

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C. P. NO. D-4669 / 2022 a/w

C. P. NO. D-3250, 2272, 3501, 3508, 3512, 3513, 3514, 3775, 4011, 4012, 4042, 4063, 4112, 4186, 4187, 4205, 4206, 4207, 4255, 4275, 4284, 4289, 4318, 4343, 4345, 4375, 443, 444, 445, 4538, 4539, 4540, 4541, 4542, 4543, 4544, 4597, 4598, 4653, 4654, 4704, 4949, 5043, 5535, 6022, 6239, 7003, 7033, 7898 & 8164 of 2022

Date

Order with signature of Judge

PRIORITY.

- 1) For hearing of Misc. No. 19798/2022.
- 2) For hearing of main case.

07.03.2023.

Advocates for the Petitioners.

Messrs. Arshad Hussain Lodhi, Tajjamul Hussai Lodhi, Nausheen Khan Tajjamul, Jam Zeeshan Ali, Furqan Mushtaq, Mansoor Ali Ghanghro, Sami-ur-Rehman Khan, Qazi Umair All, M. Inziman Sharif, Saleem Mangrio, Rabia Khan Rafy Shaikh, Raghob Ibrahim Junejo, Ajeet Kumar, Syed Iqbal H. Shah, Ajeet Sundar, Nadir Hussain Abro, Muhammad Aleem, Farrukh Usman, Raffy Zeeshan Javed Altaf, Naeem Suleman, Arshad Hussain Shehzad, Kashan Ahmed, Asghar Bangash, Ali Akbar Ponawala, Tauqir Randhawa, Nasir Latif Khan, Farrukh Usman, Muhammad Al, M. Ilyas Ahmed, Ahsan Zahoor.

Advocates for the Respondents.

M/s. Shahid Ali Qureshi, Qazi Ayazuddin Qureshi, S. Ahsan Ali Shah, Mohsin Ali Shah, Barkat Ali Metlo, Muhammad Aqeel Qureshi, Ameer Bux Metlo, Qaim Ali Memon, Shahid Ali Rana, Muhammad Ishaq, Muhabbat Hussain Awan, Syed Ali Ahmed Zaidi, Afnan Siddiqui, Iftikhar Hussain, Ayaz Sarwar Jamali, Sajjad Ali Solangi, Afsheen Aman, Bushra Zia for Zubair Hashmi, Muhammad Ishaque, Salman Ahmed, Ghulam Ali Khan, Ameer Noshawan Adil, Asad Aftab Solangi, Fawad Syed, Imtiaz Ali Solangi, S. Mohsin Imam Wasti, Ameer Nausherwan Adil.

Mr. Kafeel Ahmed Abbasi, Additional Advocate General Sindh.

Mr. Qazi Ayazuddin Qureshi, Assistant Attorney General.

Mr. G.M. Bhutto, Assistant Attorney General.

Mr. Manzoor-ul Haq, Law Officer State Bank.

These matters were partly heard by us on 07.02.2023 and the gist of the controversy as raised in these Petitions has been recorded in the said order which reads as under:-

“We have heard the learned counsel for the petitioners as well as for the respondents. The crux of the matter is that the Petitioners claiming to be Recognized Provident Funds; Approved Superannuation Funds and Approved Gratuity Funds (See Clause 47B of Part-IV of the 2nd Schedule and the 6th Schedule to the Income Tax Ordinance, 2001) have been denied respective Exemption Certificates, making them liable for tax deductions on various transactions, including but not limited to, profit on debts; dividends; advance payments on brokerage and commission; capital gains; etc. etc. This has, perhaps resulted due to a letter dated 30.7.2021 issued by FBR to all Commissioners being some direction on the

issue of Trust Laws and Specialized Trusts related to Pensions, Gratuity and Superannuation Fund. It also discloses holding of some meeting in FBR with provincial authorities and the precise reason as stated is that pursuant to Provincial Legislation in respect of Trusts by way of independent Acts; including the Sindh Trust Act, 2020, the petitioners are liable for compulsory registration and in absence of such registration, are not entitled for any Exemption Certificate.

In our considered view, such finding and direction of FBR to all Commissioner(s) asking the petitioners to obtain Registration under respective Trust Acts is ill-founded and does not appear to be a correct approach inasmuch as there is no corresponding amendment in the Income Tax Ordinance, 2001 after promulgation of the said Acts, and therefore, the objection, if any, to this effect cannot be sustained. Insofar as the Ordinance, 2001, is concerned, the position remains the same, whereas, the Petitioners before us are already approved by the Respondents and were being issued Exemption Certificates since long including up to 2022.

Prima facie, the contention of the Petitioners appears to be just, fair and correct, whereas, the objection of the Respondents appears to be frivolous, and therefore, this is a case, wherein, in our considered view, cost should be imposed upon the Respondents / FBR as numerous petitions have come before this Court, resulting in sheer wastage of precious time of the Court. It may also be noted with concern that all petitioners are managing funds pertaining to employees and their welfare (post retirement) and insofar as the entitlement to exemption is concerned, there appears to be no dispute, except issuance of an exemption certificate, which otherwise is mere procedural.

Before any order for imposition of costs could be passed, we have confronted Respondents Counsel and Mr. Shahid Ali Qureshi, learned Counsel appearing on behalf of some of the Respondents / FBR requests for time seek instructions. At his request and as an indulgence time is allowed.

To come-up on **21.02.2023 at 11:00 AM**. Interim orders passed earlier to continue till the next date of hearing. Office to place copy of this order in the connected matters as mentioned above. On the next date office shall sent all the connected files as well."

Thereafter, in compliance of the above order, instead of withdrawing the impugned action initiated by various Commissioners, on the directions of FBR statement was filed by Mr. Shahid Ali Qureshi, who is appearing in C. P. No. D-5535/2022 wherein, it was stated that matter was referred by FBR to the Ministry of Law & Justice for opinion and pursuant to such opinion it has been decided that until the Trusts are registered under the Provincial Laws they are not entitled for exemption under Income Tax Ordinance, 2001. From perusal of our order dated 7.2.2023, it could be seen that the crux of the matter is that the Petitioners claiming to be Recognized Provident Funds; Approved Superannuation Funds and Approved Gratuity Funds (**See Clause 47B of Part-IV of the 2nd Schedule and the 6th Schedule to the Income Tax Ordinance, 2001**) have been denied respective Exemption Certificates, making them liable for tax deductions on various transactions, including but not limited to, profit on debts; dividends; advance payments on brokerage and

commission; capital gains; etc. etc. it further appears that the issue was initiated by the Commissioners concerned on the ground that Provinces have promulgated independent Trust Acts including The Sindh Trust Act, 2020 (relevant for the present purposes) which requires a compulsory registration, and therefore, in absence of such registration, the Petitioners are not entitled for any exemption; hence, no exemption certificate could be issued. It further appears that from time to time waiver was granted by FBR with a rider that such registration certificates be produced positively before the cut-off date. It is an admitted position that prior to promulgation of respective Provincial Trust Acts, the Petitioners were otherwise always found to be entitled for issuance of Exemption Certificates. After hearing all learned Counsel and perusal of the record, we had observed that such stance of FBR, as well as Commissioners, is ill-founded and does not appear to be correct inasmuch as no corresponding amendment was made in the Income Tax Ordinance, 2001 after promulgation of the Trust Acts by the respective Provinces. It is not in dispute that insofar as the 2001 Ordinance is concerned, the position remains the same, whereas, the Petitioners are otherwise eligible for such exemption barring their registration as above. We had further observed that such conduct on the part of FBR as well as Commissioners was not justified; rather has resulted in unnecessary litigation by burdening the Court and in addition causing great inconvenience to the Petitioners as well. We had also noted that Petitioners before us are in fact acting as a Trust for a specific purpose, purely for managing funds pertaining to employees and their welfare, specifically post retirement, and therefore, by way of indulgence, matter was adjourned; however, with a note of caution that if no remedial action is taken by the Respondents, we may impose cost upon such Respondents for having acted beyond the mandate of law leading to this unnecessary litigation. Unfortunately, despite being cautioned, they have not corrected their stance; rather a new plea has been raised that some legal opinion was obtained from Ministry of Law and Justice. This we may add was an afterthought on the part of Respondents as the advice was sought on 15.2.2022 much after the impugned action of the Respondents. Though not relevant, but we may observe that the advice sought was on also premised on a wrong assumption of facts and law inasmuch as firstly, it was not mandatory for the Petitioners to get themselves registered under the Trust Act, 1882; secondly, 2001 Ordinance, neither prior to the said repeal; nor as of today mandates that the Petitioners must be registered under the Provincial Laws. It may also be noted that a learned Judge of the Lahore High Court in the case of ***High Noon Laboratories***

Ltd. Vs. Federation of Pakistan vide order dated 30.03.2022 in Writ Petition No. 17980 of 2022 has dealt the controversy and has accepted the stance of the Petitioners by holding that in the 2001 Ordinance, as well as in the Sixth Schedule, it is not required that for recognition of Provident Fund, Registration under the Act of 2020 is a pre-condition. The relevant observations are as under:-

“8. Perusal of Sixth Schedule with the provisions of law, noted above, does not show that for recognition of Provident Fund, registration under the Act of 2020 is a precondition. The submissions made by the petitioner and as assisted by Barrister Shehryar Kasuri, Advocate have led to the conclusion that law envisages recognition of Use Provident Fund if conditions, as prescribed in Rule (2) Part-1 of the Sixth Schedule, are fulfilled to the satisfaction of concerned Commissioner. Provident Fund and its recognition is required under the Income Tax Law for the satisfaction of department to allow the contributions, deposited in Provident Fund, as a deduction in computing the income of a person/taxpayer, therefore, submission on behalf of FBR, that provincial government is being approached for the respective amendments, is irrelevant.

9. Though the registration is not a precondition under the Income Tax Law, yet it is necessary to observe that change in provincial law relating to trust, if creates any hardship for the taxpayer, cannot be made a reason to deny any benefit under Income Tax Law.

Provident Fund has already been recognized and its recognition was never withdrawn and objection of re-registration, at stage granting exemption certificate, is not in accordance with law.

At best petitioner/taxpayer could have been confronted with the recognition order already made and after its withdrawal such objection can be taken or order for rejection of exemption certificate could be passed.

10. Under the circumstances, the impugned cancellation of exemption certificate order is set aside. The application for grant of exemption shall be deemed pending before the relevant officer, who shall decide the same strictly in accordance with law keeping in view the legal position and observations hereinabove.

We have time and again noticed, as well as ordered¹, that conduct of FBR as well as respective Commissioners / Collectors, is by itself a major impediment in timely disposal of revenue cases. In fact, we are not hesitant in saying that most of the cases crop up due to their conduct, which includes in-competence, ill-advice, mala fides, callous attitude towards tax-payers and so on and so forth. On several occasions we have tried to apprise the concerned officials at FBR, including its Chairman as well as Members, but of no avail.

In view of the above, read with our order dated 07.02.2023 and the conduct of the Respondents including FBR and so also for the reason that

¹ Orders dated 18.2.2021 in CP Nos. D-8233 of 2019 and dated 5.11.2020 in SCRA No.157 of 2013.

the learned Lahore High Court has also decided the matter against them and despite such position the issue is still being agitated by the Department with no justifiable cause and reason, these Petitions are allowed by holding that the Petitioners are not required to obtain respective registration under The Sindh Trust Act, 2020 for issuance of exemption certificate as it is not a precondition under the 2001 Ordinance. The respective Respondents shall issue requisite Exemption Certificates, after fulfillment of other remaining conditions under the 2001 Ordinance, if any.

Moreover, it is a fit case to impose costs as well, as despite being cautioned, Respondents have persisted with their stance. We may observe that FBR must act fairly in dealing with taxpayers and to abide by the law governing it, and if any benefit accrues to taxpayers under the law, it must not be withheld and the assessee's and its own time and resources should not be needlessly wasted. This frivolous litigation has wasted time of this Court; time which would have been better spent in resolving legitimate disputes². Accordingly, cost of Rs. 25,000/- is imposed on Federal Board of Revenue (FBR) in each listed petition which shall deposited in the account of Sindh High Court Clinic.

As a matter of clarification, insofar as respective ad-interim orders are concerned, in some of the matters private Respondents were though permitted to deduct tax from the Petitioners; but were required to retain it with themselves, and in view of the above, the said Respondents are directed to reimburse it to the respective Petitioners.

The Petitions are allowed in the above terms with costs.

J U D G E

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Arshad/

² Commissioner Inland Revenue v Packages Limited (2022 SCMR 634)