

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 2384 of 2015

Byco Oil Pakistan Limited----- Plaintiff

Versus

**Pakistan Through Secretary
(Revenue Division) & others----- Defendants**

Date of hearing: 19-01-2016

Date of Order: 19-01-2016

**Plaintiffs: Through Dr. Muhammad Farogh Naseem,
Advocate.**

Defendant No.2: Through Mr. Sarfaraz Ahmed Metlo, Advocate.

ORDER

CMA NO. 17591/2015.

Muhammad Junaid Ghaffar J.- Through this Suit, the plaintiff has challenged the refusal to grant exemption from minimum tax imposed under Section 113 of the Income Tax Ordinance (Ordinance, 2001), through Finance Act, 2014, and through listed application, pending final adjudication of the Suit, as an interim measure, the plaintiff has sought restraining order against the defendants from refusing to accept the tax return of the plaintiff either electronically or manually, without payment of minimum tax under Section 113 of the Ordinance, 2001.

2. Counsel for the plaintiff has contended that the plaintiff had approached the Ministry of Petroleum, Government of Pakistan to grant a tax holiday for establishing an Oil Refinery along the Coastal Belt of Baluchistan and the Economic Coordination Committee of the Cabinet vide its Decision dated 19-03-2009 was pleased to extend the facility of tax holiday for a period of 7½ years, whereafter, a Notification bearing SRO No.650(I)/2009 dated 09-07-2009 (SRO 650) was issued, whereby, clause 132-A was inserted into Part-I of the Second Schedule of the Ordinance, 2001. Counsel submits that in terms of SRO 650, the plaintiff was extended a complete exemption from Income Tax for a period of 7½

years beginning from the day on which the refinery would be setup or from the date when commercial production would commence, whichever was later. Per Learned Counsel the exemption was absolute and unconditional and did not exclude any aspect or part of the tax which would not be exempt. Learned Counsel also referred to Section 2(63) of the Ordinance, 2001, which defines tax. Per Learned Counsel by Finance Act, 2009, as amended by Finance Act, 2014, the defendant No.1 introduced the concept of levying minimum tax under Section 113 of the Ordinance, 2001 and though the plaintiff believed that no minimum tax would be applicable in view of the tax holiday granted to the plaintiff, however, as an abandoned pre-caution wrote a Letter dated 03-01-2013 to the Ministry of Petroleum seeking amendment in clause 11-A of Part IV of the Second Schedule of the Ordinance, 2001 to the effect that turn over tax would not be applicable to the case of the plaintiff. He has further submitted that despite best efforts, neither the Ministry of Petroleum nor the Government and the Economic Coordination Committee of the Federal Cabinet paid any attention to the request of the plaintiffs and through Letter / Memorandum dated 8.7.2015 impugned in the instant Suit; such exemption has been denied to the plaintiff. Per Learned Counsel the impugned action of the defendants is not only discriminatory in nature as similar exemption is still being granted to other Oil Refineries, but is also in attempt to deny the plaintiff from a lawful exemption, which otherwise still subsists in favour of the plaintiff. Learned Counsel has prayed that pending final adjudication of instant Suit, listed application may be allowed by restraining the defendants from taking any coercive action against the Plaintiff for non-deposit of minimum tax while filing its tax returns.

3. On the other hand, Counsel for the defendants has contended that the levy of minimum tax under Section 113 of the Income Tax Ordinance, 2001 is independent in nature and overrides all other exemptions in field, whereas, the same has a non-obstante clause and therefore the plaintiff cannot claim any vested right pursuant to any exemption already granted prior to the levy of minimum tax.

4. I have heard both the learned Counsel and perused the record. It appears that that plaintiff on 30-12-2008 had approached the Ministry of Petroleum seeking permission and exemption in respect of an Oil

Refinery being established in Baluchistan and pursuant to the representation of the plaintiff, the Economic Coordination Committee of the Cabinet considered the Summary dated 17-03-2009 submitted by the Ministry of Petroleum and Natural Resources and approved the grant of tax holiday for a maximum of 10 years for social and economic boost for the Province of Baluchistan. Thereafter, SRO 650 was issued and Clause 132-A was inserted in Part-I to the Second Schedule of the Ordinance, 2001 in the following terms:-

“(132A) Profit and gains derived by Bosicor Oil Pakistan Limited for a period of seven and half years beginning from the day on which the refinery is set up or commercial production is commenced, whichever is later.”

Whereas, the minimum tax, which has been levied on the basis of turnover on various taxpayers in terms of Section 113 of the Ordinance, 2001 is in the following manner:-

“(1) This section shall apply to a resident company ¹[an individual (having turnover of fifty million rupees or above in the tax year 2009 or in any subsequent tax year) and an association of persons (having turnover of fifty million rupees or above in the tax year 2007 or in any subsequent tax year)] where, for any reason whatsoever allowed under this Ordinance, including any other law or for the time being in force—

- (a) Loss for the year;
- (b) The setting off of a loss of an earlier year;
- (c) Exemption from tax;
- (d)
- (e)

5. The precise challenge in the instant Suit is a declaration being sought by the plaintiff to the effect that after having been granted an unqualified tax holiday on the basis of which they have invested a huge capital in establishment of the Oil Refinery, a minimum tax under Section 113 cannot be levied and an interpretation from this Court to the effect that such levy of minimum tax excludes the exemption already granted by the Federal Government as a promise for a specified period of time. This question requires determination by the Court after a detailed and minute examination of the pleas so raised on behalf of the parties. If required parties may also press for recording of evidence, however, for the time being through listed application, the plaintiff has prayed that till such question is finally adjudicated upon, the plaintiff may be allowed to file its tax return without making the payment of any minimum tax. It

may be noted that the grant of exemption from tax or tax holiday vide SRO 650 has not been denied by the defendants, however, the only issue raised on their behalf is to the extent, notwithstanding such tax holiday or exemption, minimum tax can be levied independently under the Ordinance, 2001. The exemption granted in terms of SRO 650 is in fact an amendment made in the Second Schedule to the Income Tax Ordinance, whereby, clause 132A has been incorporated and if the same is read with the opening words of Second Schedule (Part-I) of the Ordinance 2001, it would mean that “**profits and gains**” derived by the Plaintiff, shall be exempt from tax, subject to the conditions and to the extent specified hereunder. Through clause 132A there is no restriction imposed upon the Plaintiff, and appears to be an unqualified exemption in respect of the profits and gains of the Plaintiff for a period of 7½ years. However, this is a tentative assessment at the stage of injunctive relief, and I am of the view that the Plaintiff for the time being may not be burdened with the liability of paying the minimum tax, as it requires to be determined that as to whether the exemption in clause 132A is unqualified or not and whether minimum tax could be levied despite such tax exemption for a fixed period of time.

6. In the circumstances, I am of the opinion that the plaintiff has made out a prima-facie case and balance of convenience lies in its favour as admittedly the tax holiday is still in subsistence, whereas, irreparable loss may occur if the injunctive relief is refused. However, since this is a fiscal matter and it would be in the interest of justice to secure the interest of revenue as well, therefore, by means of a short Order dated 19-01-2016, I had allowed the listed application in the following terms:-

“For the reasons to be recorded later on the listed application is allowed on furnishing tangible surety before the Nazir of this Court in respect of the minimum tax under Section 113 of the Income Tax Ordinance, 2001, whereas, on furnishing such tangible surety the return filed by the plaintiff shall be accepted manually by the defendants/Inland Revenue Department.”

The above are the reasons thereof.

Judge