

**IN THE HIGH COURT OF SINDH, KARACHI**

CP No.D-952, 1170, 2488, 2489, 5127 & 5161 of 2018  
CP No.D-3834 of 2021

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DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)  
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*BEFORE: Irfan Saadat Khan,  
Mehmood Ahmed Khan, JJ*

Mumtaz Ali Rajpar & Borhters.,  
Petitioner in **CP No.D-952 of 2018**  
& **CP No.D-3834 of 2021**

Allah Bux Brohi,  
Petitioner in **CP Nos.D-1170 5127 of 2018**

M/s. Syed & Company,  
Petitioner in **CP No.D-2488 of 2018**

M/s. Shewak Babo,  
Petitioner in **CP No.D-2489 of 2018**

Fayyaz Hussain Mughal,  
Petitioner in **CP No.D-5161 of 2018** through  
: M/s.Zaheer-ul-Hassan Minhas &  
Asif Ali, Advocates.

Vs.

Province of Sindh & others  
Respondents : through Mr. Saifullah, AAG for  
Respondents No.1 & 2.

Mr. Kafeel Ahmed Abbasi, for  
Respondent No.3.

Mr. Ameer Bux Metlo, Advocae for  
Respondent No.4.

Syed Mohsin Imam Wasti, Advocate  
for Respondent No.5.

Date of hearing : 18.04.2022

Date of decision : 25.04.2022

JUDGEMENT

**Irfan Saadat Khan, J.** Since the issue raised in all these petitions are same, hence these are being heard and disposed of by this common judgment.

2. Briefly stated the facts of the case are that the petitioners are engaged in carrying out the business of recovering tolls, levies,

entry fee etc. on behalf of the government agencies. The petitioners participated in open auctions and were awarded the bids being the highest bidders for the royalty rights of surface minerals, marble and silica sand in different Districts after fulfilling all the legal and codal formalities. The petitioners furnished their returns of Income Tax for the Tax year 2015 and paid the tax on the amounts claimed by them earned as service charges. The Respondent then issued demand notices (impugned notices) informing the petitioners that since they have failed to clear the dues hence they were directed to deposit the same in the government treasury otherwise the amounts mentioned in the impugned notices would be recovered from them as arrears of land revenue under the provisions of Land Revenue Act, 1967. Being aggrieved with the said impugned demand notices the present petitions have been filed.

3. Mr. Zaheer-ul-Hasan Minhas, Advocate has appeared on behalf of all the petitioners and stated that the impugned notices issued by the Respondent No.2 are illegal and uncalled for. He stated that as per the provisions of Section 236(A) of the Income Tax Ordinance, 2001 (the Ordinance, 2021) only those persons are liable to deduct taxes who are selling any property or goods, and since the petitioners were neither selling any property nor goods but were only collecting royalty tolls, levies etc. on behalf of the government hence the provisions of Section 236(A) of the Ordinance, 2001 are not attracted to the petitioners. In the alternate, he stated that even if it is assumed that the provisions of Section 236(A) of the Ordinance are applicable to the petitioners by virtue of insertion of sub-section 3 in Section 236(A) of the

Ordinance whatever amount of tax is collected on lease of the right the same shall be considered as final tax, which in his view is ultra vires the constitution. He stated that since in his view the demand notice issued by the Respondent No.2 is illegal and uncalled for hence the same may be vacated and the instant petitions may be allowed.

4. Mr. Saifullah, A.A.G has appeared on behalf of the Respondents No.1 & 2, Mr. Kafeel Ahmed Abbasi, has appeared on behalf of Respondent No.3, Mr. Ameer Bux Metlo, Advocate has appeared on behalf of Respondent No.4 and Syed Mohsin Imam Wasti, Advocate has appeared on behalf of Respondent No.5. At the very outset, the counsel appearing for the Respondents have stated that instant petitions are not maintainable as the matter in dispute between the petitioner and the Respondent No.2 with regard to who would be the withholding agent in the present situation could only be resolved after thrashing out the issue in detail as per factual aspects as well as per the terms of the contract entered between the Respondent No.2 and the petitioners. They further stated that in the instant petition neither any interpretation of Section 236(A) of the Ordinance is involved nor that of the subsection 3 of Section 236-A of the Ordinance. They further stated that learned counsel for the petitioners has miserably failed to point out as to how sub-section 3 of Section 236A of the Ordinance is ultra vires the constitution. They stated that the present matter requires deliberation in respect of the contractual obligations entered between the Respondent No.2 and the petitioners therefore, the Respondent No.2 or the petitioners, as the case may be, directed to seek their remedy in a suit and

these petitions being misconceived and not maintainable may accordingly be dismissed.

5. Syed Mohsin Imam Wasti, Advocate in support of the contention has also placed reliance on the decision given in the case of *Mst. Kaniz Fatima through Legal Heirs ..Vs.. Muhammad Salim and 27 others* (2001 SCMR 1493) to show that the instant petitions being on controversial question of law are not maintainable.

6. In the alternative Mr. Saifullah, learned A.A.G stated that as per the provisions of Section 161(2) of the Ordinance it was mandatory upon the withholding agent to recover the tax and to deposit the same in the government treasury. He stated that in the instant matter since the Respondent No.2 was a withholding agent hence they were under legal obligation to recover the tax and to deposit the same with the government treasury. He stated that it appears that in the instant matter the Respondent No.2 at the initial stage has not withheld the tax from the petitioners while awarding the contract and hence they are legally justified to now demand from the petitioners to pay the respective amounts as arrears otherwise it would be the Respondent No.2 who would be treated as an assessee in default and adverse inference would be drawn against them by the FBR for not fulfilling the legal obligation. The learned counsel candidly conceded that on this aspect the FBR has already imposed a fine/penalty upon the Respondent No.2 for not properly withholding tax at the time of award of the contract and hence in his view the Respondent No.2 under the provisions of Section 161(2) of the Ordinance, is justified in requiring from the petitioners to pay these arrears as per the

terms of the contract/agreement entered between the parties, therefore, these petitions may be dismissed.

7. We have heard all the learned counsel at some length and have also perused the record and the decision relied upon by Syed Mohsin Imam Wasti.

8. Before proceeding any further, we deem it appropriate to reproduce hereinbelow provisions of Section 236(A) and Section 161(2) of the Ordinance, 2021.

**161. Failure to pay tax collected or deducted.—**

**(1)**.....

(a).....

(b).....

(2) A person personally liable for an amount of tax under sub-section (1) as a result of failing to collect or deduct the tax shall be entitled to recover the tax from the person from whom the tax should have been collected or deducted.

**[236A. Advance tax at the time of sale by auction.—**

(1) Any person making sale by public auction [or auction by a tender], of any property or goods [(including property or goods confiscated or attached)] either belonging to or not belonging to the Government, local Government, any authority, a company, a foreign association declared to be a company under sub-clause (vi) of clause (b) of subsection (2) of section 80, or a foreign contractor or a consultant or a consortium or Collector of Customs or Commissioner of [Inland Revenue] or any other authority, shall collect advance tax, computed on the basis of sale price of such property and at the rate specified in Division VIII of Part IV of the First Schedule, from the person to whom such property or goods are being sold.

[Explanation.--- For the removal of doubt it is clarified for the purpose of this section that---

(a) the expression “sale by public auction or auction by a tender” includes renewal of a license previously sold by public auction or auction by a tender; and

(b) where payment is received in installments, advance tax is to be collected with each installment.]

(2) The credit for the tax collected under sub-section (1) in that tax year shall, subject to the provisions of

section 147, be given in computing the tax payable by the person purchasing such property in the relevant tax year or in the case of a taxpayer to whom section 98B or section 145 applies, the tax year, in+ which the "said date" as referred to in that section, falls or whichever is later.

(3) Notwithstanding the provisions of sub-section (2), tax collected on a lease of the right to collect tolls shall be final tax."]

Explanation.- For the purposes of this section, sale of any property includes the awarding of any lease to any person, including a lease of the right to collect tolls, fees or other levies, by whatever name called.]

9. The perusal of the record reveals that awards for the royalty collection in respect of the rights of surface minerals, marble and silica sand in different Districts were given to the petitioners for the year 2014-2015 by approving their bids. As per the clause-8 of the said contract the petitioners were saddled with the responsibility to pay 10% income tax on the contractual amount to the Income Tax Department and furnish copy of the paid-up challan to the Respondent No.2. It is an admitted position that on the said services rendered by the petitioners for collecting tolls, levies etc. on behalf of the Respondent No.2 returns of total income were furnished and were accepted by the Income Tax Department. It may be noted that admittedly the responsibility to collect the tax and to pay the same in the government treasury in respect of award of contract/bid was that of the Respondent No.2. The FBR after finding the Respondent No.2 to be an assessee in default for not withholding the due tax on the awards has also levied fine/penalty upon them for the said default, which we were informed was being paid by them.

10. In our view in the instant matter neither any interpretation of Section 236(A) or that of sub-section 3 of Section 236A is

involved nor it could be said that the sub-section 3 of the section 236(A), which was introduced vide Finance Act, 2016, is ultra vires the constitution of the Islamic Republic of Pakistan. This sub-section clearly stipulates that the tax collected on a lease right to collect tolls etc. shall be the final tax liability meaning thereby if any tax is collected from a person on lease of the right to collect tax, the same shall be the final determination of the tax liability of that person and that person would neither be entitled for any refund on the said collected tax nor would be required to pay any additional tax on the said amount collected in this behalf. Hence we disagree with the contention of Mr. Zaheer-ul-Hassan Minhas, on the said aspect that the said provision is ultra vires the constitution of the Islamic Republic of Pakistan.

11. Moreover, during the course of the argument of the case, it was suggested to Mr. Zaheer-ul-Hassan Minhas to confine his arguments to the extent of prayer clause-B only and he conceded and agreed that he will confine his arguments to the extent of prayer clause-B only. Hence the aspect of the matter with regard to declaring sub-Section 3 of Section 236-A of the Ordinance as ultra vires in our view is not available to him.

12. So far as the aspect of controversy of deduction of tax between the petitioner and the Respondent No.2 is concerned, in our view it would be in fitness of thing, if we direct the petitioners to give a proper reply in respect of the impugned notices issued by the Respondent No.2 and in case the Respondent No.2 draws any adverse inference against the petitioners they would be at liberty to adjudicate the same before the Competent Court of Law, as in our view the matter requires thrashing out the fact with regard to the

contract entered between the parties especially with regard to clause-8 of the contract and hardly involves any interpretation either that of Section 236A or 161 of the Ordinance.

13. Needless to state that the petitioners or the Respondent No.2, as the case may be, would also be entitled to file civil suit(s) against each other for the existence of the liability or its enforcement/specific performance arising from the terms of the contract entered between the parties, if so desired and deemed necessary, as the case may be.

14. With these observations all the petitions stand disposed of alongwith all the listed and pending applications.

JUDGE

JUDGE

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