IN THE HIGH COURT OF SINDH AT KARACHI

C. P. NO. D-2112 of 2015

Present:
Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Muhammad Junaid Ghaffar.

China Harbour Engineering Company Limited ---------- Petitioner

Versus

Federation of Pakistan& others ----------Respondents

Date of hearing:	**13.5.2015, 20.05.2015& 07.09.2015**
Date of judgment:	**23.09.2015**
Petitioner:	**Through Mushtaq Hussain Qazi Advocate.**
RespondentNo.1:	**Through Mr. Dilawar Hussain Standing Counsel.**
Respondent No.2& 3	**Through Mr. Muhammad Sarfaraz Ali Metlo Advocate assisted by Dr. Najeeb Ahmed Memon Additional Commissioner Mr. Shakeel Ahmed Kasana Additional Commissioner. Mr. Abdul Wahid Deputy Commissioner.**
Respondent No. 6	**Through Ms. Sara Malkani Advocate.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through instant petition, the petitioner has impugned Order dated 8.4.2015 passed under Section 122B of the Income Tax Ordinance, 2001, ("Ordinance, 2001") whereby, the order dated 17.12.2014, passed by respondent No. 3, has been upheld, through which the Exemption Certificate dated 19.6.2014 granted in favour of the petitioner had been withdrawn.

2. Precisely, the relevant facts are that the petitioner is a Permanent Establishment of a Non-Resident Company, incorporated in Peoples of China, and is engaged in execution of contracts entered into with respondent's No. 4 to 6 in the field of Marine Infrastructure. It has been stated that in the previous years, the petitioner was issued Exemption Certificates under Sub-Section (2A) read with Clause (b) of subsection (3) of Section 152 of the Ordinance, 2001,in the years 2012, 2013 and 2014, whereas the last Certificate was validtill30.6.2015,whereafter,on 15.12.2014 a Show Cause Notice was issued to the petitioner, as to why the Exemption Certificate dated 19.6.2014 may not be withdrawn as no such certificate could be issued in terms of Section 152 (2A) of the Ordinance, 2001. The petitioner replied to such Show Cause Notice, whereafter, an order dated 17.12.2014 was passed and the exemption certificate dated 19.6.2014 was withdrawn. Such order was impugned by filing a petition bearing C.P. No. D-778 of 2015 before this Court, which was disposed of on 18.3.2015 with directions to the Petitioner to seek remedy under Section 122(B) of the Ordinance, 2001 by way of Revision before respondent No. 2. Such revision application has been decided vide impugned order dated 8.4.2015 assailed through instant petition.

3. Learned Counsel for the petitioner has contended that till 30.6.2012, prior to amendment in the Ordinance, 2001, through Finance Act 2012, the deduction of withholding tax on payments made to the petitioner was governed under subsection (1) of Section 153 of the Ordinance, 2001 and the petitioner and the like establishments, were issued Exemption Certificates under Section 153(4) of the Ordinance, 2001 read with SRO No. 586(I)/1991 dated 30.6.1991 on payment of Advance Tax under Section 147 of the Ordinance, 2001 for the year in

which the Exemption Certificate was being sought. According to the learned Counsel, thereafter through Finance Act, 2012 there were certain changes brought about in Section 152 and 153 of the Ordinance, 2001 whereby the words “Permanent Establishment in Pakistan of a Non-Resident person” from Section 153 (1) of the Ordinance, 2001 were omitted and subsection (2A) was inserted in Section 152. It is the case of the petitioner that though certain changes have been brought about under Section 152 and 153 of the Ordinance, 2001 however, the petitioner is still entitled for issuance of exemption certificate read with SRO No. 586(I)/1991 dated 30.6.1991, and, presently, also the petitioner is entitled for issuance of an Exemption Certificate from withholding of tax under sub-section (2A) read with Clause (b) of Section 152, further read with subsection (4)and (7)of Section 153 of the Ordinance, 2001. Per learned Counsel insofar as sub-section (2) of Section 152 of the Ordinance, 2001 is concerned, the same is subordinate / subservient to sub-section (3) of Section 152 of the Ordinance, 2001 and it cannot be read in isolation. Learned Counsel has further contended that despite changes in Sections 152 and 153 of the Ordinance, 2001 the legislature has neither changed or altered the rate of tax for deduction from payments to Permanent Establishment, which still continues to be at the rate of 3.5% nor it has restrained the Commissioner from issuing an Exemption Certificate in this regard. Leaned Counsel has also referred to Para 14 of Circular No. 2 of 2012 dated 27.7.2012 issued by FBR, which according to the learned Counsel, explains the reason behind deletion of words “Permanent Establishment” from sub-section (1) of Section 153 of the Ordinance, 2001 and its verbatim insertion in Section 152 of the Ordinance, 2001 vide sub-section 2A. Leaned Counsel has further contended that in view of Section 206 of the Ordinance, 2001 a Circular

issued by FBR is binding on all the authorities, except the Commissioner of Income Tax (Appeals). Learned Counsel has further submitted that despite such amendment carried out through Finance Act, 2012 two different Commissioners of Inland Revenue have issued Exemption Certificates to the petitioner under Section 152(2A) read with subsection (3) of Section 152 of the Ordinance, 2001, for the financial year ending 30.6.2013 and 30.6.2014. Per learned Counsel the third Exemption Certificate was also issued by the Commissioner Inland Revenue on 19.6.2014, which was valid up to 30.6.2015, and could not have been withdrawn by any means whatsoever till its subsistence / validity. In view of such position, learned Counsel has prayed that the impugned order, whereby a validly issued certificate has been recalled / withdrawn may be set aside.

4. Conversely learned Counsel for the Respondents duly assisted by the departmental representatives present in Court, has contended that after omission of the words “Permanent Establishment of a Non-Resident in Pakistan” from Section 153, and insertion of sub-section (2A) in Section 152 of the Ordinance, 2001 through Finance Act, 2012a substantial change has been brought about in the Withholding Tax Scheme for Permanent Establishments of Non-Resident in Pakistan. Learned Counsel has further submitted that though the apparent reason for such change is to group all withholding schemes related to Non-Residents under one Section of the Ordinance, however, it has also effectuated two substantial changes in the chargeability and withholding scheme for Permanent Establishment in Pakistan of a Non-Resident. Per learned Counsel, now the tax deducted under Section 152(2A), no more falls within the ambit of Final Tax Regime, whereas, prior to such

amendment the tax deducted on payment to Permanent Establishments under Section 153(1) was within the ambit of Final Tax Regime as envisaged in Section 152(3) of the Ordinance, 2001. However, the Permanent Establishment had an option for a Normal Tax Regime under Clause 41 of Part IV of 2nd Schedule until 2006, or could have availed for the Normal Tax Regime, if any treaty between such Country and Pakistan would so permit. Per learned Counsel, now in terms of Section 152 of the Ordinance, 2001, there is no provision for a Permanent Establishment of a Non-Resident in Pakistan to obtain any exemption from Withholding Tax, and such power is also not found under Section 159 of the Ordinance, 2001. According to the learned Counsel, the rationale behind this change is that Permanent Establishments continued to operate in Pakistan; hence, they could file Income Tax Return at the end of each year and would adjust withholding Tax against their tax liabilities. Insofar as the exemption from withholding of Tax to be obtained through a payer is concerned, per learned Counsel, the same is only available to Non-Residents who do not have any Permanent Establishment, as apparently they have a shorter stay in Pakistan and they cannot guarantee their presence after the end of Financial Year; hence Section 152(5) of the Ordinance, 2001, makes a person making payments to such Non-Residents, as an eligible person, who can claim exemption from Withholding Tax, while making such payments and such facility is not available any more to a Permanent Establishment of a Non-Resident in Pakistan.

5. We have heard both the learned Counsel and perused the record. By consent of all, instant petition is being finally disposed of at Katcha peshi stage. It appears that the controversy which has led to filing of

instant petition has arisen, because of the changes which had been brought about in Sections 152 and 153 of the Ordinance, 2001through Finance Act, 2012. It would be advantageous to reproduce hereunder both these sections as they appear before and after the Finance Act, 2012:-

2011-2012	2012-2013
152. Payments to Non-Residents.----(1) Every person paying an amount of (royalty) or fees for technical services to a Non-Resident person that is chargeable to tax under section 6 shall deduct tax from the gross amount paid at the rate specified in Division IV of Part-I of the First Schedule. [(1A) Every person making a payment in full or part (including a payment by way of advance) to a Non-Resident person on the execution of---- (a)a contract or sub-contract under a construction, assembly or installation project in Pakistan, including a contract for the supply of supervisory activities in relation to such project; or (b) any other contract for construction or services rendered relating thereto; or (c) A contract for advertisement services rendered by T.V Satellite Channels, Shall deduct tax from the gross amount payable under the contract at the rate specified in Division II of Part III of the First Schedule. [(1AA)Every person making a payment of insurance premium or re-insurance premium to a Non-Resident person shall deduct tax from the gross amount paid at the rate specified in Division-II of Part III of the First Schedule;]	152. Payments to Non-Residents.----(1) Every person paying an amount of (royalty) or fees for technical services to a Non-Resident person that is chargeable to tax under section 6 shall deduct tax from the gross amount paid at the rate specified in Division IV of Part-I of the First Schedule. [(1A) Every person making a payment in full or part (including a payment by way of advance) to a Non-Resident person on the execution of----- (a) a contract or sub-contract under a construction, assembly or installation project in Pakistan, including a contract for the supply of supervisory activities in relation to such project; or (b) any other contract for construction or services rendered relating thereto; or (c) A contract for advertisement services rendered by T.V Satellite Channels, Shall deduct tax from the gross amount payable under the contract at the rate specified in Division II of Part III of the First Schedule. [(1AA)Every person making a payment of insurance premium or re-insurance premium to a Non-Resident person shall deduct tax from the gross amount paid at the rate specified in Division-II of Part III of the First Schedule;]

(1B)The tax deducted under sub-section (1A) shall be a final tax on the income of a Non-Resident person arising from a contract.]	[(1AAA) Every person making a payment for advertisement services to a Non-Resident media person relaying from outside Pakistan shall deduct tax from the gross amount paid at the rate specified in Division IIIA of Part III of the First Schedule.
[(1BB) The tax deducted under sub-section (1AA) shall be a final tax on the income of the Non-Resident person arising out of such payment.]	(1B)The tax deducted under sub-section (1A) shall be a final tax on the income of a Non-Resident person arising from a contract.]
(2) Subject to sub-section (3), every person paying an amount to a Non-Resident person (other than an amount to which sub-section (1) [or sub-section (1A)] [, (1AA)] applies) shall deduct tax from the gross amount paid at the rate specified in Division-II of Part III of the First Schedule.	[(1BB) The tax deducted under sub-section (1AA) shall be a final tax on the income of the Non-Resident person arising out of such payment.]
(3)Sub-section (2) does not apply to an amount — (a) that is subject to deduction of tax under section 149, 150, 153, 155, [,]156 [or 233]; (b) with the written approval of the Commissioner, that is taxable to a permanent establishment in Pakistan of the Non-Resident person; (c) that is payable by a person who is liable to pay tax on the amount as representative of the Non-Resident person under sub-section (3) of section 172; or (d) where the Non-Resident person is not chargeable to Tax in respect of the amount.	(2) Subject to sub-section (3), every person paying an amount to a Non-Resident person (other than an amount to which sub-section (1) [or sub-section (1A)] [, (1AA)] applies) shall deduct tax from the gross amount paid at the rate specified in Division-II of Part III of the First Schedule. ***[(2A)Every prescribed person making a payment in full or part including a payment by way of advance to a permanent establishment in Pakistan of a Non-Resident person----*** ***(i)For the sale of goods;*** ***(ii) For the rendering of or providing services; and*** (iii) On the execution of a contract, other than a contract for the sale of goods or the rendering for providing services, 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 II of Part III of the First Schedule.] (2AA) Sub-section (1AA) shall not apply to an amount, with the written approval of the Commissioner that is taxable to a permanent establishment in Pakistan of the Non-Resident person.] (3) Sub-section (2) does not apply to an amount —

	(a) that is subject to deduction of tax under section 149, 150, 153, [***] 155, [,]156 [or 233]; (b) with the written approval of the Commissioner, that is taxable to a permanent establishment in Pakistan of the Non-Resident person; (c) that is payable by a person who is liable to pay tax on the amount as representative of the Non-Resident person under sub-section (3) of section 172; or (d) where the Non-Resident person is not chargeable to tax in Respect of the amount.
[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 ***or permanent establishment in Pakistan of a Non-Resident person—*** (a) for the sale of goods; (b) for the rendering of or providing of services; (c) on the execution of a contract, other than a contract for the sale of goods or the rendering of or providing of services, Shall, at the time of making the payment, deduct tax from the gross amount payable at the rate specified in Division III of Part III of the First Schedule. (2) Every exporter or an export house making a payment in full or part including a payment by way of advance to a resident person or permanent establishment in Pakistan of a Non-Resident person for the rendering of or providing of services of stitching, dying, printing, embroidery, washing, sizing and weaving, shall at the time of making the payment,	[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 or [***]-- (a) for the sale of goods; (b) for the rendering of or providing of services; (c) on the execution of a contract, other than a contract for the sale of goods or the rendering of or providing of services, Shall, at the time of making the payment, deduct tax from the gross amount payable at the rate specified in Division III of Part III of the First Schedule. (2) Every exporter or an export house making a payment in full or part including a payment by way of advance to a resident person or permanent establishment in Pakistan of a Non-Resident person for the rendering of or providing of services of stitching, dying, printing, embroidery, washing, sizing and weaving, shall at the time of making the payment, deduct tax from the gross amount

deduct tax from the gross amount payable at the rate specified in Division IV of Part III of the First Schedule. (3)The tax deducted under clauses (a) and (c) of sub-section (1) and under sub-section (2) of this section, on the income of a resident person or permanent establishment of a Non-Resident person, shall be final tax. Provided that,— (a) tax deducted under clause (a) of sub-section (1) shall be adjustable where payments are received on sale or supply of goods, by a,— (i) company being a manufacturer of such goods; or (ii) public company listed on a registered stock exchange in Pakistan; (b) tax deducted shall be a minimum tax on transactions referred to in clause (b) of sub-section (1); and (c) Tax deducted under clause (c) of sub-section (1) shall be adjustable if payments are received by a public company listed on a registered stock exchange in Pakistan, on account of execution of contracts. ***(4)The Commissioner may, on application made by the recipient of a payment referred to in sub-section (1) and after making such inquiry as the Commissioner thinks fit, may allow in cases where tax deductible under sub-section (1) is adjustable, by an order in writing, any person to make the payment,—*** ***(a) without deduction of tax; or*** (b) ***Deduction of tax at a reduced rate.***	payable at the rate specified in Division IV of Part III of the First Schedule. (3) The tax [deductible] under clauses (a) and (c) of sub-section (1) and under sub-section (2) of this section, on the income of a resident person or [***] shall be final tax. Provided that,— (a) tax deducted under clause (a) of sub-section (1) shall be adjustable where payments are received on sale or supply of goods, by a,— (i) company being a manufacturer of such goods; or (ii) public company listed on a registered stock exchange in Pakistan; (b) tax deducted shall be a minimum tax on transactions referred to in clause (b) of sub-section (1); and (c) Tax deducted under clause (c) of sub-section (1) shall be adjustable if payments are received by a public company listed on a registered stock exchange in Pakistan, on account of execution of contracts. (4) The Commissioner may, on application made by the recipient of a payment referred to in sub-section (1) and after making such inquiry as the Commissioner thinks fit, may allow in cases where tax deductible under sub-section (1) is adjustable, by an order in writing, any person to make the payment,— (a) without deduction of tax; or (b) Deduction of tax at a reduced rate.

6. From perusal of the aforesaid relevant and applicable provisions prior to and after the Finance Act, 2012, it appears that previously Sections 153 of the Ordinance, 2001, provided a complete mechanism for withholding of Tax from Permanent Establishments of Non-Residents in Pakistan, and, so also issuance of Exemption Certificates under sub-section (4) ibid. However, through Fiancée, Act, 2012, the provisions of withholding of Tax in respect of the Permanent Establishment of Non-Residents in Pakistan, has been shifted from Section 153 to Section 152 of the Ordinance, 2001 whereby sub-section (2A) has been inserted, after necessary amendments / omission in Section 153 regarding Permanent Establishments of Non–residents in Pakistan. However, while introducing such amendment, it appears that the amendment in the corresponding provision which was available under Section 153 (4) of the Ordinance, 2001, whereby, the Commissioner was empowered to allow payments by the payers without deduction of Tax, has not been made in Section 152 of the Ordinance, 2001, and merely the provision regarding withholding of Tax has been incorporated through insertion of Section (2A) in Section 152 of the Ordinance, 2001, which in fact, has led to the present controversy. Perusal of the record reflects that despite aforesaid amendments through Finance Act, 2012, the Income Tax Authorities had been regularly issuing Exemption Certificates, by certifying that the provisions of subsection (2A) of Section 152of the Ordinance, 2001 are not applicable to the case of the petitioner, in view of Clause (b) and Sub-Section (3) of Section 152 the Ordinance, 2001.Reference in this regard can be made to Exemption Certificates dated 30.6.2013, 19.6.2014 and

26.9.2014 available at pages 79 to 85 of the instant file. Thereafter, proceedings for revoking / cancellation of the last Exemption Certificate dated 26.9.2014 had been initiated by respondent while issuing Show Cause Notice dated 15.12.2014, wherein, it has been observed that no Exemption Certificate can be issued under Section 152 (2A) of the Ordinance, 2001 as no such authority is vested with the Commissioner under such provision. We have also been assisted by the learned Counsel for the petitioner that immediately after the amendment so carried out through Finance Act, 2012 the Federal Board of Revenue had issued a Circular No.02 of 2012 on 27.7.2012 regarding explanations in respect of important amendments made in the Ordinance 2001 through Finance Act, 2012. It would be advantageous to reproduce hereunder Para 14 of the said Circular which deals with the amendments carried out in Section 152 and 153 of the Ordinance, 2001:-

> "14. WITHHOLDING TAX PROVISIONS APPLICABLE TO NON-RESIDENTS.
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> (i) Withholding tax provisions applicable on payments to Permanent Establishment of a Non-Resident person on account of sale of goods, rendering of or providing services or execution of a contract, have been consolidated with other payments to Non-Residents covered under section 152.
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> Withholding tax provisions regarding payments made to Non-Residents, such as royalty payments, technical assistance fee payments, insurance payments etc. are dealt with in section 152 of Income Tax Ordinance, 2001. However, withholding tax provisions regarding payments in respect of contracts, supply of goods or services to Permanent establishment of a Non-Resident, were placed in section 153 which mostly deals with residents. This resulted in complications, particularly, when treatment of withholding tax rates for resident companies were changed, for example, treating them as final tax or minimum tax, the rates for PEs of Non-Resident companies also changed automatically, which otherwise are protected by double taxation agreements between Pakistan and other countries. So frequent changes in law were made through circulars

> etc. To remove this problem, these payments, through Finance Act, 2012, have been omitted from section 153 and are made part of section 152."

7. Perusal of the aforesaid clarification by FBR, reflects that the only purpose and intent for carrying out the amendment in Section 152 and 153 of the Ordinance, 2001 through Finance Act, 2012, was to simplify and harmonize the withholding Tax regime pertaining to Permanent Establishment of a Non-Resident person in Pakistan, as there was some over lapping and confusion with regard to withholding and deduction of tax on such establishments. It has been further clarified through the aforesaid Circular, that to remove this problem, the mechanism of payments in respect of Permanent Establishment of Non-Residents through Finance Act 2012, has been omitted from Section 153 and now are made part of Section 152 ibid. However, on a careful examination of the same it appears that it was never the intention of the legislature, to discontinue the issuance of Exemption Certificates to such Permanent Establishments. If this would have been the intention of legislature, in that case, a categorical explanation would have been issued by FBR to the effect that after above amendments, No Exemption Certificates to such Permanent Establishments of Non-Resident in Pakistan would be issued while making payments. In our candid view, this appears to be a genuine omission on the part of the draftsman, that the corresponding provision for grant of Exemption Certificates to the Permanent Establishments of Non-Resident in Pakistan, has not been made in Section 152 as available earlier under sub-section (4) of Section 153 ibid, though the provision for deduction of such tax has been incorporated by insertion of Section (2A) in Section 152 of the Ordinance, 2001.

8. We have been able to lay our hands on the recent amendment made through Finance Act, 2015, whereby Sub-Section 4Ahas been inserted in Section 152 of the Ordinance, 2001, which reflects that the legislature having realised such omission has restored the original position, which provides for issuance of an Exemption Certificate to a Permanent Establishment of a Non-Resident person in Pakistan. It would be advantageous to refer to Section (4A) of Section 152 of the Ordinance, 2001, which reads as under:-

> "(4A) The Commissioner may, on application made by the recipient of a payment referred to in sub-section (2A) and after making such inquiry as the Commissioner thinks fit, may allow in cases where the tax deductible under sub-section (2A) is adjustable, by order in writing, any person to make the payment, without deduction of tax or deduction of tax at a reduced rate."

9. Perusal of the aforesaid provision reflects that now the Commissioner, on an application made by the recipient (i.e. Permanent Establishment of a Non-Resident) of a payment referred to in sub-section (2A) and after making such inquiry as the Commissioner thinks fit, may allow in case where the tax deductable under sub-section (2A) is adjustable, by order in writing, any person to make the payment, without deduction of tax or deduction of tax at a reduced rate. Therefore, it appears that the provision regarding issuance of an Exemption Certificate to a Permanent Establishment of a Non-Resident in Pakistan, stands restored, and the ambiguity on the basis of which the Exemption Certificates earlier issued to the petitioner was cancelled or withdrawn subsequently, is put to at rest. Insofar, as the intervening period is concerned, we may observe, that this appears to be a case of inadvertent mistake and omission on the part of the draftsman, whereas, FBR and its sub-ordinate Officers, being conscious of such fact, and despite there

being no specific provision for issuance of such Certificates, issued such Exemption Certificates to the claimants and the petitioner as well. In our view, after insertion of Sub Section 4A in Section 152 of the Ordinance, 2001, through Finance Act, 2015, the mistake stands rectified, whereas, such insertion through Finance Act 2015, is curative and beneficial in nature, whereby, a provision for grant of Exemption Certificate has been restored which was already available prior to Finance Act, 2012. We are of the view that amendment introduced through Finance Act, 2015, whereby, the original position with regard to issuance of Exemption Certificate in terms of Sub-Section 4A of Section 152 of the Income Tax Ordinance, 2001, has been restored, is a beneficial and curative legislation which would apply retrospectively to the pending case, as the one in hand, more particularly, when such Exemption Certificate had already been issued by the Commissioner in accordance with law, after fulfilment of legal requirements.

10. In arriving at such conclusion that insertion of Section 4A in Section 152 of the Ordinance 2001, through Finance Act, 2015 being a remedial and curative legislation, would be applicable retrospectively on the case of the petitioner in hand, we are fortified by the pronouncement of the Hon'ble Supreme Court as laid down in the case of ***Commissioner of Income Tax Vs. Shah Nawaz Ltd. and others (1993 SCMR 73)***, wherein, the amendment made in subsection (6) of Section 18A of the Income Tax Act 1922, by Finance Act 1973, whereby, the additional amount of Tax under subsection (6) of Section 18A could only be charged for a period not exceeding 15 months, extended also to the case of assessees who had submitted their returns before coming into force of the said amendment, but their cases of regular assessment had not yet

been finalized and were still pending, has been given retrospective effect by the Hon'ble Supreme Court as being applicable on pending cases. Very briefly in that case the respondents assessments proceedings were pending and they were liable to pay an additional tax at the rate of two percent per mensum from the first day of April in the year in which the tax was paid up to the date of the regular assessment, if the assesee had paid tax under sub section (2) or (3), on the basis of his own estimate and the tax so paid was less than eighty percent of the tax determined on the basis of regular assessment under section 23. Thereafter, through Finance Act, 1973, sub section (6) of Section 18A was amended and it was provided that two percent additional tax per mensum would be payable from first day of April in the year in which the tax was paid up to the thirtieth day of June of the year next following or up to the date of said regular assessment whichever is earlier. Though the amendment was brought in the year 1973, however, the same was also made applicable to the assessment years before 1973, on the ground that such assessments were not finalised and such amendment being beneficial and curative in nature was to be given retrospective effect. The relevant findings, whereby, the judgment of High Court of Sindh had been upheld reads as under:-

> "Discussing the nature of the remedial statutes the High Court referred to Corpus Juris Secundum, Vol. 82 (paragraph 388), which, inter alia, is the following effect:-
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> > "In construing remedial statutes, regard should be had to the former law, the defects or evils to be cured or abolished, or the mischief to be remedied, and the remedy provided, and they should be interpreted liberally to embrace all cases within their scope so as to accomplish the object of the legislature and to give effect to the purpose of the statute by suppressing the mischief and advancing the remedy, provided it can be done by reasonable construction in furtherance of the object."
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> The question whether remedial statutes can be given retrospective effect has been considered by Crawford in his "Statutory Construction" (1940 Edn.) in Para 282 as follows:-

> "282. Remedial statutes.--- Even remedial statutes may be subject to the principles hereinto force discussed, opposing any construction which will be give the enactment retrospective operation. Yet, since remedial statutes are usually looked upon with favour by the Courts, they should be liberally construed. But there appears to be considerable confusion in the cases with reference to giving remedial Acts retrospective through construction. If the rule of liberal construction is to be applied, as it obviously should then any doubt should be resolved in favour of retrospective operation, if such operation does not destroy or disturb vested rights, impair the obligations of contracts, create new liabilities violate due process of law or contravene some other Constitutional provision, and if such operation will carry out the intention of the legislature as ascertained through the application of the principle of liberal construction. In other words, a statute relating to remedial law may properly, in several instances, be given retrospective operation."

The conclusion arrived at by the High Court on this question was expressed in the following words:-

> "In our view, as the amending provision under consideration had been inserted in subsection (6) of Section 18A to remedy a wrong that was being done to the assesse, and the amending provision does not affect any vested right or create any new obligations, the amending provisions is to be given retrospective operation for extending benefit to the affected parties in pending cases, to give effect to the intent of the legislature. As observed earlier, a wrong was being done to the assesses by providing for an indefinite period during which they were made liable for payment of additional tax at the rate of 2% per mensem and this wrong was sought to be remedied by the remedial and curative amendment brought about by the Finance Act, 1973. If the intention of the Legislature had been that this remedy should be available only in respect of assessment for the year 1973-74 and subsequent years, the legislature would have used appropriate words to express such intention. No such appropriate words are mentioned in the amending provision. There is no reason why the remedial provision of the amending law should not be applied to pending proceedings. In fact, this appears to be the intent of legislature."

While applying its dictum, the High Court, however, felt that the retrospective operation visualized by the instant amendment could extend only to such "cases which were pending at the time the amending law was enacted i.e. cases which had not been finally determined or proceedings which had not attained finality. The retrospective effect of the amending law would, therefore, apply only to those cases where assessment had not been made by the I.T.Os, or where an appeal was pending before the Tribunal or a reference was subjudice before the High Court, at the time the amending law was enacted. The cases which had finally been determined or had attained finality i.e. which were past and closed transactions, could not be reopened under amending legislation as there are no express words to that effect employed in the amending law."

> Accordingly the references were answered by the High Court in above terms.
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> In support of these appeals Mr. Sheikh Haider has submitted that the answer returned by the High Court is somewhat self-contradictory, in that the High Court while holding the amendment made to be a part of the substantive law relating to income-tax, had still given a retrospective effect to it, which was possible only if the amendment was found to be procedural in nature. It is further submitted that even if the amendment was remedial and curative in nature, retrospective effect could not be given to the said curative legislation.
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> However, nothing has been adduced before us in support of the last mentioned submission. As explained in Crawford's "Statutory Construction" a statute relating to remedial law may properly, in several instances, be given retrospective operation and we are of the opinion that as the amendment in the instant case was introduced to redress an injury which in the words of Circular No. 6 of 1973 (Income Tax) issued on 7th July, 1973 by the Central Board of Revenue itself was "designed to soften the law in favour of tax-payers who could previously be charged to additional tax up to the date of assessment even though the finalization of assessment was delayed due to no fault of theirs." This was a proper case in which retrospective operation, to the extent the High Court gave to it, could be given to the amending law.
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> The upshot is that we find no merit in these appeals. They are, accordingly, dismissed. The parties are, however, left to bear their own costs.

11. Similarly, a learned Division Bench of this Court in the case of ***Dawood Cotton Mills Vs. Commissioner of Income Tax (2000 PTD 285)*** while following the aforesaid judgment of the Hon'ble Supreme Court has held as under:-

> "Applying the principle laid down by the Supreme Court to the case. It can be said that the Finance Ordinance, 1978 by amending section 10 (4) (bb) of the repealed Act had removed the snag or the burden of deducting the tax at source on payment made to a non-resident in Pakistan for claiming such payment as an admissible deduction though it was not chargeable to tax under the repealed Act. The Amending Ordinance had provided benefit both to the applicant/assesse and the non-resident in Pakistan. In the circumstances, the Amending Ordinance was a remedial or a curative Statute and in view of the afore-referred enunciation made by the Supreme Court it would be operative retrospectively. *The benefit of the Amending Ordinance would not be available only in respect of assessment year 1978-79 and thereafter but also for assessment year prior to 1978-79, subject to the condition that at the time when the Amending Ordinance was promulgated the case had not been finally decided and was*

> *pending.* The applicant/assesse had filed an appeal before the Commissioner of Income Tax (Appeals) after the Amending Ordinance was enacted. The Commissioner of Income-tax (Appeals) had granted relief to the applicant/assesse and had allowed the payment made by the applicant/assesse by way of brokerage/commission to a non-resident in Pakistan on interpretation of the amended section 10 (4) (bb) on which such payment was not found to be chargeable to tax under the repealed Act. However, the said finding was reversed by the Appellate Tribunal. In view of these facts the case of the Applicant/assesse cannot be said to have been finally decided at the time when the amendment was made and it would be entitled to the benefit provided by the Amending Ordinance. ***(Emphasis supplied)***
>
> Upon the above discussion, we are satisfied that this Reference merits consideration and must succeed. Accordingly, we allow this Income Tax Reference, answer the question in the affirmative, set aside the finding of the Appellate Tribunal in its order, dated 18.6.1983 on this issue and restore the finding of the Commissioner of the Income-tax (Appeals)."

12. A Division Bench of Lahore High Court in the case of ***Commissioner of Income Tax Vs. J.D. Sugar Mills Ltd. (2009 PTD 481)*** has been pleased to hold that remedial and curative legislation, unless made prospective in clear and unambiguous terms, would always be retrospective and would apply to pending cases. The relevant finding reads as under:-

> "23. This case has got still another angle. As already mentioned the legislature vide Finance Ordinance, 1998 has amended the provisions of section 50 (4) (b) (i). Consequent upon amendment withholding tax under section 50 (4) shall not be attracted in the case of sale of an asset to a leasing company or a modaraba which is to be leased back to the same person by a lease back arrangement. The exact language of the section after insertion is as follows:-
>
> > "Nothing contained in clause (a) or clause (b) shall apply ("any payment on account of securitization of receivable by a special purpose vehicle to the originator or") to any payment made on account of the refund of any security deposit (or to the purchase of an asset under a lease and buy back agreement by a modaraba or a leasing company) (or a banking company or a financial institutions.)
>
> 24. The respondent's claim is that this amendment has come out with cure and to provide a remedy. This is a legal recompense for an invasion of right by the revenue authorities who had extended their arms by deducting tax on an arrangement which on the face of it was neither a trading transaction nor in the true

sense of sale/supply. The amendment brought in by the legislature is for curing a disease or remedying an ill. Such remedial statutes as defined in Law Terms and Phrases published by PLD Publishers is an act "which remove some defect in the existing law and redress any difficulty or inconvenience without any penal provision". The above definition though is precise, is quite comprehensive. Applying above principle if we look into the provision as above after amendment the amendment that has excluded the purchase and lease back arrangement the amendment that has excluded the purchase and lease back arrangement from the purview of section 50 (4) has obviously come as a relief to the concerned persons. It is obviously a remedial and curative legislation. On one hand it has redressed the grievance of the companies obtaining loan and on the other hand cured the inconvenience which was being rendered to them by the authorities by deduction of tax and subsequent treatment by treating the deduction as tax payable on a revenue transaction. This, Court, therefore, does not have any doubt in its mind that the amendment is curative as well as remedial.

25. This is where the next argument advanced by Mr. Siraj Khalid, advocate, would require dilation. The claim is that all the provisions introduced to cure an inconvenience or remedy an ill in the society are always retrospective. Since it is now almost settled that remedial and curative legislation, unless the law makes it prospective in clear and unambiguous terms, is always retrospective, detailed discussion would not be required. However, mentioning some of the relevant judgments on this issue shall definitely of help. There is plethora of the judgments on this issue. However, for the purposes of brevity this Court would refer the judgments of the Hon'ble Supreme Court of Pakistan in terms of "Commissioner of Income Tax v. Shahnawaz Ltd and others" (1992) 66 Tax 122 (S.C) 131 = 1993 SCMR 73, "Messrs Army Welfare Sugar Mills Ltd v. Federation" (1992 SCMR 1652/1673), "Anoud Power Generation v. Federation" (PTCL 2001 CL 277 SC) and "Government of Pakistan v. Village Devt. Organization" (2005 Tax Review 75 SC).

26. The only exception to the principle that curative and remedial legislature is retrospective, is that the same applies only on the pending cases. 'Pending' would, however, mean and include at any stage of the proceedings starting from Assessing Officer to the Supreme Court of Pakistan. The [sic] obviously means that it would not apply on the cases wherein the concerned persons have not challenged the action of the revenue authorities before any higher forum and the same is not pending adjudication. In this regard the reference is made to the prime judgment on the issue Messrs Shahnawaz Limited and others (supra)."

13. In view of herein above facts and circumstance of the instant case and respectfully following the aforesaid dicta laid down by the Hon'ble Supreme Court and the High Courts, we are of the view that insertion of Section 4A in Section 152 of the Ordinance, 2001 through

Finance Act, 2015 is remedial and curative in nature as it has rectified an apparent mistake and omission, hence, the same would be applicable retrospectively on the case of the petitioner, as the petitioner's case was pending when such amendment was introduced in the Ordinance 2001. Therefore, petitioner would be entitled for issuance of Exemption Certificate during the period prior to 2015 as well. Accordingly, the impugned order dated 8.4.2015, as well as order dated 17.12.2014, whereby such Exemption Certificate dated 19.6.2014 already issued to the petitioner had been withdrawn / recalled is hereby set aside. Petition stands allowed in the aforesaid terms, however, with no order as to costs.

Dated: 23.09.2015

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