

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Muhammad Junaid Ghaffar, J.

Agha Faisal, J.

ITRA 13 of 2018 : *The CIR vs. MSC Switzerland Geneva*
ITRA 395 of 2017 : *The CIR vs. APL Co. (Pvt.) Ltd*
ITRA 49 of 2018 : *The CIR vs. Agha Khan Funds for Economic Dev. S.A*
ITRA 212 of 2018 : *The CIR vs. Unilever Overseas Holding Ltd*
ITRA 279 of 2019 : *The CIR vs. Unilever PLD, UK*
CP D 4570 of 2017 : *The Procter & Gamble & Co. vs. Pakistan & Others*
CP D 5893 of 2017 : *Hino Motors Ltd. (Japan) vs. Fed of Pak. & Others*
CP D 151 of 2018 : *Freeport Shipping (LLC) vs. Pakistan & Others*
CP D 655 of 2018 : *Detergent Products SARL vs. Fed of Pak & Others*
CP D 974 of 2018 : *Agha Khan FED S.A vs. Pakistan & Others*
CP D 2692 of 2018 : *Gold Trade International Ltd. vs. Pakistan & Others*
CP D 3289 of 2018 : *Standard Chartered Bank vs. Pakistan & Others*
CP D 8275 of 2018 : *Freeport shipping (LLC) vs. Pakistan & Others*
CP D 51 of 2019 : *APL Co Pte Ltd & Another vs. Pakistan & Others*
CP D 582 of 2019 : *Detergent products SARL vs. Pakistan & Others*
CP D 1771 of 2019 : *The Procter & Gamble Co. vs. Pakistan & Others*
CP D 2758 of 2019 : *Freeport Shipping (LLC) vs. Pakistan & Others*
CP D 2783 of 2019 : *Hino Motors Ltd (Japan) vs. Pakistan & Others*
CP D 2784 of 2019 : *Hino Motors Ltd (Japan) vs. Pakistan & Others*
CP D 544 of 2020 : *Freeport shipping (LLC) vs. Pakistan & Others*
CP D 1248 of 2020 : *Standard Chartered Bank vs. Pakistan & Others*
CP D 2039 of 2020 : *Hino Motors Ltd (Japan) vs. Pakistan & Others*
CP D 3672 of 2020 : *Agha Khan FED S.A vs. Pakistan & Others*
CP D 3673 of 2020 : *Agha Khan FED S.A vs. Pakistan & Others*
CP D 4854 of 2020 : *APL Co.Pte Ltd vs. Pakistan & Others*
CP D 4855 of 2020 : *Continental G H Netherland B.V. vs. Pakistan & Others*
CP D 5927 of 2020 : *Freeport Shipping (LLC) vs. Pakistan & Others*
CP D 6665 of 2020 : *Bashir Dawood vs. Federation of Pak & Others*
CP D 6666 of 2020 : *Bashir Dawood vs. Federation of Pak & Others*

For the Petitioners : Mr. Hyder Ali Khan, Advocate
Mr. Jam Zeeshan Advocate
Mr. Sami-ur-Rehman Khan Advocate
Mr. Hamza Waleed Advocate
Mr. Shaheer Roashan Advocate
Mr. Ahtzaz Manzoor Memon Advocate
Mr. Shafqat Zaman Advocate
Mr. Kashif Anwar Mumtaz Advocate
Mr. Ammar Athar Saeed, Advocate
Mr. Rana Sakhawat Ali Advocate
Mr. Muhammad Adil Saeed Advocate

For the Respondents : Mr. Kafil Ahmed Abbasi, Advocate
Mr. Shahid Ali Qureshi Advocate
Dr. Shahnawaz Memon, Advocate
Mr. S. Mohsin Imam Wasti Advocate
Mr. Muhammad Zubair Hashmi Advocate
Mr. Muhammad Aqeel Qureshi Advocate
Mr. Ameer Bakhsh Metlo Advocate
Mr. Imran Ali Mithani Advocate
Mr. Mohsin Ali Mithani Advocate
Mr. Junaid Ali Mithani Advocate
Mr. Aslam Khokhar Advocate
Mr. Irfan Mir Halepoto Advocate

Dates of hearing : 03.02.2021; 09.03.2021; 31.03.2021

Date of Judgment : 31.03.2021

JUDGMENT

Agha Faisal, J. The crux of this determination is whether tax payers, who are otherwise qualified and fall within the remit of double taxation treaties between Pakistan and foreign countries, are entitled to the benefit of the respective treaties in so far as the levy of super tax is concerned. The references have been filed, by the department, impugning orders of the learned Appellate Tribunal Inland Revenue wherein such entitlement has been recognized / upheld; whereas the petitions have been filed, by tax payers, seeking to enforce such entitlement. Since the legal issue to be decided was common *inter se*, therefore, the references and the petitions were heard conjunctively and determined vide our common short order dated 31.03.2021, announced in Court upon conclusion of the proceedings, which read as follows:

“After levy of Super Tax¹ being held to be *intra vires* by this Court², in all listed Petitions and connected Income Tax Reference Applications only one common legal question is involved i.e. *“Whether the petitioners / respondents / tax-payers who are otherwise qualified and fall within Double Taxation Treaties between Pakistan and respective Foreign Countries are either fully exempt or wherever applicable, liable to pay Super tax at reduced rate(s) in terms of their respective Treaties”*

We have heard all the learned Counsel as well as learned DAG. For reasons to be recorded later on, the above question is answered in the affirmative; in favour of the petitioners / respondents / tax-payers and against the Department. All Petitions are allowed to this extent and at the same time Reference Applications of the department are dismissed. All impugned actions stands modified accordingly. The department, wherever required, shall be at liberty to determine the quantum of super tax, at reduced rates, if otherwise payable in accordance with respective treaties.

Office is directed to place copy of this order in all above connected matters.”

2. Briefly stated, super tax was levied vide section 4B³ of the Income Tax Ordinance 2001 (“Ordinance”) and there is no challenge to the *vires* thereof in the present matter. It was articulated before us that double taxation treaties, between Pakistan and foreign countries, give exceptive treatment, either partially or fully, to qualifying tax payers and the said benefit extends to the incidence of super tax as well.

¹ imposed under Section 4B of the Income Tax Ordinance, 2001.

² *HBL Stock Fund vs. ACIR* reported as 2020 PTD 1742.

³ Inserted vide Finance Act 2015.

3. The tax payers' learned counsel⁴ set forth the general principles of interpretation⁵ of double taxation treaties and submitted that the same took precedence over domestic law⁶. It was elaborated that the pertinent double taxation treaty would marginalize the incidence of super tax upon qualifying persons; therefore, any demand to the contrary thereupon would be in dissonance with the law.

4. The departmental counsel controverted the applicability of double taxation treaties in respect of super tax, *inter alia*, on the premise that the relevant treaties pre dated the levy and super tax, as levied per the Ordinance, was not in the field when the respective treaties were executed⁷, therefore, super tax fell outside the remit thereof⁸; super tax is not a tax on income⁹; and that taxes contemplated vide the respective treaties were neither identical nor similar to super tax.

5. We have appreciated the arguments of the respective learned counsel and considered the law to which our surveillance was solicited. The empirical question before us is whether double taxation treaties encompass the incidence of super tax¹⁰ as well. In such regard the following question was phrased for the determination of the references:

“Whether the petitioners / respondents / tax-payers who are otherwise qualified and fall within Double Taxation Treaties between Pakistan and respective Foreign Countries are either fully exempt or wherever applicable, liable to pay Super tax at reduced rate(s) in terms of their respective Treaties”

Since the answer to the aforesaid question was inextricably linked to the fate of the petitions before us, therefore, the learned counsel jointly proposed that the said answer may collectively determine all the listed matters, without delving into each reference / petition individually.

6. The learned counsel also submitted that the form and substance of the double taxation treaty (“Treaty”), relevant to ITRA 13 of 2018, was representative of all the treaties under scrutiny, therefore, it would suffice to base this deliberation upon the relevant verbiage therein, reproduced herein below:

⁴ Mr. Hyder Ali Khan, Advocate.

⁵ *A.P.Moller vs. Taxation Officer* reported as 2011 PTD 1460; *A.P.Moller vs. CIT* reported as 2012 PTD 683; *A.P.Moller Maersk vs. CIR* reported as 2020 PTD 1614.

⁶ *CIR vs. Geogizkya Krakow Pakistan Limited* reported as 2017 SCMR 140.

⁷ Mr. Irfan Mir Halepota, Advocate.

⁸ Mr. Kafil Ahmed Abbasi, Advocate.

⁹ Mr. Ameer Bux Maitlo, Advocate.

¹⁰ Per section 4B of the Ordinance.

“ARTICLE 2
TAXES COVERED

1. This Agreement shall apply to taxes on income imposed on behalf of a Contracting State or of its political sub-divisions or local authorities, irrespective of the manner in which they are levied.
 2. The existing taxes to which the Agreement shall apply are in particular:
 - (a) in the case of Switzerland:
the income tax (hereinafter referred to as “Swiss tax”):
 - (b) in the case of Pakistan:
- the income tax;
- the super tax; and
- the surcharge;
(hereinafter referred to as Pakistan tax”)
 3. The Agreement shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Agreement in addition to or in place of the existing taxes by either Contracting State or by the government of any territory to which the Agreement is extended under Article 28.
 4. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws.”
7. The Ordinance contains an express provision to deal with double taxation treaties being section 107¹¹ thereof, and it provides statutory sanction for availing of benefits under such treaties. It is manifest from the verbiage of the provision that it gives significance to the constituents of the treaty over domestic law. The august Supreme Court has maintained in *Geogizkya Krakow*¹² that treaties for the avoidance of double taxation have to be given preference and would prevail over the provisions of the income tax law. It was further held that in view of the preferential status of such treaties, the levy of any tax under the income tax law would be subject thereto.
8. In the present circumstances there was no issue of any treaty, or provision thereof, being dissonant with the Ordinance and further that no cavil was articulated with respect to the applicability of the respective treaties in the case of the relevant tax payers; the only question was whether the remit of the double taxation treaty / ies excluded super tax, as levied vide the Ordinance in 2015. In this regard we initiate this deliberation by adverting to the verbiage of Article 2 of the Treaty, reproduced supra.

¹¹ 107. Agreements for the avoidance of double taxation and prevention of fiscal evasion. (1) The Federal Government may enter into a tax treaty, a tax information exchange agreement, a multilateral convention, an inter-governmental agreement or similar agreement or mechanism for the avoidance of double taxation... (2) Subject to section 109, where any agreement is made in accordance with sub-section (1) the agreement and the provisions made by notification for implementing the agreement shall, notwithstanding anything contained in any law for the time being in force, have effect in so far as they provide for at least one of the following: (a) relief from the tax payable under this Ordinance...

¹² Per *Mian Saqib Nisar J (as he then was)* in *CIR vs. Geogizkya Krakow Pakistan Limited* reported as 2017 SCMR 140; albeit in the analogous context of the Income Tax Ordinance 1979.

9. Article 2(1) of the Treaty stipulates that it shall apply to taxes on income, irrespective of the manner in which they are levied and Article 2(1)(b) makes specific reference to *super tax*.

10. Entry 47 of Part I to the Fourth Schedule of the Constitution provides for levy of taxes on income¹³. An earlier Division bench of this Court in the *HBL case*¹⁴, while upholding the levy of super tax, has held that the said levy is a specie of tax on income. A similar view was taken earlier by the honorable Lahore High Court¹⁵. *Shahid Karim J*¹⁶ had also bolstered his conclusion upon the budget speech, of the Finance Minister delineating the *raison d'être* of super tax in respect of the Budget 2015-16, wherefrom it was manifest that super tax was always intended to be a tax on income. Reliance upon the relevant budget documents is a judicially recognized means of assessment of statutory provisions, as demonstrated by the honorable Supreme Court in *Durrani Ceramics*¹⁷.

It is apparent here from, especially in view of the binding¹⁸ nature of the *HBL case*, that super tax has been interpreted to be a tax on income; hence, contemplated within the ambit of Article 2(1) of the Treaty.

11. We find ourselves unable to sustain the respondents' argument that super tax, as denoted in the Treaty, cannot be equated with *super tax*, as presently in force, as the present tax was not levied when the Treaty was executed, for two reasons. Firstly, since exceptional treatment is required to be accorded to taxes on income, per the Treaty, and the present super tax has already been determined to be a specie thereof. And secondly, upon reliance on Article 2(3) of the Treaty which states that the benefit of the Treaty shall also extend to any identical or substantially similar taxes which are imposed in the future.

12. *Klaus Vogel on Double Taxation Conventions*¹⁹ explicates, with respect to Article 2, that the ambit of the said provision extends to existing taxes and subsequent taxes, that are identical or substantially similar to existing taxes. A similar view is expounded in the commentary by the Organization for Economic Cooperation and Development ("OECD") as contained in OECD's

¹³ Other than agricultural income.

¹⁴ *HBL Stock Fund vs. ACIR* reported as 2020 PTD 1742.

¹⁵ *D G Khan Cement Company Limited vs. FBR* reported as 2018 PTD 287; upheld vide *D G Khan Cement Company Limited vs. FBR* reported as 2020 PTD 1186.

¹⁶ In paragraph 37 of *D G Khan Cement Company Limited vs. FBR* reported as 2018 PTD 287.

¹⁷ *Federation of Pakistan & Another vs. Durrani Ceramics & Others* reported as 2014 SCMR 1630.

¹⁸ *Multiline Associates vs. Ardeshir Cowasjee & Others* reported as 1995 SCMR 362.

¹⁹ Klaus Vogel on Double Taxation Conventions; Fourth Edition; Volume I; page 165.

Model Tax Convention 2010²⁰. *Carlo Garbino* in *Judicial Interpretation of Tax Treaties*²¹ specifies that *new taxes*, in the nature enumerated supra, fall squarely within the ambit of the relevant double taxation treaty. It is considered significant to mention that OECD guidelines, including the commentary thereon, have been judicially accepted, *inter alia* by earlier division benches of this Court, as instruments of reference while interpreting double taxation treaties²².

13. It is imperative to denote that we have been assisted with no cogent rationale to consider super tax, under consideration herein, being at any variance to the nature of existing taxes mentioned in the Treaty. Even upon independent assessment²³ of the character of super tax, as levied presently, we find it to be *prima facie* identical / substantially similar to the existing levies expounded in the Treaty. Therefore, the case of present tax payers is clearly clinched per Article 2(3) of the Treaty.

14. In view of the binding pronouncements holding super tax to be a tax on income coupled with our finding that the present levy is identical / substantially similar to the levies existing at the time that the Treaty was entered into, we are of the considered view that tax-payers, who are otherwise qualified and fall within double taxation treaties between Pakistan and respective foreign countries are either exempt or, wherever applicable, liable to pay super tax at reduced rate(s) in terms of their respective treaties; hence, we had determined these references and petitions vide our short order dated 31.03.2021. These are the reasons for our aforementioned short order.

15. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Appellate Tribunal Inland Revenue, as required per section 133(5) of the Income Tax Ordinance 2001.

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²⁰ Page 76 of the OECD's Model Tax Convention 2010.

²¹ Pages 79-86 of *Judicial Interpretation of Tax Treaties – The Use of OECD Commentary*.

²² *A.P.Moller vs. Taxation Officer of Income Tax & Another* reported as 20122 PTD 1460; *A.P.Moller Maersk vs. CIR* reported as 2020 PTD 1614.

²³ With reliance upon the detailed expositions contained in *HBL Stock Fund vs. ACIR* reported as 2020 PTD 1742; *D G Khan Cement Company Limited vs. FBR* reported as 2018 PTD 287; *D G Khan Cement Company Limited vs. FBR* reported as 2020 PTD 1186.