

IN THE HIGH COURT OF SINDH, KARACHI

**Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Agha Faisal**

1.	C.P.No.D-2694/2019	Human Resources Solution (Pvt) Ltd.	Petitioner
2.	C.P.No.D-249/2018	M/s. ASK Development & others	Petitioner
3.	C.P.No.D-612/2019	M/s Human Resource Solution (Pvt) Ltd	Petitioner
4.	C.P.No.D-613/2019	M/s Human Resource Solution (Pvt) Ltd	Petitioner
5.	C.P.No.D-4399/2019	E Square Service Pvt. Ltd & another	Petitioners
6.	C.P.No.D-4812/2019	3-E Business Solution (Pvt) Ltd	Petitioner
7.	C.P.No.D-4899/2019	Icon Consultants (Pvt) Ltd.	Petitioner
8.	C.P.No.D-4904/2019	Pro Link Consulting Pvt Ltd.	Petitioner
9.	C.P.No.D-4941/2019	M/s SMS Global Pvt Ltd	Petitioner
10.	C.P.No.D-4978/2019	M/s G.M.B Rass Services (Pvt) Ltd	Petitioner
11.	C.P.No.D-4979/2019	M/s Motivated Consultancy	Petitioner
12.	C.P.No.D-5138/2019	M/s. Anwar Chaudhary & Sons (Pvt) Ltd	Petitioner
13.	C.P.No.D-5240/2019	M/s Ashraf Ali and Others	Petitioners
14.	C.P.No.D-5443/2019	M/s Micel Enterprises (Pvt) Ltd	Petitioner
15.	C.P.No.D-5510/2019	M/s Excel Management & Consultancy Services. (Pvt) Ltd	Petitioner
16.	C.P.No.D-5713/2019	M/s Professional Employers (Pvt) Ltd	Petitioner
17.	C.P.No.D-7909/2019	M/s Jan Afridi & Co. (Pvt) Ltd	Petitioner
18.	C.P.No.D-8196/2019	M/s High Quality Services Pvt Ltd	Petitioner
19.	C.P.No.D-648/2020	M/s NKC (SMC-PVT) Ltd and others	Petitioners
20.	C.P.No.D-1216/2020	M/s Rondon Enterprises Pvt Ltd.	Petitioner
21.	C.P.No.D-2156/2020	M.M. Associates	Petitioner
22.	C.P.No.D-2157/2020	Power Supplies Co. Pvt Ltd	Petitioner
23.	C.P.No.D-2368/2020	M/S Secom Engineering Services (Pvt) Ltd.	Petitioner
24.	C.P.No.D-2550/2020	M/S Human Resource Solution (Pvt) Ltd	Petitioner
25.	C.P.No.D-4785/2020	Sajan & Co.	Petitioner
26.	C.P.No.D-4786/2020	M/s Stalwart	Petitioner
27.	C.P.No.D-5172/2020	M/s M.A Outsourcing (Pvt) Ltd	Petitioner
28.	C.P.No.D-6160/2020	M/s. Line Resources (Pvt) Ltd	Petitioner

V/s

Federation of Pakistan & others.....Respondents

For the Petitioners:

M/s. Abdul Moiz Jaferii, Muhammad Taimoor Ahmed Qureshi, Muhammad Aleem, Saleem Altaf, Dil Khurram Shaheen, Ahmed Ali Hussain, Uzair Qadir Shoro, Aijaz Ali, Muhammad Umer Akhund, Imran Ali, Aijaz Ali, Rahmat Shakeel, Mustafa Safvi, Shams Moinuddin Ansari, Qazi Ajmal Kamal, Shehzad Rahim, Shiraz Ahmed, Mr. Jam Asif Mehmood, Syed Amir Ali Shah, Syed Sultan Ahmed, K. Jahangir, Advocates.

For the Respondents

M/s. Kafeel Ahmed Abbasi (DAG), Shahid Ali Qureshi, Ameer Bakhsh Metlo, Zulfiqar Ali Khan, Khalid Rajpar, Shakeel Ahmed, Muhammad Aqeel Qureshi, Imran Ali Mithani, Junaid Ali Mithani, Muhammad Aslam Khokhar, Mohsin Ali Mithani, Pervez Ahmed Memon, Muhammad Khalid for Mr. Bilal Bhatti, Zehra Jabeen holding brief for Mr. Zubair Hashmi, Syed Ahmed holds brief for Mr. Ghulam Asghar Pathan, Advocates.

Date of hearing: 24.02.2021 & 16.03.2021

Date of Judgment: 27.04.2021

J U D G E M E N T

Muhammad Junaid Ghaffar, J.- Through these Petitions, the Petitioners seek a declaration that Withholding Tax under Section 153 (1) (b) of the Income Tax Ordinance, 2001 (“**Ordinance**”) has to be deducted on the amount of their service fee and not the gross amount received from recipient of services, which includes amounts of salaries, contributions, insurance etc. etc. They also seek a declaration that wherever the word “turnover” has been used in this respect, including for obtaining an Exemption Certificate, it is only the gross service fee and not the entire amount of gross receipts on which such tax is payable.

2. Learned Counsel for the Petitioners¹ have contended that the Petitioners are human resource and manpower service providers and render such services to the recipients by providing labourers and employees under agreements; that employees, so engaged, work under the control of the service recipients, whereas, the Petitioners are paid charges for such services, which includes their fee for services and the reimbursement of the salaries and dues of the employees and labourers; that previously the tax deducted by the service recipients under Section 153(1)(b) of the Ordinance was a final tax; that post 2009, the said deduction was treated as Minimum Tax; that pursuant to Clause-94 of Part-IV of 2nd Schedule to the Ordinance, there was certain reduction in the rate of tax, whereas, even to a certain category of service providers, Exemption Certificates were also issued; that the respondent-department has misconstrued

¹ Led by Mr. Abdul Moiz Jaferii, Mr. Taimoor Ahmed Qureshi, Mr. Rahmat Shakil, Mr. Shams Mohiuddin Ansari

the relevant provisions of the Ordinance and use of the word “gross amount” is interpreted so as to include the entire amount received from the service recipient, which is incorrect; that in somewhat similar circumstances, relating to levy of Sales Tax on Services under the Sindh Sales Tax on Services Act, 2011, this Court, in its Judgment dated 17.11.2020 passed in C.P No.D-5220/2017 and other connected matters, has been pleased to hold that such tax could only be levied on the amount of service fee; and not on the gross amount received from the service recipient; that Section 113(b) of the Ordinance is *pari-materia* to Section 153(1)(b), which has already been interpreted through various judgments and is in favour of the Petitioners; that Section 153(7)(v)(b) has defined “turnover” which excludes the total amount including reimbursement expenses; hence Petitioners are not liable for payment of advance tax on the entire amount. In support they have relied upon various reported cases².

3. On the other hand, learned Counsel for the respondents³ have argued that Section 153 has used the words “gross amount payable” and has to be read with Division-III, Part-III of the First Schedule to the Ordinance; that Section 153(7)(v)(b) refers to turnover of the prescribed persons (withholding agents) and not of the Petitioners; that the tax has to be deducted on the gross amount, whereas, the advance tax is not a tax on income and now is a minimum tax; that the accounting arrangement, through a contract between the parties cannot override the provisions of the Ordinance, which has used the words “gross amount payable”; that there cannot be any distinction in payment of such amount as it is one payment together; hence the Petitioners have no case. In support they have relied upon various reported cases⁴.

4. Learned DAG has contended that as per agreement between the parties tax is to be levied on the full amount received by the

² PLD 1966 SC 828 (Messrs Hotel Metropole Ltd., Karachi v. The Commissioner of Income Tax (Central), Karachi, 2009 PTD 891 (Commissioner (Legal Division) Karachi Vs. Novartis Pharma (Pvt) Ltd., PTCL 2018 CL 783 (Pakistan State Oil Ltd. Vs. Commissioner of Income Tax, Karachi, 2018 SCMR 1181 (State Oil Ltd. Vs. Bakht Siddique), 2018 SCMR 894 Pakistan State Oil Ltd. Vs. Commissioner of Income Tax Karachi and 2020 SCMR 638 (Sui Southern Gas Co. Ltd. Vs. Registrar of Trade Unions).

³ Through Mr. Shahid Ali Qureshi, Mr. Ameer Baksh Metlo, Mr. Aqeel Qureshi and Mr. Kafeel Abbasi D.A.G.

⁴ 2000 PTD 280 (Commissioner of Income Tax Vs. Muhammad Kassim) and 2017 PTD 1359 (Pakistan Telecommunication Company Ltd. Vs. Government of Khyber Pakhtunkhwa (KPK).

Petitioners, whereas, literal meaning of the “gross amount” is the total amount received by them; hence the Petitioners have no case. He has relied upon the reported case⁵.

5. We have heard all the learned Counsel and learned DAG and perused the record. The Petitioners, as stated, are service providers engaged in providing human resource, labour and manpower services to different service recipients, which includes unskilled and skilled labourers/ employees. The Petitioners have arrangement/agreements duly executed between them and the service recipients and for that they receive payments, which include payments of salaries of the workforce supplied by them, including payables such as contributions for Employees Old Age Benefits, gratuity, premium for life insurances, provincial sales tax etc. etc. After receiving such payments, the salaries are paid to the employees through banking channels on which, wherever applicable, necessary tax is also deducted and deposited, while rest of the payables are deposited directly with the respective departments and entities, and the balance amount is retained in lieu of their fee and service charges. It is their case that usually on an average; this amount is not more than 5% of the total amount received by them. In terms of Section 153(1)(b)⁶ of the Ordinance while making such payments, the service recipients (prescribed persons) are required to withhold advance income tax, whereas, for certain period of time Clause-94 of Part-IV to the Second Schedule of the Ordinance had provided that Section 153(1)(b) (ibid) shall not apply to a *Company*⁷ engaged in providing or rendering manpower services provided that the tax, payable or paid from such income, shall not be less than 2% of the *gross amount of Turnover* from all

⁵ 2016 PTD 1393 Commissioner of Income Tax Vs. Khurshid Ahmed and others.

⁶ **153. Payments for goods, services and contracts.**—(1) Every prescribed person making a payment in full or part including a payment by way of advance to a resident person —

(b) for the rendering of or providing of services ¹[except where payment is less than thirty thousand Rupees in aggregate, during a financial year];

shall, at the time of making the payment, deduct tax from the gross amount payable (including sales tax, if any) at the rate specified in Division III of Part III of the First Schedule

(7) In this section, —
(v) “Turnover” means—

(b) the gross fees for the rendering of services for giving benefits including commissions;

⁷ As defined in section 80(b)

sources. Subsection 4(a) of Section 153 of the Ordinance, provided that on an application, made by the recipients of payment referred to in Clause-94 of Part-IV of the 2nd Schedule to the Ordinance, the Commissioner by order in writing for a period of at least 3 months allow any person, which includes the service recipient to make payment without deduction of tax, as required under Section 153(1)(b) of the Ordinance subject to the condition, the service provider has made advance payment of tax equal to 2% of the total Turnover of the corresponding period of the minimum preceding tax year. It is a matter of record that various such certificates were issued from time to time, but suddenly were refused, and even in certain cases show cause notice were also issued to amend the assessment orders. All these actions have been impugned; but the only legal issue as presented before us by the Respondent department is that in any case the advance tax in respect of the petitioners is to be calculated on entire gross amount received by them from the prescribed person or service recipient. This according to them would also apply when an exemption certificate is being claimed pursuant to the repealed Clause-94⁸ of Part-IV of the 2nd Schedule to the Ordinance as it also requires payment of tax on “turnover”.

6. On perusal of relevant provisions of Section 153(1)(b), it appears that the prescribed person, which in the instant matter, is the service recipient or the client of the Petitioner, while making payment in full or part including a payment by way of an advance **for the rendering of or providing of services** shall at the time of making payment deduct tax **from the gross amount payable** including sales tax, if any, at the

⁸ Clause 94 of Part-II of the 2nd Schedule

“(94) The provisions of clause (b) of the proviso to sub-section (3) of section 153 shall not apply for [the period beginning on the first day of July, 2015 and ending on the thirtieth day of June, [2019] to a company being a filer and engaged in providing or rendering freight forwarding services, air cargo services, courier services, manpower outsourcing services, hotel services, security guard services, software development services, [IT services and IT enabled services a defined in clause (133) of Part I of this Schedule] tracking services, advertising services (other than by print or electronic media), share registrar services, engineering services [.] car rental services [building maintenance services, services rendered by Pakistan Stock Exchange Limited and Pakistan mercantile Exchange Limited (inspection, certification, testing and training services)].
 Provided that the tax payable or paid on the income from providing or rendering aforesaid services shall not be less than two percent of the gross amount of turnover from all sources and that the company furnishes in writing an irrevocable undertaking by the fifteenth day of November, 2015 to present its accounts to the Commissioner within thirty days of filing of return, for audit of its income tax affairs for [any of the tax year 2016 to /2019]
 Provided further that for tax year [2019], the company shall furnish irrevocable undertaking by November, [2018], to present its accounts to the Commissioner.]

rate specified in Division-III of Part-III of the First Schedule⁹. Now the precise legal issue before us is, that what is the gross amount on which advance tax is to be deducted by the recipient of service. The Petitioners have relied upon the definition of “**turnover**” in Section 153 (7) (v) (b)¹⁰, which is defined as the gross fee for rendering of services for giving benefit including commissions, and according to them, it is only the gross fee on which advance tax is to be deducted by the prescribed person and not the gross amount paid by such prescribed person. They have also relied upon section 113 *ibid* which also deals with the definition of minimum tax on turnover. This is in fact the crux of the matter. However, we may observe that the word turnover here is not in the context of section 153(1) (b) itself; but has been provided for certain categories of persons as mentioned in sub-section (7) of section 153 *ibid*. At the same time it also has nexus with Clause 94 in Schedule II Part-IV of the Ordinance and we will discuss the same in some details in following paragraphs. This though may seem to be not so relevant at a glance; however, a detailed look would result otherwise, and would be of much relevance to the issue in hand.

7. It is a matter of fact that before 2009, the tax deducted under section 153¹¹(1) (b) was adjustable at the time of filing of the tax return by the service provider, whereas, it was a final tax for persons falling in clause (a) and (c) of section 153; however, pursuant to proviso to sub-section (6) this was not to apply on Companies engaged in rendering of services as provided in 153(1) (b) *ibid*. It is also noted that via Circular No.6 of 2009 dated 18.8.2009 FBR also

⁹**DIVISION III**
PAYMENTS FOR GOODS OR SERVICES

- (2) The rate of tax to be deducted from a payment referred to in clause (b) of sub-section (1) of section 153 shall be--
- (i) **3% of the gross amount payable**, in the cases of transport services, freight forwarding services, air cargo services, courier services, manpower outsourcing services, hotel services, security guard services, software development services, IT services and IT enabled services as defined in clause (133) of Part I of the Second Schedule, tracking services, advertising services (other than by print or electronic media), share registrar services, engineering services, warehousing services, services rendered by asset management companies, data services provided under license issued by the Pakistan Telecommunication Authority, telecommunication infrastructure (tower) services, car rental services, building maintenance services, services rendered by Pakistan Stock Exchange Limited and Pakistan Mercantile Exchange Limited, inspection, certification testing and training services;
- (ii) in case of rendering of or providing of services other than sub-clause(i),--
- (a) in case of a company, 8% of the gross amount payable;
- (b) in any other case, 10% of the gross amount payable; and
- (c) in respect of persons making payments to electronic and print media for advertising services, 1.5% of the gross amount payable;

¹⁰ (b) the gross fees for the rendering of services for giving benefits including commission.

¹¹ As was available till, July 2011, when the entire section was substituted.

clarified that the services rendered by Corporate Sector shall remain outside the scope of either the final tax regime or the minimum tax regime. This was further affirmed by means of clause (79) in Part-IV of the Second Schedule to the Ordinance, whereby, the tax deducted under s.153 (1) (b) was not treated as minimum tax. Thereafter vide Finance, Act, 2015, clause (79) *ibid* was omitted, and once again the tax deducted in advance became a minimum tax. The service providers were aggrieved and perhaps on their representation another mechanism was brought into effect and clause (94) was introduced in Schedule II Part-IV of the Ordinance, and service providers including the petitioners were entitled to obtain exemption certificates under section 153(1) (b) upon payment of 2% tax on their turnover. There were other requirements as well which were to be fulfilled. It is this definition of *turnover* which was used for calculations pursuant to section 153(7)(v)(b)¹² which has now been relied upon by the Petitioners to contend that it was always the gross fee and not the gross payment received by them on which advance tax is to be deducted by the service recipient. By virtue of clause (94) *ibid*, requisite exemption certificates were being issued to the petitioners (Companies) on payment of 2% tax on the amount of turnover as provided under section 153(7)(v)(b) and therefore, tax was neither being deducted by the service recipient; nor any issue of advance tax deduction on the gross amount was raised. In some of the cases in hand even at the time of issuing Exemption Certificates an objection was raised that turnover for the purposes of clause (94) would be the gross amount of receipts including all amounts received from the service recipient. There are some cases in which proceedings have been initiated for amending the assessment orders in terms of s.122 (9) of the Ordinance, on this ground or on the ground that the turnover has been declared wrongly. Nonetheless, and notwithstanding all this, the crux of the matter is the quantum of amount liable for advance tax under section 153(1) (b) of the Ordinance, or for that matter, the turnover as referred to in Clause 94 *ibid* for the purposes of issuing an Exemption Certificate and our opinion in this matter is confined to these two issues only.

¹² The gross fees for the rendering of services for giving benefits including commissions;

8. Coming to the issue, it appears that thereafter, through Finance Act, 2019, the said clause (94) now stands omitted, and once again the Petitioners are now exposed to deduction of advance tax which tax is now a minimum tax; it is neither refundable nor can be carried over, and if finally the liability of tax is less than the tax already deducted, it becomes the minimum tax payable and the burden is to be borne by the Petitioners. This, according to them, as service providers if accepted, would amount to taxing the entire amount of gross turnover, and would put them out of business. It further appears that between July, 2015 to June, 2019 pursuant to Clause-94 in Schedule-II, Part-IV, of the Ordinance, the provision of Clause (b) of the proviso to subsection (3) to Section 153 was not applicable on a Company being a filer and engaged in providing or rendering various services including services of labour and manpower provided that the tax payable or paid on the income from providing of such services shall not be less than 2% of the gross amount of Turnover from all sources. This facility or exemption from withholding of advance tax, to service providers upon payment of 2% advance tax on their Turnover was benefiting them as no withholding tax was being deducted; nor was any further tax required to be paid. This use of the word "turnover" in this provision was understood as to be the "turnover" defined in Section 153(7)(v)(b) and as soon as Clause (94) *ibid* was omitted, the issue has come as to the correct value or amount on which the advance tax is to be deducted. It is but natural that the service recipients, in order to avoid any punitive action from the department have started deducting advance tax on the gross amount, they were paying to the service providers and this has resulted in this dispute now before us. The crux of the matter and the relevant provision, which requires interpretation for the present purposes, is Section 153(1) (b) as this appears to be, if we may term it a charging Section for the purposes of withholding advance tax from the service providers, notwithstanding that this does not amount to levy of tax by itself. In addition the connected issue is that what is turnover for the purposes of Clause 94 *ibid*. When Section 153(1) (b) is read, it requires deduction of advance tax for the rendering of, or providing services which at the time of making payment, the service recipient has to deduct from the gross amount payable at rate specified in Division-III of Part-III of the First

Schedule to the Ordinance. Therefore, in essence, the gross amount payable has to be understood vis-à-vis for *rendering or providing services*. The triggering event is the *rendering or providing services*, hence, reference to the gross amount has to be in relation to the *rendering or providing services*. It cannot be read in isolation. It has come on record that the mode and manner in which the petitioners operate, it is the *rendering or providing services* for human resource for which they are paid service fee and other amount in lieu of salaries and other reimbursements. It has a distinct break up in their billing system as well. Therefore, when we read both these provisions in juxta-position, it can be safely said that the *gross amount* referred to is the amount of service fee, which is being received by the service provider and not otherwise. It is clear that the gross amount, they are receiving includes the service fee alongwith various amounts, which are either expenses or reimbursable. It has come on record and has not been denied that the major chunk of this gross amount is the salary of labourers or the manpower provided by the Petitioners, which is then paid to them and necessary tax, if liable to be deducted from such salary, is being done and then deposited with the concerned authority. Time and again changes have been brought as to the treatment given to the advance tax deducted from the payment received by the petitioners, as sometimes it was treated as a final tax under the presumptive tax regime; at times as minimum tax, which is though not refundable; but is adjustable in filing normal tax returns from time to time. These changes have brought these disputes as to the quantum and gross amount, on which tax has to be deducted by the service recipient. Insofar as Section 153(7)(b)(v) of the Ordinance, wherein, turnover has been defined is concerned; it appears to be identical to section 113(3)(b) which also defines turnover in respect of minimum tax on the income of certain persons including service providers. Both these provisions clearly provide that wherever a reference has been made to turnover, it is the *gross fee for the rendering of services for giving benefits including commissions*. The turnover in section 153(7)(b)(v) is though in relation to the “prescribed person” who has to deduct tax on payments referred to in section 153 and is defined in section 153(7)(i)(h) & (i), wherein individuals and association of persons have been defined as prescribed persons with relation to their turnover; whereas, when we read this provision alongwith Section 153(1)(b), it appears that use of

the word “turnover” has no nexus with this provision as the said provision has referred to gross amount payable. Similarly, the rate of tax on such gross amount has been prescribed under Division-III of Part-III of the First Schedule, which relates payment of goods or services and Clause 2(i) prescribes rate on which tax is to be deducted from a payment referred to in Clause (b) of Subsection 1 of Section 153 and it shall be 3%¹³ of the gross amount payable in respect of various service providers including the Petitioners i.e. manpower outsourcing services. To that extent the contention of the Respondents Counsel¹⁴ appears to be correct that the turnover defined in 153(7)(b)(v) is only relevant for the service recipient; however, at the same time it has not been disputed before us that all service recipients are being treated as prescribed persons based on the gross amount of payments they are making to the petitioners. Even for that purposes the respondents are not accepting the gross service fee as a bench mark and are insisting that gross amount paid inclusive of all would be the bench-mark. This perhaps is misconceived and not proper interpretation of this definition. Moreover, when clause 94 ibid is looked into it also refers to the word “turnover”, and therefore, the definition provided in Section 153(7)(b)(v) would squarely apply. Where the legislature defines, in the same statute, the meaning of a word used therein, such definition most authoritatively expresses its intent which definition and construction is binding on the courts. When a word has been defined to mean such and such, the definition is prima facie restrictive and exhaustive¹⁵. In our view, if a word, phrase or term is used in a clause of any Part of the Schedule, and that word, etc. is defined in and /or for the purposes of the section being disappplied by the clause under consideration, then it should have the same meaning in the clause as the section itself, unless the clause itself contains a definition to the contrary. The reason is that each clause of a Part to the Schedule applies to a particular and specified section (or part thereof)¹⁶. Nonetheless, in our considered view as of today when the advance tax deducted under Section 153(1)(b) is a minimum tax, the gross amount referred to therein cannot include the amount of

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¹⁴ Mr. Shahid Ali Qureshi

¹⁵ Commissioner of Income Tax v Khurshid Ahmad (2016 PTD 1393)

¹⁶ Engro Vopak Terminal Ltd. v Pakistan (2012 PTD 130)

salaries and contributions paid by the service recipients and would only be in respect of the *gross amount received for rendering of services* by the Petitioners. Similarly, in case of an exemption certificate under repealed clause 94, the turnover referred to in Section 153(7)(v)(b) is the gross amount of fee exclusive of the reimbursable amounts and expenses paid by the service recipient.

9. A learned Division Bench of this Court in the case reported as **COMMISSIONER (LEGAL DIVISION), KARACHI V NOVARTIS PHARMA (PAKISTAN) LTD (2009 PTD 891)** has been pleased to deal a somewhat similar question in relation to the repealed section 50(4) of the 1979 Ordinance. The question before the Court was that "*Whether on the facts and in the circumstances of the case, the learned ITAT was justified in holding that the payment made to Messrs Lasani Pak. Limited by Messrs Novartis Pakistan was not commission?*". The precise facts were that an Order under section 52 of the Ordinance, 1979 was passed treating the respondent as "Assessee in default" on the premise that it had not deducted tax on the payment made as reimbursement of expenses to Messrs Lasani Pak. Private Limited, and had treated it as "Commission" on the ground that respondent should have deducted tax under the provisions of section 50(4A) of the Ordinance, 1979 while making payments to it. The case of the respondent was that in consideration of the performance of various functions, the respondent company had reimbursed expenses actually incurred and borne by them in connection with the distribution of the products of the respondent company. According to them as per agreement the said company was entitled to a fee calculated at the agreed rate of such expenses. The Commissioner Appeals and the Appellate Tribunal decided the issue in favor of the respondent and department had come before this Court by means of a Tax Reference. The question was answered against the department in the following manner.

Having considering the scope of expression "commission" and "reimbursement" and considering the provision:, of agreement entered into between the parties, in our considered view the amount reimbursed by the Respondent Company to Messrs Lasani Pak. (Private) Limited cannot by, any stretch of imagination be treated as "commission". The terms of the agreement clearly shows and it has come on record that Messrs Lasani Pak. (Private) Limited performed certain functions in connection with distribution of certain pharmaceutical products of the respondent such as¹⁷:

¹⁷ 1. Booking of orders.2. Maintaining necessary storage facilities. 3. Handling Inventories and deliveries etc.4. Invoicing to customers.5. Collection from customers and depositing in bank accounts of buyer appellant.6. Transporting the goods from factory to various depots and also from depot to depot.7. Accounting of receivables and inventories.8. Other acts agreed upon mutually from time to time.

The respondent for such service paid fee equal to 7.5 % of the said expenses incurred and that the expenses incurred were reimbursed by the respondent. The Deputy Commissioner of Income Tax has not challenged the validity of the reimbursement and it has also come on record as observed by the Commissioner of Income Tax (Appeals) in his Appellate order that the distributing company had in fact deducted tax under the provisions of section 50. Keeping in view the above fact and discussion, the Deputy Commissioner of Income Tax erred in law to treat "reimbursement" of expenses as "Commission".

In view of the above discussions, we are of the considered opinion that the action of treating the "reimbursement" of expenses in the facts and circumstances of this case (underlined for emphasis) was not legally justified and the Commissioner of Income Tax (Appeals) and the learned Income Tax Appellate Tribunal correctly appreciated the facts. The distinction made between the expression "commission" and "reimbursement" with reference to the substance of transaction, was correctly made which needs no interference. So far as the deduction of Tax on service charges is concerned same is not the subject matter of the present Income Tax Reference Application and we, therefore, refrain to give any opinion.

In view of the above, both the proposed questions are answered in affirmative i.e. against the applicant and in favour of the respondent.

The above Income Tax Reference Application is dismissed in limine.

10. In view of hereinabove facts and circumstances of the case, the petitioners have made out a case and it is accordingly held that for the gross amount referred to in section 153(1)(b) on which advance tax has to be deducted at the rate specified in Division III of Part III of the First Schedule to the Ordinance, is the gross fee received in lieu of services excluding the amount of reimbursable expenses. It is further held that for the purposes of clause 94 in Schedule II Part-IV of the Ordinance (since repealed) the turnover would be as defined in section 153(7)(b)(v) which is gross fee for rendering services excluding the amount of reimbursable expenses. All petitions are accordingly allowed to this extent. All impugned actions of the Respondents stand modified accordingly.

Dated: 27.04.2021

J U D G E

J U D G E

Ayaz