

**Ss. 127, 149, 161, 162.**

**Peshawar High Court**

**Before Yahya Afridi and Musarrat Hilali, JJ**

**Rehmanullah Shah and Ibrahim Shah for Petitioner. Qazi Ghulam Dastagir, Rehmanullah and Ishtiaq Ahmad for Respondents.**

**Date of hearing: 13th February, 2014.**

**SHAFIULLAH KHAN, VICE PRESIDENT and 79 others**

**Vs**

**ZARAI TARAQIATI BANK LTD. through President, ZTBL and 5 others**

**Writ Petitions Nos. 3535 of 2011, and 263-A, 977-P, 758-P, 1577, 3161-P, 294, 2734-P of 2012, decided on 13th February, 2014**

**JUDGMENT**

{MR. YAHYA AFRIDI, Justice}.....Through this single judgment this Court proposes to. dispose of eight connected Writ Petitions, as in all these petitions Circular No.HRD/33 of 2011 dated 13-10-2011, has been challenged to be declared as illegal; without lawful authority and of no legal effect being discriminator in nature. The particulars of the petitions are as follows:--

(1) Writ Petition No. 3535 of 2011 (Shafiullah Khan and others v. Zari Taraqiati Bank Limited (Agriculture Development Bank), Islamabad etc.

(2) Writ Petition No. 263-A of 2012 (Faiz Khan and others V. Zari Taraqiati Bank Limited (Agriculture Development Bank), Islamabad and others.

(3) Writ Petition No. 977-P of 2012 (Muhammad Younas Khan and others v. Zari Taraqiati Bank Limited (Agriculture Development Bank), Islamabad and others.

(4) Writ Petition No. 758-P of 2012 Liaqat Ali and others v. Zari Taraqiati Bank Limited (Agriculture Development Bank), Islamabad and others.

(5) Writ Petition No. 1577 of 2012 (Burhan-ud-Din and others v. Zari Taraqiati Bank Limited (Agricultural Development Bank), Islamabad and others.

(6) Writ Petition No. 3161-P of 2012 (Muhammad Salih and others v. Zari Taraqiati Bank Limited (Agricultural Development Bank), Islamabad and others.

(7) Writ Petition No. 294 of 2012 (Muhammad Anwar Khan and others v. Zari Taraqiati Bank Limited (Agricultural Development Bank), Islamabad and others.

(8) Writ Petition No. 2734-P of 2012 (Mansoor Ahmad v. Zari Taraqiati Bank Limited (Agricultural Development Bank), Islamabad and others.

2. Brief and essentials facts of the cases, in chronological order, are as under:--

1961 Agricultural Development Bank of Pakistan (ADBP) Ordinance, 1961. Agricultural Development Bank of Pakistan ("ADBP") was established, to carry on, 'inter alia', banking business.

4-18-2002. ADBP (Reorganization and Conversation) Ordinance, 2002 ("Ordinance").

ADBP was converted into a public limited company, as envisaged under the Companies Ordinance, 1984, under the name and style of Zari Taraqiyati Bank Limited' ("ZTBL"), and its employees ("previous employees") stood transferred to the ZTBL on the same terms and conditions of their service prior to the said conversion.

16-11-2005. The Board of Directors of ZTBL approved Zari Taraqiyati Bank Limited Staff Regulations, 2005 ("Regulation of 2005") and subsequently issued Circular No. PD/24 of 2005 dated 30th December, 2005, which, 'inter alia', provided for a pension Scheme, (Scheme of 2005). In essence, the Scheme 2005 provided to the previous employees an option to avail the benefits of 100% commutation of their pension, as full and final settlement of all retirement benefits, under the original pension regime offered by ADBP. The option so made under the Scheme of 2005 by any of the previous employee was made irreversible. 2007-2005. The ZTBL paid commutation to its previous employees amounting to Rs.3.016 billion, who had opted under the Scheme of 2005.

5-5-2011 Officer Inland Revenue, Income Tax Department initiated proceedings under section 161 of the Income Tax Ordinance ("Ordinance") against the ZTBL for failing to deduct tax and pay to the Revenue under section 149 (Supra) at the time of paying its previous employees their commutation under the Scheme of 2005.

ZTBL claimed that commutation was made from the pension fund, which was exempted from payment of withholding tax under the 2nd Schedule of the Ordinance.

25-6-2011 S.R.O. 647(I)/2011 dated 25-6-2011 was issued under section 183 of the Ordinance, ("S.R.O. 647"), whereby penalty and default surcharge under the Ordinance were exempted in case the withholding agent, after fulfilling other conditions, deposited the due amount in the Treasury on or before 30-6-2011.

The said S.R.O. further provided that:--

"In case where refund becomes due to any person in consequence of a decision or judgment of a Court at any stage after the issuance of the Notification, the tax deposited by that person under this Notification shall be refunded to him."

29-6-2011. The Officer Inland Revenue vide Assessment Order dated 29-6-2011 treated the ZTBL as an Assessee in Default for non-deduction of tax from commutation of pension under Scheme, of 2005 for an amount of Rs. 156.787 Million. In addition, all 1966 employees of ZTBL, including the petitioners, who had availed the Scheme of 2005, were also declared defaulters in terms that that;

“The Taxpayer was required to deduce the tax from the payments made to staff on account of SR-2005 but the taxpayer not deducted the tax and paid the amount of SR-2005 without deduction of tax. Now the taxpayer has liberty to recover the tax paid on behalf of employees/optees from employees/optees.

The employees of the bank are equally defaulter and are liable to pay their individual liability of tax along with additional tax. However, if bank makes the payment on their behalf the bank has the right to collect/recover from employees/optees of the defaulted amount of tax.”

(emphasis provided)

29-6-2012. The Bank paid the Assessed amount and availed tax amnesty under S.R.O. 647. The ZTBL did not challenge the Assessment Order, made by the Revenue.

13-10-2011. The Board of Directors of ZTBL decided to recover from its previous employees, who had opted for commutation of the pension under the Regulation of 2005, the withholding tax paid to Revenue.

13-10-2012. Circular No.1-IDR/33/2011 (“impugned Circular”) was issued by ZTBL, whereby it has demanded the withholding tax from its employees including the petitioners, who had availed the computation of their pension offered under the Scheme of 2005.

Hence, the present Writ Petitions.

3. The learned counsel for the petitioners contended that the petitioners availed the said benefit in the light of the amendment so made in the Second Schedule of the Ordinance, along with the Circular issued

to the ZTBL itself for the exemption in case the existing employees opt for the Regulation 2005; that almost after five years, all of a sudden, the Director of the ZTBL decided to give directions to the employees of the ZTBL for payment of the exempted amount, which was availed in 2006 and the ZTBL itself has issued certificates to the employees regarding the exemption; that the Directors of the Bank have no authority to override the amendment so made in the Ordinance and demanded the exempted amount from the employees/petitioners and that the impugned Circular was illegal, without lawful authority and of no legal effect on the rights of the petitioners.

4. The learned counsel for the respondents opposed the contentions raised by the learned counsel for the petitioners, stating that there is no exemption available under Clause (12) of Part-I of the Second Schedule to the Ordinance; that the payments received by the petitioners were neither pension nor commutation of pension, and are not exempt from Income Tax; that ZTBL was under a legal obligation to withhold tax from payments made to the petitioners; and that under the law, ZTBL can recover tax from the recipients of payments, if tax has been paid by it on behalf of the recipients/petitioners.

5. Valuable arguments of the learned counsel for the parties heard and the record perused with their able assistance.

6. The legislature has in its Wisdom envisaged a collection regime in the Ordinance; whereby the Revenue has the option to seek from the Employer, as a 'Collecting Agent', under section 161 or the employee directly under section 162, all the taxes due under the Ordinance. In case the Revenue, as in the present case, opts to seek the withholding tax from the 'employer'/ZTBL, who under section 149 of the Ordinance acting as a 'Collecting Agent' on behalf of the Revenue, deposited in the Treasury, the due tax from its 'employees'/Petitioners, thereafter, the 'Employer'/ZTBL may recover the paid tax from its 'employees'/ petitioners under the authority vested in it under subsection (2) of section 161 of the Ordinance, which reads:--

"Failure to pay tax collected or deducted.---(1) Where a person-

(a) fails to collect tax as required under Division II of this Part [or Chapter XII] or deduct tax from a payment as required under Division III of this Part [or Chapter XII] [or as required under section 50 of the repealed Ordinance;

(b) having collected tax under Division II of this Part for Chapter XII or deducted tax under Division III of this Part, [or Chapter XIII] fails to pay the tax to the Commissioner as required under section 160, [or having collected tax under section 50 of the repealed Ordinance pay to the credit of the Federal Government as required under subsection (8) of section 50 of the repealed Ordinance].

the person shall be personally liable to pay the amount of tax to the Commissioner [who may [pass an order, to that effect and] proceed to recover the same.

(1A) No recovery under subsection (1) shall be made unless the person referred to in subsection (1); has been provided with an opportunity of being heard.

(1B) Where at the time of recovery of tax under subsection (1) it is established that the tax that was to be deducted from the payment made to a person or collected from a person has meanwhile been paid by that person, no recovery shall be made from the person who had failed to collect or deduct the tax but the said person shall be liable to pay [default surcharge] at the rate of eighteen percent per annum from the date he failed to collect or deduct the tax to the date the tax was paid.

(2) A person personally liable for an amount of tax under subsection (1) as a result of failing to collect or deduct the tax shall be entitled to recover the tax from the person from whom the tax should have been collected or deducted;

7. Now that the authority of ZTBL to issue the Circular demanding from the petitioners, withholding tax has the express backing of the law, as provided under subsection (2) of section 161 of the Ordinance, this Court has to consider; whether it should proceed in adjudicating the grievance of the petitioners or otherwise especially when the legislature has not provided any provision for regulating the procedure for the demand so made by the Employer from its 'employees', as provided under subsection (2) of section 161 of the Ordinance. Ordinarily, faced with such situations, constitutional Courts assume jurisdiction and proceeds to decide such matters to render complete justice. However, in the present case, this Court considers it not appropriate to issue the writ, as sought by the petitioners in the instant petitions, for the reasons stated hereunder:-

Firstly, the provision of appeal, as provided under section 127 of the Ordinance, grants a statutory right of an appeal to any person, who is aggrieved -of- an order passed under the Ordinance. The said right is

without any expressed requirement of the person to be a party to the original proceedings, for him to invoke the right of appeal provided under section 127 of the Ordinance, which reads:--

“127, Appeal to the Commissioner (Appeals).---(1) Any person dissatisfied with any order passed by a Commissioner or a taxation officer under sections 121, 122, 143, 144, [162], 170, 182, [\*\*\*\*\*]or 2005], or an order under subsection (1) of section 161 holding a person to be personally liable to pay an amount of tax, or an order under clause (f) of subsection (3) of section 172 [declaring] a person to be the representative of a non-resident person, or an order under section 221 refusing to rectify the mistake, either in full or in part, as claimed by the taxpayer or an order having the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the person, [except [an] assessment order under section 122C], may prefer an appeal to the Commissioner (Appeals) against the order. ] .....

(5) An appeal shall be preferred to the Commissioner (Appeals) within thirty days of the following---

- (a) where the appeal relates to any assessment or penalty, the date of service of the ‘ notice of demand relating to the said assessment or penalty, as the case may be; and
- (b) in any other case, the date on which the order to be appealed against is served].

(6) The Commissioner (Appeals) may, upon application in writing by the appellant, admit an appeal, after the expiration of the period specified in subsection (5) if the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from lodging the appeal within that period.”

(emphasis provided)

In view of the above, it is noted that through the petitioners were not a party before the Assessing Officer, who passed the impugned Assessment order dated 29-6-2011, the petitioners having been adversely affected by the said order, would surely have a right of appeal against the same before the Commissioner (Appeals), as provided under section 127 of the Ordinance.

Secondly, superior Court of our jurisdiction have discouraged entertaining direct constitutional petitions, when fiscal issue could be resolved in the Revenue appellate hierarchy provided by the legislation as in the present case. Reference with approval in this regard is made to BP Pakistan Exploration and

Production Inc's case (2011 PTD 647), Syed Muhammad Zamin's case (2002PLC 1538), Syed Match Company's case (2003 SCMR 1493), and Khalid-Mahmood's case (1999 SCMR 1881).

Thirdly, the petitioners cannot be left remediless when the impugned assessment order dated 29-6-2011, which led to the impugned Circular dated 13-10-2011, was in fact, passed behind the back of the petitioners and thus, against the cardinal principles of natural justice.

Finally, the issue of limitation, the legality and exemption of withholding tax under the Scheme of 2005 in view of the provisions of the Ordinance and most importantly the contest regarding the amount of tax are all contentious issues between the parties and cannot be resolved by this Court from the available record. Thus, it would be most appropriate for just and fair decision to allow the Revenue hierarchy provided under the Ordinance to resolve the same.

9. Accordingly, for the reasons stated hereinabove this Court---

(I) Declares the impugned Circular issued by ZTBL to be 'intra vires' of section 161 (2) of the Ordinance.

(II) Declare the instant petitions to be deemed as Appeals of the petitioners under section 127 of the Ordinance and directs the petitioners to appear before the Worthy Commissioner (Appeals); Islamabad on 17-3-2014 for redressal of their grievances. All the legal objections of the present petitioners are to be addressed by the Worthy Commissioner, while deciding their appeals.

(III) Restrain ZTBL from recovering from the petitioners, the demanded tax under the Circular, till a legal determination of the said tax has been made by the competent appellate forum under the Ordinance.

(IV) In case, the petitioners are successful in their claim of disputing the demand of tax, ZTBL may seek the refund of the deposited amount from the Revenue, as is provided under S.R.O. 467 under the enabling provisions of the Ordinance.

Consequently, all the Writ Petitions are disposed of in the above terms.



