

PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

WP No. 4346-P/2019

M/s CGGC-Descon Joint Venture
Through Sajjad Haider Abidi,
Lahore.

.....Petitioner.

V/s

Federation of Pakistan,
Through Secretary,
Ministry of Finance, Islamabad and others.

.....Respondents.

For the Petitioner:

Mr. Isaac Ali Qazi, Advocate.

For the Respondents:

M/s Sanaulah DAG,
Shakirullah Afridi & Mukhtar
Ahmad Maneri, Advocates.

Date of hearing:

30.01.2023

JUDGMENT

SYED ARSHAD ALI, J:- On 25th May, 2018, a joint venture agreement under the name & style of M/s CGGC-Descon Joint Venture ("**JV**") was inked between China Gezhouba Group Company Limited, a corporation registered under the Laws of People's Republic of China having registered office at China Wuhan City (hereinafter referred to as **Foreign Company**) and Descon Engineering Limited; a company incorporated under the Company Laws of Pakistan having Head Office at Ferozpur, Lahore (hereinafter referred to **Local Company**). As evident from the JV, the object of this agreement was to offer a joint bid for the project, namely, Construction of Civil Works including, Design, Supply and Installation of Electrical and Mechanical Works and Hydraulic Steel Structures for Mohmand Dam Hydropower Project to Pakistan Water & Power Development Authority ("**WAPDA**") being the employer. Article-III of the JV describes the shares of the respective companies at the ratio of 70% and 30%; whereas Article-VI of the JV envisages that the project will be

managed through a Project Implementation Office lead by the Project Manager appointed by the Lead Partner. The said Nominated Project Manager shall be authorized to deal with the employer/Engineer regarding all matters related with and/or arising out of the performance of the contract on behalf of the JV in consultation with Project Implementation Officer.

2. The bid of JV was accepted by the Employer/WAPDA through letter of acceptance dated 07.03.2019 addressed to the Lead Foreign Company at its office situated at House No.01, F-6/2 Hill Road, Islamabad (Pakistan). Pursuant to the aforesaid letter of acceptance, a formal agreement was executed between the employer/WAPDA and the JV. It is one of the claim of the petitioner for exemption from taxes that the contract document executed with the employer i.e. clause-14.1 clearly envisages that the contractual income of the contract of the contractor is not subject to Income Tax Ordinance, 2001 and Sales Tax Act, 1990 on service.

3. The JV applied for registration with the Federal Board of Revenue and on 22.05.2019 accordingly the JV was registered having registration No. 5387927. In the said application for registration as well as the registration certificate, the address of the JV is provided as Moza Patti Banda Tehsil Pandiyali, Mohmand District Khyber Pakhtunkhwa, Mohmand. The JV had also applied for exemption from income tax through a proper application. The said exemption was refused by the Commissioner Income Tax on the ground that when the representative of the revenue department had visited the alleged office situated at Moza Patti Banda, it could not be verified as the JV was not physically present at the said address. The petitioner has also appended an agreement whereby certain properties were obtained on lease from locals which is situated in Mohmand Agency, the erstwhile Federally Administered Tribal Area ("FATA").

4. Appeal against the order of Income Tax Officer was dismissed by the Commissioner Inland Revenue vide order dated 07.05.2019.

5. The learned counsel representing the petitioner while referring the law laid down by the Hon'ble Apex Court in the case of *Pakistan through Chairman FBR and others vs. Hazrat Hussain and others* (2018 SCMR 939) has argued that there was complete immunity from payment of all taxes to all the persons who were resident of the erstwhile FATA and on promulgation of 25th amendment in the Constitution when normal taxation laws were extended to the erstwhile FATA, the income of all the persons including the companies who were residing in the erstwhile FATA were exempt from payment of income tax through SRO 1213(1)/2018 dated 05.10.2018, therefore, the impugned order whereby exemption was refused to the petitioner on its income albeit on the payment which the petitioner/JV would receive from WAPDA against the project's income.

6. Against that, M/s Sanaullah DAG, Ghulam Shoaib Jally & Mukhtar Ahmad Maneri, Advocates have strongly stressed that the address given in the application for registration though relating to the project office when verified, there was no physical presence of the JV in the erstwhile FATA as the JV is operating from Islamabad and thus is not entitled to any exemption. The respondents in their arguments have also relied upon the judgment of the Apex Court in the case of *Hasnain Cotex Limited vs. Commissioner Inland Revenue, Lahore* (2017 PTD 1561).

7. Arguments heard and record perused.

8. The gamut of the arguments of the learned counsel for the petitioner is that since the JV being a person in terms of Section 80 Income Tax Ordinance, 2001 ("*Ordinance*") is physically located in the erstwhile FATA therefore, is entitled for exemption of the income tax. In order to appreciate the said arguments of the learned counsel for the

petitioner, we would like to refer to the brief history of the applicability of the Tax Laws to the erstwhile FATA.

BACKGROUND OF IMMUNITY FROM TAXES FOR THE INDIVIDUALS/PERSONS/COMPANIES ETC LOCATED IN THE ERSTWHILE FATA

9. Prior to the 25th amendment in the Constitution through Act No. XXXVII of 2018 dated 05.06.2018, there was a separate dispensation/mechanism for extension of laws to the erstwhile FATA. The relevant provision of the Constitution i.e. Article 247(3) for ease reference is reproduced as under:-

“247 (3). No Act of [Majlis-e-Shoora (Parliament)] shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no Act of [Majlis-e-Shoora (Parliament)] or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situate, with the approval of the President, so directs; and in giving such a direction with respect to any law, the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction”.

10. There remained a judicial consensus that the Income Tax as well as Sales Tax Laws were never extended to the FATA, prior to the promulgation of 25th amendment thereby omitting Article 247 from the Constitution. However, there has been a long standing dispute between the Federal Board of Revenue (“FBR”) and the trade community/business community of erstwhile tribal area regarding the imposition of income tax as well as sales tax on the import of raw material for the manufacturing units, which were located in the erstwhile FATA. This Court in its celebrated judgment authored by his Lordship Justice Yahya Afridi as he then was in the case of Messrs Taj Packages Company (Pvt) Ltd through Manager vs. The Government of Pakistan through Federal Secretary Finance and Revenue Division and 6

other (2016 PTD 203), has elaborately dealt with the issue of taxing the raw material/goods which were imported for the purpose of its consumption in the erstwhile FATA. The said judgment was also approved by the august Supreme Court of Pakistan in the case of Pakistan through Chairman, FBR and others Vs. Hazrat Hussain (2018 SCMR 939), wherein it has been unequivocally held that the business concerns/manufacturing units located in the PATA are immune from the impost of both, the income tax as well as sales taxes; that similarly, the goods or machinery, which they are importing for their home consumption are equally immune from the impost of both taxes at the import stage, however, in order to ensure that the consumption of goods do not cross the limits of non-tariff area, the petitioners have to provide a security in form of post-dated cheques equal to the value of the imported goods.

11. The aforesaid immunity was available to the persons/corporate entities located within the erstwhile area of PATA as in view of the legal barrier of Article 247 of the Constitution; the provisions of the Ordinance were not extended to the erstwhile FATA.

12. Upon promulgation of the 25th Constitutional Amendment Act, 2018 on 24.5.2018, this legal barrier in form of Article 247 of the Constitution was erased and, thus, the provisions of the Ordinance became applicable to all the persons/corporate entities located within the territory of erstwhile FATA, as such, their income was subject to imposition of income tax under the Ordinance.

13. After 25th amendment in the Constitution, the trade community had raised voice for continuance of the said exemption from imposition of income tax and sales tax. The Federal Government through SRO.1212 (1)/2018 dated 05.10.2018 and SRO. 1213(1)/2018 dated 05.10.20218 had allowed the said exemption to the resident/domicile of the erstwhile FATA/PATA.

14. The Ordinance provides both; the provisions of charging as well the mechanism for collection of tax whereas the word 'income' is defined in Section 2(29) of the Ordinance as:

"(29) 'income' includes any amount chargeable to tax under this Ordinance, any amount subject to collection or deduction of tax under section 148, 150, 152(1), 153, 154, 156, 156A, 233, 233A, subsection (5) of Section 234 and any amount treated as income under any provision of this Ordinance and any loss of income."

Chapter II of the Ordinance deals with the charging provisions whereas Part I of Chapter III explains taxable income, total income and heads of income. Chapter X of the Ordinance envisages for procedure of filing of return/assessments adjudication of claims as well as recovery of income tax dues. The mechanism for deduction and collection of advanced tax is provided in Part V of Chapter X of the Ordinance. The Division IV of the said chapter relates to grant of exemption from total income tax or issuance of lower rate certificate.

15. Section 53 of the Ordinance empowers the Federal Government not only to grant exemption to any person or class of persons from the payment of income tax but can also exempt/partially exempt any person from the application of the Ordinance. For convenience, Section 53 is reproduced as under:-

"53. Exemptions and tax concessions in the Second Schedule.—(1) The income or classes income, or persons or classes of persons specified in the Second Schedule shall be – (a) exempt from tax under this Ordinance, subject to any conditions and to the extent specified therein; (b) subject to tax under this Ordinance at such rates, which are less than the rates specified in the First Schedule, as are specified therein; (c) allowed a reduction in tax liability under this Ordinance, subject to any conditions and to the extent specified therein; or (d) exempted from the operation of any provision of this Ordinance, subject to any condition and to the extent specified therein."

16. Section 80 of the Ordinance, envisages that association of persons includes a firm, a Hindu undivided family, any artificial juridical person and anybody of persons formed under a foreign law but does not includes a company.

17 Section 92 of the Ordinance envisages for principal of taxation of association of persons which reads:-

"An association of persons shall be liable to tax separately from the members of the association and [where the association of persons has paid tax the] amount received by a member of association in the capacity as member out of the income of the association shall be exempted from tax."

18. Reverting back to the legal issue involved in the present case; as stated above, when on the promulgation of 25th amendment in the Constitution, the provisions of Ordinance became operative in the erstwhile FATA, the Federal Government pursuant to their commitment with the people/residents of erstwhile FATA/PATA issued SRO No. 887-1 of 2018 on 08.7.2018 thereby granting exemption to the individuals/corporate entities domiciled/resident of erstwhile FATA/PATA from the payment of income tax. Later the afore-said SRO was substituted by SRO No. 1213, which read as under:-

*Government of Pakistan
Revenue Division
Federal Board of Revenue.*

Islamabad, the 5th October, 2018

NOTIFICATION

(Income Tax)

S.R.O. 1213(1)/2018.- WHEREAS prior to the Constitution (Twenty-fifty Amendment) Act, 2018 (XXXVII of 2018), the Income Tax Ordinance, 2001 (XLIX of 2001) was not in force in the Tribal Areas as defined in Article 246 of the Constitution of the Islamic Republic of Pakistan, hereinafter called as the Constitution, and the levy of income tax was not attracted to the said Tribal Areas;

AND WHEREAS Article 247 of the Constitution stood omitted on commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 (XXXVII of 2018) with effect from 31st day of May, 2018 and the Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA) stood merged in the Provinces of Khyber Pakhtunkhwa and Balochistan under paragraph (d) of Article 246 of the Constitution.

AND WHEREAS on commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 (XXXVII of 2018), the Income Tax Ordinance, 2001 (XLIX of 2001) is in force in the said Provinces including the erstwhile Tribal Areas forming part thereof;

AND WHEREAS a phased approach was needed for the full application of fiscal laws to the said erstwhile Tribal Areas, a decision was made to exempt all persons from levy of income tax which was not applicable to the said areas by virtue of said Article 247 and accordingly Notification No. S.R.O. 887(1)/2018, dated the 23rd July, 2018, was issued by the Federal Government granting exemption from income tax as aforesaid;

AND WHEREAS concerns were raised by the trading community of the said erstwhile Tribal Areas to the effect that the aforesaid Notification did not restore the position as existed prior to the commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 (XXXVII of 2018);

NOW THEREFORE in order to address the concerns so raised and to restore the position in relation to levy of income tax to the said erstwhile Tribal Areas, and in exercise of the powers conferred by sub-section (2) of section 53 of the Income Tax Ordinance, 2001 (XLIX of 2001), the Federal Government is pleased to direct that the following further amendments shall be made in the Second Schedule to the said Ordinance, namely:-

In the aforesaid Schedule-

(a) In Part –

- (i) Clauses (144) and (145) shall be omitted; and
- (ii) after clause (145), omitted as aforesaid, the following new clause shall be added, namely:-
 “(146) Any income which was not chargeable to tax prior to the commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 (XXXVII of 2018) of any individual domiciled or company and association of persons resident in the Tribal Areas forming part of the Provinces of Khyber Pakhtunkhwa and Balochistan under paragraph (d) of Article 246 of the Constitution with effect from the 1st day of June, 2018 to the 30th day of June, 2023 (both days inclusive); and

(b) In Part Iv.-

- (i) clause (106) shall be omitted;
- (ii) after clause (109), the following new clause shall be added, namely:-
 “(110) The provisions of sections in Division III of Part V of Chapter X and Chapter XII of the Ordinance for deduction or collection of withholding tax which were not applicable prior to commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 (XXXVII of 2018) shall not apply to individual domiciled or company and association of person resident in the Tribal Areas forming part of the Provinces of Khyber Pakhtunkhwa and Balochistan under paragraph (d) of Article 246 of the Constitution with effect from the 1st day of June, 2018 to the 30th day of June, 2023 (both days inclusive).

Sd/-----

(Dr. Muhammad Iqbal)
Additional Secretary

19. Admittedly, the JV received the letter of acceptance for construction of Mohmand Dam on 07.03.2019 and then applied for registration with the Federal Board of Revenue on 22.05.2019 whereas the said SRO was issued/notified on 5th October, 2018. The perusal of the third recital as well as clause-146 of the said SRO would clearly suggest that any income of any individual domiciled or company and association of persons resident in the Tribal Areas which was not subject to the incidence of chargeability and income tax on the commencement of 25th Amendment in the Constitution through Act No. XXXVII dated 05.06.2018 would be enjoying the same immunity from the payment of income tax. The plain reading of this SRO would suggest that the said exemption was applicable to those individuals domiciled in erstwhile area, company and association of persons resident in the tribal area before the promulgation of 25th Amendment in the Constitution if were enjoying exemption from income tax, would be applicable to them. It is well settled that in a taxing statute one has to look at what is clearly said; there is no room for any intendment; there is no equity about a tax, nothing is to be read and nothing is to be implied.¹

20. Similarly, it is settled by now that where a provision in a taxing statute can be reasonably interpreted in two ways, that interpretation which is favourable to the assessee has to be accepted.² Also if two views are possible, the one favour to the assessee has to be accepted.³ However, the rules regarding exemption under taxing statute have to be established by the precedents and exemption under

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1. Commissioner of Income Tax Khanpur vs. Upper Doab Sugar Mills (1978 All L-128).
Pakistan Textile Mill Owners Association, Karachi and 02 others vs. Administrator of Karachi and 02 others (PLD 1963 SC 137)
Islamabad Electric Supply Company Limited vs. Deputy Commissioner Inland Revenue Audit-II, LTU, Islamabad (2016 PTD 2685).
 2. CIT vs. Naga Hills Tea Co. Ltd (AIR 1973 SC 2524).
 3. Sun Export Corporation vs. Collector of Customs (1997) 6 SCC 564.

taxing statute must be strictly construed. Grants of tax exemptions are given a rigid interpretation against the assertions of the taxpayer and in favour of the taxing power. The basis for the rule is the same as that supporting a rule of strict construction of positive revenue laws that the burdens of taxation should be distributed equally and fairly among the members of society.⁴

The reason for requiring a strict construction of statutes in favour of the State where a person claims immunity from the common burden of taxation, has been stated by Mr. Justice Brewer, as appears from the quotation from his opinion in *Stahl v. The Education Association of the Methodist Church* (54 Kan. 542, 38 Pac. 796):

"All property receives protection from the state. Every man is secured in the enjoyments of his own, no matter to what use he devotes it. This security and protection carry with them the corresponding obligation to support. It is an obligation which rests equally upon all. It may require military service in time of war, or civil service in time of peace. It always requires pecuniary support. This is taxation. The obligation to pay taxes is co-extensive with the protection received. An exemption from taxation is a release from this obligation. It is the receiving of protection without contributing to the support of the authority which protects. It is an exception to a rule, and is justified and upheld upon the theory of peculiar benefits received by the state from the property exempted. Nevertheless, it is an exception; and they who claim under an exception must show themselves within its terms".

21. Therefore, when an exempting provision is susceptible to two interpretations, the one going against the tax payer is preferred.⁵

4. Sutherland on Statutory Construction (Third Edition Vol.3)

5. Collector of Custom FBR and another vs. Messrs Fitter Pakistan (Pvt) Ltd (2020 SCMR 1157).

Oxford University Press vs. Commissioner of Income Tax, Companies Zone-I, Karachi and others (2019 SCMR 235).

Pakistan Machine Tool Factory (Pvt) Ltd, Karachi vs. Commissioner of Sales, Central, Zone-B, Karachi (2006 SCMR 1577).

Messrs Bisvil Spinners Ltd vs. Superintendent Central Excise and Land Customs Circle Sheikhpura and another (PLD 1988 SC 370).

22. Thus, keeping in view the law laid down, as stated above, that while interpreting a taxing statute must first be given their ordinary and natural meaning and in case of exemption, the person claiming exemption, it should establish that its case squarely falls under the provision of exemption. The history of extension of tax laws to the erstwhile FATA the immunity claimed by the residents of the area and the clear language of SRO 1213(1)/2018 dated 05.10.2018 would clearly suggest that the said exemption was/is applicable to those individuals/domiciled in erstwhile FATA, companies and associations of persons resident in the said area, their income prior to 25th amendment was immune from payment of income tax could only claim the said exemption and any company or individual not being the resident of erstwhile FATA who have subsequently established their office in FATA after 25th Amendment in the Constitution are not entitled to the exemption in terms of SRO 1213(1)/2018 dated 05.10.2018.

23. Even otherwise, in the present case, the reliance of the JV is in the first amendment to the JV agreement whereas Article-VI was amended by referring that the project will be managed through a Project Implementation Officer (PIO) situated at Mauza Patti Banda, Tehsil Pandiyali Mohmand District, Khyber Pakhtunkhwa. Therefore, it is the claim of the JV that it has a registered office at erstwhile FATA, therefore, it being a person situated at/resident of

erstwhile FATA is exempt from the payment of tax. However, not only the fact that the said JV has allegedly subsequently established the said place of business but the relevant officer of the respondent-department as evident from the impugned order when visited the said place, he could not find any place of business of the petitioner-JV; hence, this being purely a question of fact cannot be decided by this Court in its limited jurisdiction once it has been seriously disputed by the respondent-Revenue.⁶

24. Moving on further. The close perusal of Section 92 of the Ordinance of 2001 clearly suggest that income received by the members of the association of person constituted the income of the members of the JV and in order to avoid the said income being taxed twice, the association of person is required to pay the tax U/S 92 of the Ordinance of 2001. Thus, for all practical purposes it is the income of the partners of the JV which is subject to the incidence of taxation and both the members of JV are the resident of settled area as one has registered office at Lahore and the other is Foreign Company having office at Islamabad.

25. Moving on to the assertion of the learned counsel for the petitioner that since in the contract document, the employer has undertaken that the income of the contractor

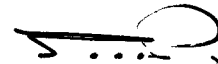
6. Messrs Arshad & Company vs. Capital Development Authority, Faisalabad through Chairman (2000 SCMR 1557).
Fida Hussain and another vs. Mst. Saiqa and others (2011 SCMR 1990)
PAKCOM Limited and others vs. Federation of Pakistan and others (PLD 2011 SC 44)

would not be subject to the incidence of taxation. There can be no two views that a tax is levied under the authority of Parliament/appropriate legislature and thus exemption can be granted by the appropriate legislature or the delegated authority under the legislation. WAPDA has no authority either to commit with the contractor or to allow the contractor to claim exemption from the statutory taxation. Similarly, ignorance of law is no excuse for a person that he would not be subject to the penal or taxing laws of the State.

26. In view of the above, we have reached at the inescapable conclusion that the petitioner has failed to make out a case for grant of exemption. Resultantly, we find no merit in this petition which is accordingly dismissed.

ANNOUNCED.
30.01.2023


Judge


Judge

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