2021 P T D 933

[Sindh High Court]

Before Muhammad Junaid Ghaffar and Agha Faisal, JJ

HUMAN RESOURCES SOLUTIONS (PVT.) LTD. through authorized representative

Versus

FEDERATION OF PAKISTAN through Secretary, Revenue Division/Chairman, Federal Board of Revenue, Islamabad and others

Constitution Petitions Nos. D-2694 of 2019, D-249 of 2018, D-612, D-613, D-4399, D-4812, D-4899, D-4904, D-4941, D-4978, D-4979, D-5138, D-5240, D-5443, D-5510, D-5713, D-7909, D-8196 of 2019, D-648, D-1216, D-2156, D-2157, D-2368, D-2550, D-4785, D-4786, D-5172, D-6160 of 2020, decided on 27th April, 2021.

(a) Income Tax Ordinance (XLIX of 2001)---

----S.153(1)(b) & Part-III of First Sched.---Deduction of advance tax at source---Rendering or providing of services---Tax deduction in terms of S.153(1)(b) of Income Tax Ordinance, 2001---Scope---Petitioners, who were human resource and manpower providers, sought declaration to the effect that advance tax per S.153(1)(b) of Income Tax Ordinance, 2001 had to be deducted by service-recipient on amount of service fee only, and not on gross amount paid to petitioners, which included amounts for salaries, contributions etc. in addition to service fee---Validity---Section 153(1)(b) required deduction of advanced tax for rendering or providing of services which at time of making payment, service-recipient had to deduct from "gross amount" payable at rate specified in Part-III of First Schedule to Income Tax Ordinance, 2001---Such gross amount payable had to be understood vis-à-vis rendering or providing of services and could not be read in isolation---Such "gross amount" in case of petitioners was therefore amount of service fee received by them, excluding amount of reimbursable expenses and could not include amount of salaries, and other contributions paid by service-recipients---Constitutional petitions were allowed, accordingly.

Commissioner (Legal Division) Karachi v. Novartis Pharma (Pvt.) Ltd., 2009 PTD 891; Pakistan State Oil Ltd. v. Commissioner of Income Tax, Karachi PTCL 2018 CL 783; State Oil Ltd. v. Bakht Siddique 2018 SCMR 1181; Pakistan State Oil Ltd. v. Commissioner of Income Tax Karachi 2018 SCMR 894; Sui Southern Gas Co. Ltd. v. Registrar of Trade Unions 2020 SCMR 638 and Pakistan Telecommunication Company Ltd. v. Government of Khyber Bakhtunkhwa (KPK) 2017 PTD 1359 ref.

Commissioner of Income Tax v. Khurshid Ahmed and others 2016 PTD 1393; Engro Vopak Terminal Ltd. v. Pakistan 2012 PTD 130 and Commissioner (Legal Division), Karachi v. Novartis Pharma (Pakistan) Ltd. 2009 PTD 891 rel.

(b) Interpretation of statutes ---

----Statutory definition of words / phrases---Scope---Where a word had been defined in a statute, such definition most authoritatively expressed Legislative intent, which

definition and construction was binding on courts; and such definition was prima facie restrictive and exhaustive.

Commissioner of Income Tax v. Khurshid Ahmed and others 2016 PTD 1393 and Engro Vopak Terminal Ltd. v. Pakistan 2012 PTD 130 rel.

Abdul Moiz Jaferi, 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, Jam Asif Mehmood, Syed Amir Ali Shah, Syed Sultan Ahmed and K. Jahangir for Petitioners.

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 Bilal Bhatti, Zehra Jabeen holding brief for Zubair Hashmi, Syed Ahmed holds brief for Ghulam Asghar Pathan for Respondents.

Dates of hearing: 24th February and 16th March, 2021.

JUDGMENT

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 Petitioners[1] 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 were also issued; that the respondent-department has misconstrued 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 cases[2].

3. On the other hand, learned Counsel for the respondents[3] 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 cases[4].

4. Learned DAG has contended that as per agreement between the parties tax is to be levied on the full amount received by the 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 case[5].

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 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-94[8] 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 rate specified in Division-III of Part-III of the First Schedule[9]. 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 subsection (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 153[11](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 clauses (a) and (c) of section 153; however, pursuant to proviso to subsection (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 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 section 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 section 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.

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 along with 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 along with 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 Counsel[14] 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 exhaustive[15]. 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 disapplied 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 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 provisions 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 as[17]:

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.

KMZ/H-14/Sindh

Order accordingly.