd. (in C.Ps. Nos. D-5399, 5401 and 5402/2015).

Date of hearing: 4th November, 2015.

JUDGMENT

FAISAL ARAB, C.J.---Impugned in this petition is Circular dated 12.05.2015 which requires that a valid exemption certificate be first obtained prior to availing benefit under Clause 47B of Part IV of the second schedule to the Income Tax Ordinance, 2001. The case of the petitioners is that they fall within the category of entities mentioned in Clause 47B hence stand exempted from advance tax deductions and to avail, such concession they are not required to obtain valid exemption certificate under Section 159 of the Income Tax Ordinance. The impugned Circular for convenience sake is reproduced as under:--

**Government of Pakistan
REVENUE DIVISION
(FEDERAL BOARD OF REVENUE)**

C. No.1(43)DG(WHT)/2008-Vo I . II-66417-R Islamabad, 12th May, 2015
The Chief Commissioner
Large Taxpayers Unit,
Islamabad/Lahore/Karachi.
The Chief Commissioner,
Regional Tax Office,

Karachi-I/Karachi-II/Karachi-III/Lahore
 1/Lahore11/Hyderabad/Sukkur/Quetta/Multan/Bahawalpur/
 Sialkot/Rawalpindi/Sargodha/Faisalabad/Gujranwala/Islamabad/
 Abbottabad/Peshawar.

**Subject: REQUIREMENT OF VALID TAX EXEMPTION CERTIFICATE
 FOR CLAIM OF EXEMPTION UNDER SECTION 150 AND
 233 OF THE INCOME TAX ORDINANCE, 2001 IN THE
 CASES WHERE STATUTORY EXEMPTION UNDER
 CLAUSE 47B OF PART - IV OF SECOND SCHEDULE IS
 AVAILABLE.**

Please refer to the subject

2. It has been learnt by this office that some of the field officers are not issuing specific exemptions in the cases falling within the ambit of subject mentioned provisions on the pretext that statutory exemption under clause (47-B) of part IV of the said 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.

3. The matter has already been clarified by the Board also vide C.No.1 (29) WIIT/2006 dated 30.06.2010 upon the request of Central Directorate of National Savings (CDNS) (copy enclosed).

4. In view thereof, it is re-iterated that exemption certificate in such cases may be issued in the light of Board's above clarification.

Sd/=
 (SHAUKAT MAHMOOD)
 Director-General (WHT)

2. On the other hand, the stand takers by the department is that the direction contained in the impugned Circular are based on the statutory requirement of Section 159 of the Income Tax Ordinance as the concession granted under Clause 47B of Part IV to the second Schedule of the Income Tax Ordinance, 2001 can be availed when a person holds a valid exemption certificate issued to him under Section 159(1) of the Income Tax Ordinance. It was submitted that in absence of exemption certificate the withholder is legally obligated under Section 159(2) of the Income Tax Ordinance to make advance tax deduction wherever required under the Income Tax Ordinance, 2001. Thus it is the case of the department that unless valid tax exemption certificate from the concerned Commissioner under Section 159(1) is presented to the withholder, the withholder is bound under Section 159(2) to deduct advance tax for matters that are covered under Clause 47B of Part IV to the second Schedule.

3. In order to appreciate the respective stands of both the sides it is necessary to examine the relevant provisions of the Income Tax Ordinance where-under the petitioners can prevent the withholder from making advance tax deductions. These provisions are Clause 47B of Part IV to the second Schedule and Sections 150, 151, 233 and 159 of the Income Tax Ordinance. For convenience sake, Clause 47B is reproduced below:--

Clause 47B of Part IV of the Second Schedule

"(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 modaraba or Approved Pension Fund or an Approved Income Payment Plan or a REIT Scheme or a Private. Equity and Venture Capital Fund or a recognized provident fund or an approved superannuation fund or an approved gratuity fund.

4. Under Sections 150, 151 and 233 of the Income Tax Ordinance every person making certain specified kind of payments is required to first deduct withholding tax. However, to avail such concession, exemption certificate is required to be obtained under Section 159. Section 159 reads ns under:--

159. Exemption or lower rate certificate.---(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 per cent tax credit under section 100C, the Commissioner shall, upon application in writing by the person, issue the person with an exemption or lower rate certificate.

(1A) The Commissioner shall, upon application from a person whose income is not likely to be chargeable to tax under this Ordinance, issue exemption certificate for the profit on debt referred to in clause (c) of subsection (1) of section 151.

(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 the full amount of tax specified in Division II or III or Chapter XII, as the case may be, unless there is in force a certificate issued under subsection (1) relating to the collection or deduction of such tax, in which case the person shall comply with the certificate.

(3) omitted.

(4) omitted.

(5) omitted

(6) Notwithstanding omission of subsection (3), (4) and (5), any notification issued under the said subsections and for the time being in force, shall continue to remain in force, unless rescinded by the Board through notification in the official Gazette.

5. 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 category 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 obligation to make advance tax deductions. It is an admitted position that provision 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 the concession under Clause 47B is availed.

6. 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 & 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 Section 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) stand 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.

7. 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 outrightly availed by the withholder from the withholder on account of the bar contained in Section 159(2) unless the withholder 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 want to seek benefit under Clause 47B may be such person who is not entitled to the benefit or in the past may have been 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. In the circumstances, the challenge to the impugned Circular dated 12.05.2015 fails. All these 280 petitions are dismissed.

KMZ/M-57/Sindh Petitions dismissed.

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