

Judgment Sheet.

**IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT.**

Case No. W.P.No.1671/2014

AN Industries (Private) Limited

Versus

Federation of Pakistan etc

JUDGMENT

Date of hearing	27.10.2016
Petitioners by	Mr. Khurram Shahbaz Butt, Advocate
Respondents by	Mr. Liaquat Ali Ch., Advocate alongwith Malik Abdullah Raza, Advocate on behalf of Mr. Sarfraz Ahmad Cheema, Advocate/Legal Advisor of respondent department.

Abid Aziz Sheikh, J.- This judgment will also decide writ petition No.1283/2014, writ petition No.5742/2014, writ petition No.7224/2014, writ petition No.8158/2014 and writ petition No.13555/2014 as common questions of law and facts are involved in these constitutional petitions.

2. Through these constitutional petitions, petitioners have challenged the circular No.8 of 2013 dated 03.9.2013 (circular 8) amended by circular No.12 of 2013 dated 11.11.2013 (circular 12) being against the provision of clause 72B of Part-IV of Second Schedule to the Income

Tax Ordinance, 2001 (Ordinance) (herein after referred to as clause 72B).

3. Brief facts are that petitioners are engaged in the manufacturing of steel pipes and being industrial undertaking import raw material for the purpose of self consumption. The respondents at the time of release of goods so imported are required to collect advance tax on the value of goods in terms of subsection 1 of section 148 of the Ordinance at the rates specified in Part-II of the first schedule to the Ordinance alongwith statutory charges and taxes. Through Finance Act, 2013, clause 72B was inserted in Part-IV of Second Schedule of the Ordinance, whereby, exemption allowed from advance tax to industrial undertakings who fulfil the requirement of clause 72B of the Ordinance. The claim of the petitioners is that they have been issued exemption certificate under clause 72B of the Ordinance, from time to time, however on 03.9.2012, circular No.8 as amended by circular No.12 were issued under section 206 of the Ordinance, which provided additional conditions for obtaining exemption certificate under clause 72-B of the Ordinance. The petitioners being aggrieved with additional conditions in impugned circular No.8 and circular 12, have filed these constitutional petitions.

4. Learned counsel for the petitioners submits that though petitioners have assailed circulars No.8 and 12 in these petitions, however, their main grievance is with regard to condition No.(iii) in circular No.8 of 2013 dated 03.9.2013 (herein after referred to as impugned condition). He, therefore, submits that at this stage, he will confine his arguments and relief claimed to the extent of said impugned condition. Learned counsel contends that clause 72B allow exemption from advance tax under section 148 of the Ordinance to industrial undertaking if it fulfil the requirements prescribed under clause 72B. Contends that impugned condition is beyond the scope of clause 72B of the Ordinance. Further submits that impugned circulars were issued by the Federal Board of Revenue (FBR) under section 206 of the Ordinance, which does not authorize the FBR to amend law or prescribe additional conditions to clause 72B. Further submits that above defects in impugned circulars were realized by respondents themselves when, subsequently in 2014, proviso to clause 72B was added empowering FBR to issue conditions for exemption certificate. Submits that accordingly SRO 717 of 2014 dated 07.8.2014 (SRO) was issued and condition No.(V) of the SRO was similar to impugned condition No.(iii) of the circular No.8. Contends that even that condition No.V of the SRO, was challenged in

various writ petitions being beyond scope of clause 72B and was struck down vide judgment dated 17.12.2015 passed in writ petition No.30425/2014. He submits that after judgment dated 17.12.2015 passed by this Court, respondents have further amended clause 72B and added condition similar to impugned condition (iii) of the circular 8 and condition (V) of the SRO through second proviso in clause 72B. He submits that from above facts and legal position, it is evident that impugned condition (iii) of circular 8 is not only beyond but also against the provision of clause 72B of the Ordinance.

5. Learned counsel for the respondents argued that FBR was legally authorized under section 206 of the Ordinance to clarify the ambiguity in clause 72B of the Ordinance through impugned circular 8 and 12. Further submits that under section 53 of the Ordinance, exemption certificate could only be issued subject to certain conditions, therefore, petitioners were not entitled for exemption certificate unless conditions specify in circular were fulfilled. To support his argument, he placed reliance on Anoud Power Generation Limited and others vs. Federation of Pakistan and others (PLD 2001 Supreme Court 340).

6. I have heard the learned counsel for the parties and perused the record. The main issue involved in these cases is whether impugned condition (iii) of circular 8 is beyond or against the provision of clause 72B of the Ordinance. To examine this legal question, it is expedient to reproduce clause 72B of the Ordinance prevailing in September, 2013 and condition No.(iii) of circular No.8 as under:-

Clause 72B

“72B. The provision of section 148 shall not apply to an industrial undertaking if the tax liability for the current tax year, on the basis of determined tax liability for any of the proceeding two tax years, whichever is the higher, has been paid and a certificate to this effect is issued by the concerned Commissioner”

Impugned condition No.(iii)

iii) The quantity of raw material to be imported shall not exceed 110 per cent of the quantity of raw material imported in the immediately proceeding quarter. The taxpayer shall be liable to pay tax at the normal rate under section 148 of the Income Tax Ordinance, 2001 for the quantity exceeding the said quantity of raw material imported in the immediately proceeding quarter”.

7. Perusal of clause 72B of the Ordinance shows that provision of section 148 of the Ordinance shall not apply to industrial undertaking if the tax liability for the current tax year on the basis of determined tax liability for any of the preceding two tax years which ever is the higher has been

paid and certificate to this effect is issued by the concerned Commissioner. There is no other condition prescribed under clause 72B for exemption under section 148 of the Ordinance. Bare reading of impugned condition No.(iii) of circular No.8 shows that if quantity of raw material to be imported exceed 110 per cent of the quantity of raw material imported in the immediately preceding quarter, the tax payer shall be liable to pay tax at normal rate under section 148 of the Ordinance. No such condition is prescribed under clause 72B of the Ordinance for issuance of exemption certificate. It is well recognized principal of interpretation of statute that if the subordinate legislation by regulator is in excess of the provision of the statute or is in conflict with substantive provision of law under which circular was issued, than that subordinate legislation must be regarded as ultra vires of the substantive provision and statute. Further there was no provision in clause 72B at the relevant time, which authorized FBR to impose such additional condition for exemption under clause 72B of the Ordinance. Subordinate body charged with duty of issuing circular must strictly confine itself within sphere of its authority for the exercise of its subordinate legislative power.

8. This Court in judicial review can always examine question as to whether subordinate legislation is within the parameters of substantive provision and statute under which such order/circular was issued. The language of clause 72B at relevant time is very clear and unambiguous. There was no condition mentioned in clause 72B of the Ordinance as prescribed in condition No.(iii) of circular No.8. The impugned condition on the face of it is not only in excess but also in conflict with substantive provision of clause 72B of the Ordinance. The impugned condition on face of it has gone beyond to and out-reached the substitutive provision of section 72B of the Ordinance itself. August Supreme Court in Suo Motu Case No.11 (PLD 2014 Supreme Court 389) and Suo motu case No.13 of 2009 (PLD 2011 Supreme Court 619) held that rule making body cannot frame rules in-conflict with, or in derogation of the substantive provisions of the law or statute. Further, it is trite law that taxing provisions such as 72B is to be construed strictly and what cannot be done directly cannot be allowed to be done indirectly through circular by FBR.

9. Learned counsel for the respondents defended the impugned condition of circular No.8 on the ground that FBR under section 206 read with section 53 of the Ordinance, was

authorized to issue such circular. To examine this argument, it is necessary to reproduce section 206 of the Ordinance hereunder:-

206.Circulars. (1) To achieve consistency in the administration of this Ordinance and to provide guidance to taxpayers and officers of the [Board], the [Board] may issue Circulars setting out the Board's interpretation of this Ordinance"

(2) A circular issued by the [Board] shall be binding on all Income Tax Authorities and other persons employed in the execution of the Ordinance, under the control of the said Board other than Commissioners of Income Tax (Appeals).]

(3) A Circular shall not [be] binding on a taxpayer".

The power of FBR under section 206 of the Ordinance is only to provide guidance and to interpret the provision of the Ordinance. Bare reading of section 206 of the Ordinance shows that there is no power available with the FBR to legislate or introduce conditions in substantive provisions of the Ordinance. Section 53 of the Ordinance also does not confer jurisdiction on FBR to introduce conditions in substantive provision of the Ordinance. The august Supreme Court in Messrs Central Insurance Co. and others vs. The Central Board of Revenue, Islamabad and other (1993 PTD 766), held similar power of Central Board of Revenue (CBR) under Income Tax Ordinance, 1979, to be of only administrative nature. The relevant observations by Hon'ble Supreme Court are reproduced hereunder:-

“It is evident from the above provisions that though the Central Board of Revenue has administrative control over the functionaries discharging their functions under the Ordinance, but it does not figure in the hierarchy of the forums provided for adjudication of assessee’s liability as to the tax. In this view of the matter, any interpretation placed by the Central Board of Revenue, on a statutory provision cannot be treated as a pronouncement by a forum competent to adjudicate upon such a question judicially or quasi-judicially. We may point out that the Central Board of Revenue cannot issue any administrative direction of the nature which may interfere with the judicial or quasi-judicial functions entrusted to the various functionaries under a statute. The instructions and directions of the Central Board of Revenue are binding on the functionaries discharging their functions under the Ordinance in view of section 8 so long as they are confined to the administrative matters. The interpretation of any provision of the Ordinance can be rendered judicially by the hierarchy of the forums provided for under the above provisions of the Ordinance, namely, the Income Tax Officer, Appellate Assistant commissioner, Appellate Tribunal, the High Court and this Court and not by the Central Board of Revenue. In this view of the matter, the interpretation placed by the Central Board of Revenue on the relevant provisions of the Ordinance in the Circular, can be treated as administrative interpretation and not judicial interpretation”.

From above discussion and law, it is evident that FBR under section 206 of the Ordinance could not clothe itself with power which the statute itself does not give to the FBR. In view of above, there is no manner of doubt that FBR had no jurisdiction to introduce condition No.(iii) in clause 72B of the Ordinance through impugned circular.

10. It is also notable that apparently, above illegality in the impugned circular No.8 and 12 was realized by respondents themselves, when proviso to clause 72B of the

Ordinance was introduced through Finance Act, 2014 which is reproduced as under:-

“Provided that the certificate shall only be issued by the Commissioner if an application for the said certificate is filed before the Commissioner, in the manner and after fulfilling the conditions as specified by notification in the official Gazette, issued by the Board for the purpose of this clause”.

The above proviso shows that in year 2014, clause 72B of the Ordinance was amended and it was specifically provided that exemption certificate shall only be issued by Commissioner if an application for said certificate is filed before Commissioner in the manner and after fulfilling the condition as specified by notification in official gazette. The aforesaid proviso was not available in 2013 when impugned condition No.(iii) was introduced, which prove that FBR in 2013 had no jurisdiction to prescribe impugned condition in clause 72B of the Ordinance. This conclusion is supported by well settled law that amendment in statute always meant to bring change in law. In this regard reliance is placed on K.G. Old, Principal, Christian Technical Training Centre, Gujranwala vs. Presiding Officer, Punjab Labour Court, Northern Zone and 6 others (PLD 1976 Lahore 1097) and Prime Commercial Bank and others vs. Assistant Commissioner of Income Tax (1997 PTCL (C.L) 29).

11. I have also noted that after amendment in clause 72B of the Ordinance in 2014, FBR issued SRO 717/2014 dated 07.8.2014 where condition no.(V) similar to impugned condition No.(iii) of circular 8 was introduced. This condition No.(V) was challenged before this Court and vide judgment dated 17.12.2015 passed in writ petition No.30425/2014, it was held that said condition (V) of SRO was ultra vires of law being beyond the FBR power and scope of clause 72B of the Ordinance. The relevant observation is reproduced:-

“Upon a reading of clause 72B, it is evident that it relates to issuance of a certificate and the proviso relates to that part of clause 72B only. A holistic reading of conditions V and VIII would mean that the certificate will never be issued and effectively clause 72B will be rendered redundant. It may be emphasized that the laying of a condition does not include within it a condition to do away within the exemption. Therefore, the terms ‘manner and conditions’ used in the proviso must be construed in the context of the purpose and the relief contemplated by clause 72B. Had it been the intention of the legislature to impose the conditions V and VIII, the legislature could easily have been done away with clause 72B or amended it suitably. One of the main planks of the arguments by the counsels for the respondents justifying the insertion of the conditions was that they were designed to thwart any attempt on the part of the manufacturers to misuse the concession. This, in my opinion, can hardly form a basis for these conditions. If this was the underlying purpose then it would have been expressed by the legislature itself or delegated in clear terms. It could not be assumed to exist by the FBR or culled out by its own subjective rules of deduction from a reading of the proviso when we go through the contents of the Notification, it becomes evident that the rest of the stipulations and

terms comprising the ‘manner and conditions’ (apart from the conditions V and VIII) are comprehensive enough to guard against any such attempt by the manufacturers”.

The present cases of the petitioners are even on better footing, because in present cases, not only impugned condition (iii) of circular 8 is beyond the scope of clause 72B of the Ordinance but same is also issued by incompetent authority, as no provision was available under clause 72B of the Ordinance at the relevant time for issuing such condition by the FBR.

12. In view of above discussion, these constitutional petitions are **allowed** to the extent that impugned condition No.(iii) of circular 8 of 2013 dated 03.12.2013 is held to be ultra vires of the power of FBR as well as against the provision of clause 72B of the Ordinance.

(Abid Aziz Sheikh)
Judge

Approved for Reporting

Judge