

IN THE HIGH COURT OF SINDH AT KARACHI

CP D 8028 of 2019 : Bank Islami Pakistan Limited vs.
CP D 8029 of 2019 : Commissioner Inland Revenue
& Others

For the Petitioners : Mr. Anwar Kashif Mumtaz
Advocate

For the Respondents : Mr. Muhammad Ahmer
Assistant Attorney General

Mr. Ameer Bukhsh Metlo
Advocate

Date of hearing : 19.11.2020

Date of announcement : 19.11.2020

JUDGMENT

Agha Faisal, J. These petitions assail show-cause notices¹, in respect of withholding tax, issued under section 161 (1A) of the Income Tax Ordinance 2001 (“Ordinance”) on the premise the issue subject matter therein had already been the subject of earlier show cause notices², proceedings in respect whereof culminated in amended assessment orders³ wherein it was concluded that the replies of the petitioner were examined and found tenable in light of the law and the evidence for deduction of taxes furnished. Since the subject matter is common, therefore, these petitions will be determined vide this common judgment.

2. Per petitioner’s counsel the Impugned Notices were unwarranted, manifestly unjust and constituted an abuse of the process of the law; hence, merited interference in writ jurisdiction⁴. The respondents’ counsel did not validate the issuance of the Impugned Notices and submitted that even the departmental comments did not augment its stance as no rationale was proffered with respect to the necessity of the Impugned Notices when in fact the relevant record, to substantiate the petitioner’s stance, had already been examined and found to be satisfactory.

¹ Show Cause Notice dated 21.11.2019 for the tax year 2014 and Show Cause Notice dated 14.11.2019 for the tax year 2017 issued to the petitioner under section 161(1A) of the Ordinance (“Impugned Notices”).

² Show Cause Notice dated 13.03.2018 for the tax year 2014 and Show Cause Notice dated 17.08.2018 for the tax year 2017 issued to the petitioner under section 122(9) of the Ordinance (“Earlier Notices”).

³ Order to amend original assessment dated 09.07.2018 for the tax year 2014 and Order to amend original assessment dated 17.08.2018 for the tax year 2017 rendered under section 122(5A) of the Ordinance (“Amended Assessment Orders”).

⁴ Reliance was placed in such regard upon an unreported Division Bench, of which one of us (*Muhammad Junaid Ghaffar J*) was a member, judgment of this Court dated 20.05.2015 in (*CP D 2595 of 2015*) *Fecto Cement Limited vs. Additional Commissioner Inland Revenue & Others*.

3. We have heard respective learned counsel and considered the law and documentation to which our attention was solicited. There appears to be consensus that the issue, period and grounds invoked vide the Impugned Notices is common to constituents of the proceedings initiated vide the Earlier Notices and culminated vide the Amended Assessment Orders, therefore, the only issue for determination before us is whether in the present facts and circumstances issuance of the Impugned Notices was merited. It is considered illustrative to commence this deliberation by reproducing the relevant segments of the respective Amended Assessment Orders:

Order to amend original assessment dated 09.07.2018

“9) Non Deduction Of Tax Under Section 151

The taxpayer was confronted on the issue vide SCN dated 13 March 2018. Relevant part of the said notice is reproduced as under:

“Perusal of statement u/ 165 shows that you have not deducted tax u/s 151 on the interest expenses of Rs. 3789.538 millions deducted in Profit and loss account. Thus the said expenses is not admissible u/s 21(c) read with rule 9 of the Seventh Schedule to the Income Tax Ordinance 2001”

The AR of the taxpayer has submitted the reply/explanation vide letter dated 28 May 2018, which is reproduced as under:

9.1 You have allegedly observed that the Bank has failed to deduct tax on profit on debt in terms of the Section 151 of the Ordinance therefore, you have intended to disallow expense of interest claimed by the Bank at Rs. 3,789.53 millions by virtue of the Section 21(c) of the Ordinance.

9.2 At the outset, we would like to submit that the banking industry is under litigation relating to disclosure of party-wise profit on debt due to compromising confidentiality of personal information of depositors and matter is still sub-judice before the Honorable High Court of Sindh. Please note that the Bank duly deducted income tax on profit on debt and deposited into the Government Treasury however, did not declare party-wise profits in its monthly withholding statements.

9.3 In addition to above, we would like to apprise you that the Bank pays profit on interbank borrowing (lending) which is obtained for short term funds accommodation by the Bank. In this respect, we would like to refer Note 213 to the audited accounts whereby the Bank is declaring interest expense on other Bank deposits which represents profit paid to other banking companies which is amounting to Rs. 102,853,000/- (Rs. 55,833,000/- + Rs.47,020,000/-). You would appreciate that in accordance the Rule 5(2) of the Seventh Schedule to the Ordinance withholding provision under the Ordinance shall not be attracted to the banking companies.

9.4. Furthermore, you would further appreciate that there are certain nature of tax payer whose profit on debt are not subject to deduction under Section 151 of the Ordinance. We are hereunder specifying certain transaction/person which does not attract income tax deduction under the Section 151 of the Ordinance;

Specified Transaction/Person Reference.

Group companies entitled to group taxation under Section 59AA (11C) of Part-IV Second Schedule Agha Khan Development Network (Pakistan) (16) of Part-IV Second Schedule
non residence in respect of their receipts from Pak Rupees denominated Government and corporate securities and redeemable, as defined in the Companies Ordinance, 1984 (XLVII of 1984), listed on a registered Stock Exchange (19) of Part-IV Second Schedule
Bahbood Savings Certificate or Pensioners Benefit Account.] (36) of Part-V Second Schedule.
Special purpose vehicle for the purpose of securitization. (38) of Part-V Second Schedule.
Venture Capital Company (38A) of Part-IV Second Schedule.
Islamic Development Bank (38C) of Part-IV Second Schedule.
National Investment Unit Trust or a collective investment scheme or a modaraba or Approved Pension Fund or an Approved Income Plan or a REIT (47B) of Part-IV Second Schedule.
Interest to any person on Term Finance Certificate being the instruments of redeemable capital under the Companies Ordinance, 1984 (XLVII of 1984), issued by Prime Minister's Housing Development Company (Pvt). Limited (59) of Part-IV Second Schedule.

9.5. In view of the above, we are herewith Annexure-A whereby reconciling interest extends paid by the Bank which is subject to deduction under the Section 151 of the Ordinance and also enclosing challans income Tax deposited by the Bank under Section 151 of the Ordinance. Furthermore, we are also enclosing soft copy of party-wise details of interest paid by the Bank which does not attracts deductions by virtue of above mentioned exemptions under the Ordinance.

9.6. In view of the above, you are request to kindly not draw any negative inference in this respect as the Bank has duly complied provision of the Section 151 of the Ordinance.

Findings:

The reply of the tax payer has been examined and reconciliation submitted by tax payer has been considered and found correct. Accordingly, this issue is deleted by this office.”

(Underline added for emphasis.)

Order to amend original assessment dated 17.08.2018

"12) NON DEDUCTION OF TAX ON PROFIT ON DEBT

The taxpayer was confronted on the issue vide SCN dated 16 March 2018. Relevant part of the said notice is reproduced as under:

"Perusal of statement u/ 165 shows that you have not deducted tax u/s 151 on the interest expenses of Rs. 5791.2 millions deducted in Profit and loss account. Thus the said expenses is not admissible u/s 21(c) read with rule 9 of the Seventh Schedule to the Income Tax Ordinance 2001"

The AR of the taxpayer has submitted the reply/explanation vide letter dated 22 June 2018 and 26 June 2018, which is reproduced as under:

12.1 You have allegedly observed that the Bank has failed to deduct tax on profit on debt in terms of the Section 151 of the Ordinance therefore, you have intended to disallow expense of interest claimed by the Bank at Rs. 5,791.2 millions by virtue of the Section 21(c) of the Ordinance.

12.2 At the outset, we would like to submit that the banking industry is under litigation relating to disclosure of party-wise profit on debt due to compromising confidentiality of personal information of depositors and matter is still sub-judice before the Honorable High Court of Sindh. Please note that the Bank duly deducted income tax on profit on debt and deposited into the Government Treasury however, did not declare party-wise profits in its monthly withholding statements.

12.3 In addition to above, we would like to apprise you that the Bank pays profit on interbank borrowing (lending) which is obtained for short term funds accommodation by the Bank. In this respect, we would like to refer Note 23 to the audited accounts whereby the Bank is declaring interest expense on other Bank deposits which represents profit paid to other banking companies which is amounting to Rs. 927,938,000/-. You would appreciate that in accordance the Rule 5(2) of the Seventh Schedule to the Ordinance withholding provision under the Ordinance shall not be attracted to the banking companies.

12.4. Furthermore, you would further appreciate that there are certain nature of tax payer whose profit on debt are not subject to deduction under Section 151 of the Ordinance. We are hereunder specifying certain transaction/person which does not attract income tax deduction under the Section 151 of the Ordinance;

Specified Transaction/Person Reference.

Group companies entitled to group taxation under Section 59AA (11C) of Part-IV Second Schedule Agha Khan Development Network (Pakistan) (16) of Part-IV Second Schedule non residence in respect of their receipts from Pak Rupees denominated Government and corporate securities and redeemable, as defined in the Companies Ordinance, 1984 (XLVII of 1984), listed on a registered Stock Exchange (19) of Part-IV Second Schedule Bahbood Savings Certificate or Pensioners Benefit Account.] (36) of Part-IV Second Schedule. Special purpose vehicle for the purpose of securitization. (38) of Part-IV Second Schedule. Venture Capital Company (38A) of Part-IV Second Schedule. Islamic Development Bank (38C) of Part-IV Second Schedule. National Investment Unit Trust or a collective investment scheme or a modaraba or Approved Pension Fund or an Approved Income Plan or a REIT (47B) of Part-IV Second Schedule. Interest to any person on Term Finance Certificate being the instruments of redeemable capital under the Companies Ordinance, 1984 (XLVII of 1984), issued by Prime Minister's Housing Development Company (Pvt).Limited (59) of Part-IV Second Schedule.

12.5. In view of the above, we are herewith Annexure-A whereby reconciling interest extends paid by the Bank which is subject to deduction under the Section 151 of the Ordinance and also enclosing challans income Tax deposited by the Bank under Section 151 of the Ordinance. Furthermore, we are also enclosing soft copy of party-wise details of interest paid by the Bank which does not attracts deductions by virtue of above mentioned exemptions under the Ordinance.

12.6. In view of the above, you are request to kindly not draw any negative inference in this respect as the Bank has duly complied provision of the Section 151 of the Ordinance.

Findings:

The reply of the taxpayer has been examined and found tenable in light of the legal provisions of law and evidence for deduction of taxes has been furnished by the Bank. In view thereof, no negative interference is drawn on this account."

(Underline added for emphasis.)

4. It is an admitted position that the respective Earlier Notices had encompassed the issue raised vide the Impugned Notices and the findings of the department, enumerated vide the respective Amended Assessment Orders, clearly demarcate that the reply of the taxpayer and the reconciliation was examined and found to be correct. Since upon examination of the entire record the deposit of the relevant taxes has already been sanctified to be in accordance with the law, therefore, issuance of the Impugned Notices merely upon the withholding statements would appear to serve no cogent purpose.

5. In this context it is our considered view that no case has been set forth before us to justify the issuance of the notices impugned before us; therefore, in the present facts and circumstances, the Impugned Notices⁵ appear to be unwarranted and manifestly unjust / prejudicial towards the petitioner, hence, cannot be sustained⁶ and are hereby set aside.

JUDGE

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⁵ Show Cause Notice dated 21.11.2019 for the tax year 2014 and Show Cause Notice dated 14.11.2019 for the tax year 2017 issued to the petitioner under section 161(1A) of the Ordinance ("Impugned Notices").

⁶ Per *Saeeduzzaman Siddiqui J. in PIA vs. CBR & Others* reported as 1990 CLC 868; *Assistant Collector Customs & Others vs. Khyber Electric Lamps & Others* reported as 2001 SCMR 838.