KTBA Karachi Tax Bar Association

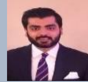
23rd OF 2024 KTBA ONE PAGER CASE LAW UPDATE (OCTOBER 21, 2024)

Committee Members

Shams M. Ansari (Convener)
0333-2298701
shamsansari01@gmail.com

Muhammad Tarique
0300-2026398
muhammad.tarique@mooreshekhamufti.com

Hameer Arshad Siraj
0333-2251555
hameer.siraj@gmail.com



Shabbar Muraj
0321-8920972
shabbar.muraj@pk.ey.com

Noman Amin Khan
0310-2271271
advocatenomanaminkhan@gmail.com

Asif Zafar
0345-8214733
asif.zafar@pk.ey.com

Shah Hilal Khan
0333-8686343
hilal.khan@ssgc.com.pk

Syed Zafar Ahmed
President
0314-2590000
zafar.ahmed@mooreshekhamufti.com

Asim Rizwani
General Secretary
0301-8119609
asimrizwani37@gmail.com

Dear Members,

A brief update on a judgment by the Appellate Tribunal Inland Revenue, Islamabad on **"Offerring Oneself for Audit U/C 72B Was a Precondition For Withholding Exemption On Imports:"** is being shared with you for your knowledge. The order has been attached herewith the update.

This update is in line with the efforts undertaken by our **"CASE LAW UPDATE COMMITTEE"** to apprise our Bar members with important court decisions.

You are equally encouraged to share any important case law, which you feel that should be disseminated for the good of all members.

You may contact the Committee Convener Mr. Shams M. Ansari or at the Bar's numbers 021-99212222, 99211792 or email at info@karachitaxbar.com & ktba01@gmail.com

(Syed Zafar Ahmed)
President

(Asim Rizwani Sheikh)
Hon. General Secretary

23rd OF 2024 KTBA ONE PAGER
CASE LAW UPDATE
(October 21, 2024)

OFFERRING ONESELF FOR AUDIT U/C 72B WAS A PRECONDITION FOR WITHHOLDING EXEMPTION ON IMPORTS:

THE WITHHOLDEE CANNOT ESCAPE FROM AUDIT U/C 105:

SPECIAL PROVISION OVERRIDES GENERAL PROVISION.

Appellate Authority: High Court of Sindh
Appellants: United Refrigeration Ind. Ltd.
Section: Clause 72B and Clause 105 of Part IV of 2nd Schedule to the Income Tax Ordinance, 2001

Detailed judgment was issued on October 3, 2024

BACKGROUND:
The Sindh High Court dismissed the Petitioner's claim for exemption from audit under clause 105 of Part IV of the Second Schedule to the Ordinance. The court ruled that the exemption did not apply because the Petitioner obtained a conditional withholding exemption certificate on its imports under Section 148 of the Ordinance, on the condition of offering oneself to mandatory audit under clause 72B.

The Petitioner argued that clause 105 should exempt them from audit, as their tax affairs were already audited in one of the last three years, which the court disagreed, emphasizing the compulsory audit requirement tied to the conditional exemption under clause 72B.

Decision of the Court:
First Ruling of the Court:
TAX AUDIT WAS A PRE-CONDITION U/C 72B

The court noted that the exemption certificates granted to the Petitioners were not issued under sections 177 or 214C but were based on the third proviso of clause 72B of Part IV of the Second Schedule to the Ordinance. The Petitioners enjoyed exemption from Income tax deductions under section 148 against his offer for audit under clause 72B, which mandates the audit of the accounts for the year in which the certificate is issued, thereby treating the taxpayer as to have been selected for audit under Section 214C. This proviso is crucial to the case.

Second Ruling of the Court:
CLAUSE 72B IS A SPECIAL PROVISION
CLAUSE 105 IS A GENERAL PROVISION

The court held that clause 105 of the Ordinance, which provides audit exemption if already audited in the past three years, is general and does not override clause 72B, which is specific to taxpayers with withholding exemption certificates on imports. Clause 72B, applicable to the Petitioners, grants this exemption but requires an audit of the taxpayer's consumption, production, and sales as a condition for issuing the exemption certificate. The court emphasized that clause 72B includes an automatic audit requirement, making the audit selection inherent in the exemption process. Therefore, clause 105, which applies to taxpayers without such exemptions, is not applicable to the Petitioners.

Third Ruling of the Court:
DUAL EXEMPTIONS CANNOT BE CLAIMED

The court ruled that both the exemptions: one from withholding on imports and second from tax audit under clause 105 cannot be claimed together. The mandatory audit is inherent u/c 72B for those applying for withholding exemption, making clause 105 irrelevant and non-applicable to them.

Provision for Exemption from audit where an audit has already been conducted in any of the last three (03) years does not exempt the withholdee from the audit required u/c 72B. Accepting the Petitioners' argument would render the audit requirement under clause 72B redundant, which is contrary to legislative intent.

Additionally, clause 72B takes precedence over clause 105 due to the nature of the exemption certificate. Lastly, the omission of clause 105 through the Finance Act, 2019, makes it irrelevant to the case, even if it had not been removed.

CONCLUSION:
The court held that the mandatory audit requirement under clause 72B takes precedence over clause 105, preventing the Petitioners from claiming dual exemptions.

An interesting question remains unanswered that as to whether Audit U/C 72B will provide exemption from audit in the next three 3 years?

DISCLAIMER:

This update has been prepared for KTBA members and carries a brief narrative on a detailed Judgment and does not contain an opinion of the Bar, in any manner or sort. It is therefore, suggested that the judgment alone should be relied upon. Any reliance on the summary in any proceedings would not be binding on KTBA.

IN THE HIGH COURT OF SINDH, KARACHI

Constitution Petition Nos.D-3073 & 3074 of 2021

Date	Order with signature of Judge

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Mohammad Abdur Rahman

PETITIONERS (in both Petitions)	:	**United Refrigeration Industries Limited & Dawlance (Private) Limited** **Through Mr. Ali Almani along with Mr.Furquan Mushtaq, Advocate.**
RESPONDENT NO.2 (in both Petitions)	:	**Commissioner Inland Revenue, Legal Zone, Large Taxpayer Office, Karachi** **Through Mr. Faheem Ali Memon, Advocate AND Mr. Qaim Ali Memon, Advocate.**
RESPONDENT	:	**Through Mr. Faheem Raza Khuhro, Advocate.**
FEDERATION OF PAKISTAN	:	**Through Mr. Kashif Nazeer, Assistant Attorney General.**
Date of Hearing	:	**06.09.2024**
Date of Judgment	:	**03.10.2024**

J U D G M E N T

Muhammad Junaid Ghaffar, J: In both these Petitions an identical issue is involved, whereas the relief sought is also the same, hence both these Petitions are being decided through this common judgment. The prayers of the Petitioners read as follows:-

> i. *Declare Impugned Notice I dated 06.01.2020 and Impugned Notice II dated 10.02.2020 are illegal and without jurisdiction.*
>
> ii. *Pending disposal of the petition, suspend the Impugned Notices and restraining the Respondents from, directly or indirectly, through their officers, servants or assigns, taking any adverse action against the Petitioner on the basis of the Impugned Notice I dated 06.01.2020 and Impugned Notice II dated 10.02.2020.*
>
> iii. *Grand such other relief as this Honourable Court deems just and proper in the facts and circumstances of this case.*

iv. Grant costs.

2. Learned counsel appearing on behalf of the Petitioners has contended that the impugned notices for conducting audit of the Petitioners' tax affairs for Tax Year 2019 are illegal, without lawful authority and jurisdiction. According to him, it is not in dispute that both the Petitioners were selected for audit in one of the last three preceding tax years, whereby, audit was conducted; Show Cause Notices were issued and amended assessment orders were also passed. Per learned counsel, on 01.07.2018 Clause 105 was added to Part IV of the Second Schedule to the Income Tax Ordinance 2001, ("**Ordinance**") pursuant to which, provisions of sections 177 and 214C are not applicable to a person whose income tax affairs have been audited in any of the preceding three tax years. He has further contended that though, Commissioner can still select a person under section 177 for audit; however, it can only be done with the approval of the Board, whereas in the case of the Petitioners no approval of the Board has been obtained. Therefore, per learned Counsel pursuant to Clause 105 ibid, the tax affairs of the Petitioners cannot be selected for audit either under section 177 or 214C of the Ordinance; hence the impugned notices are illegal, without lawful authority and jurisdiction. As to placing reliance on Clause 72B of Part IV of the Second Schedule to the Ordinance by the Respondents learned Counsel has contended that Clause 105 ibid, overrides Clause 72B being special in nature and, therefore, Petitioners cannot be audited through issuance of impugned notices. He has further contended that since Clause 105 grants a benefit for a specified period, it constitutes a vested right which subsists; hence, cannot be withdrawn unilaterally. He has lastly argued that when there is a conflict between a general provision and a special provision in a statute, the special provision i.e. Clause 105, ibid, will prevail in the instant case. In support of his contention, he has placed

reliance on various reported cases[1] and has prayed that the impugned notices be set-aside.

3. On the other hand, learned counsel appearing on behalf of Respondent No.2 has opposed the Petitions on the ground that notwithstanding the fact that the Petitioners have been selected for audit in one of the last three preceding tax years, at the time of issuance of notice, Clause 105, ibid, stands omitted, therefore, no right can be claimed by the Petitioners in terms of Clause 105. He has further contended that for the present purposes, the Petitioners have not been selected under section 177 or section 214C of the Ordinance, inasmuch as Clause 72B is applicable, as the Petitioners had claimed exemption from deduction of advance tax at import stage under section 148 of the Ordinance and pursuant to the third proviso of Clause 72B, their tax affairs are to be audited notwithstanding clause 105, ibid. Per learned counsel, since a privilege of a special provision was granted to the Petitioners by way of an exemption certificate from deduction of advance tax on imports, therefore, to examine as to whether such exemption was properly availed or not, an inbuilt mechanism has been provided under Clause 72B of the Part IV of the Second Schedule to the Ordinance, which provides for selection in an automatic manner, therefore, the impugned notices are valid and justified. He has lastly argued that before filing of these Petitions and obtaining restraining orders, Petitioners had participated by

---

[1] Kurdistan Trading Corporation v. C.I.R. [2014 PTD 339]; Allied Engineering Services v. Commissioner Income Tax [2015 PTD 2562]; Shahnawaz v. Pakistan [2011 PTD 1558]; Justice Qazi Faez Isa v. President of Pakistan [PLD 2022 SC 119]; Anwar Yahya v. Pakistan [2017 PTD 1069]; Commissioner Inland Revenue v. Olympia Chemicals [2021 PTD 1512]; D.G. Khan Cement v. Federation of Pakistan [2004 SCMR 456]; Kamaluddin Qureshi v. Ali International [PLD 2009 SC 367]; Dr. Tariq Iqbal and others v. Government of Khyber Pakhunkhwa and others [2019 PLC (CS) 821]; Saif-ur-Rehman v. Additional District Judge, Toba Tek Singh and others [2018 SCMR 1885]; The State v. Zia-ur-Rahman [PLD 1973 SC 49]; State of Gujarat v. Patel [AIR 1979 SC 1098]; Golden Oraphies v. Director of Vigilance [1993 SCMR 1635]; Anand Reddi v. The State of Andhra Pradesh [AIR 1959 AP 144]; Kewal Vadhera v. Lakshmi Narain Bansal [AIR 1985 Delhi 472]; Sayyed Muhammad Ali Shah Bokhari v. Chief Administrator of Auqaf, Punjab [PLD 1972 Lahore 416]; and Sahibzada Sharafuddin v. Town Committee [1984 CLC 1517].

responding to the impugned audit notices; hence they are not entitled for exercise of any discretion in their favour. He has placed reliance on certain reported cases[2] and has prayed for dismissal of these Petitions with costs.

4. Heard learned counsel for the parties and perused the record. Record reflects that both the Petitioners are industrial units and are engaged in imports from abroad for their manufacturing facilities. They had approached the concerned Commissioners and requested for issuance of exemption certificates from deduction of tax at import stage which otherwise is to be deducted in terms of section 148 of the Ordinance, on rates prescribed in Part II of the First Schedule in respect of goods classified in Part I to III of the Twelfth Schedule to the Ordinance. By virtue of clause 72B of Part IV of the Second Schedule the Petitioners were exempted from deduction of such tax on their imports. For the present purposes, they have impugned identical but different notices issued to them on the same date i.e. 6.1.2020 & 10.2.2020 for conducting audit in terms of the 3rd proviso to clause 72B ibid. Before proceeding further, it would be advantageous to refer to the relevant provisions in consideration i.e. Clauses 105 and 72B (both omitted vide Finance Acts, 2019 & 2020 respectively) of Part IV of the Second Schedule to the Ordinance which reads as under: -

> "(103) ....
>
> (104) ....
>
> (105) The provisions of section 177 and 214C shall not apply to a person whose income tax affairs have been audited in any of the preceding three tax years:
>
> Provided that the Commissioner may select a person under section 177 for audit, with approval of the Board.";

---

[2] Azee Securities (Pvt.) Ltd. v. Federation of Pakistan [2019 PTD 903] and Messrs Cellandgene Pharmaceutical International [2022 PTD 1464].

and

> *"**[(72B)** The provisions 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 preceding two tax years, whichever is the higher, has been paid [in the manner as may be prescribed] and a certificate to this effect is issued by the concerned Commissioner.]*
>
> *[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 [:]]*
>
> *[Provided further that the quantity of raw material to be imported which is sought to be exempted from tax under section 148 shall not exceed [125] per cent of the quantity of raw material imported and consumed during the previous tax year:*
>
> ***Provided also that the Commissioner shall conduct audit of taxpayer's accounts during the financial year in which the certificate is issued in respect of consumption, production and sales of the latest tax year for which return has been filed and the taxpayer shall be treated to have been selected for audit under section 214C:***
>
> *Provided also if the taxpayer fails to present accounts or documents to the Commissioner or the officer authorized by the Commissioner, the Commissioner shall, by an order in writing, cancel the certificate issued and shall proceed to recover the tax not collected under section 148 for the period prior to such cancellation and all the provisions of the Ordinance shall apply accordingly [:]]*
>
> *[Provided also that exemption certificate shall not be issued to an industrial undertaking importing raw materials, specified in sub-section (8) of section 148.]*
>
> *[Provided further that the Commissioner shall be deemed to have issued the exemption certificate in cases where the certificate is automatically processed and issued by IRIS upon expiry of prescribed time period:*
>
> *Provided also that the Commissioner may modify or cancel the certificate issued automatically by IRIS on the basis of reasons to be recorded in writing after providing an opportunity of being heard.]"*

5. From perusal of Clause 105 inserted vide Finance Act, 2018 (w.e.f. 01.07.2018) it reflects that a sort of a special privilege has been granted to the taxpayers from being selected for audit under section 177 or 214C, if their tax affairs have been audited in any of the last three preceding tax years. There is one exception to this i.e. the Commissioner can still select a person for audit under section 177, if he takes an approval from the Board for such

purpose. As to the Petitioners before us and based on the facts available on record, there is no dispute that both the Petitioners have been audited in one of the last three preceding tax years, whereas the Commissioner has not taken any approval from the Board. However, when the impugned notices are examined, it appears that the same have not been issued either in terms of section 177 or section 214C ibid but have been issued while exercising powers under the third proviso to clause 72B of Part IV of the Second Schedule to the Ordinance. As already noted, both the Petitioners are enjoying exemption from deduction of advance tax chargeable under section 148 of the Ordinance pursuant to Clause 72B. Clause 72B provides that provisions 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 preceding two tax years, whichever is the higher, has been paid and a certificate to this effect is issued by the concerned Commissioner. The third proviso, which is relevant for the present purposes, provides that the Commissioner shall conduct audit of taxpayer's accounts during the financial year in which the certificate is issued in respect of consumption, production and sales of the latest tax year for which return has been filed and the ***taxpayer shall be treated to have been selected for audit under section 214C*** of the Ordinance. This proviso in the given facts and circumstances of the Petitioner's case, who are enjoying a special exemption from payment of advance tax at import stage is most crucial and relevant insofar as the protection or privilege / exemption from audit clause 105 ibid is concerned. In our considered view, clause 105 is general in nature applicable to all taxpayers who have been audited in any of the last three preceding tax years, as against the argument of the Petitioners' Counsel that it is a special provision and will have an overriding effect. In fact, in our considered view, in the case of the Petitioners, Clause 72B is special in nature and will override clause 105, ibid. This is for the reason because the Petitioners are

enjoying a special privilege and are exempt from deduction of advance tax at import stage. This is pursuant to issuance of certificate of exemption, which is dependent upon fulfilling certain requirements, including an audit as to the consumption, production and sales so made by the Petitioners while enjoying the said exemption. The selection for audit in fact is inbuilt in clause 72B and has no nexus with clause 105, ibid, which only applies to taxpayers, who have not been issued any exemption certificate from deduction of advance tax at import stage. It is not a case of either, selection under section 177 or Section 214C of the Ordinance; rather it is a case of ***deemed selection***. As soon as the Petitioners applied for availing such benefit and were issued exemption certificate(s) under clause 72B of the Ordinance, they stood selected automatically as it was a condition precedent for issuance of an exemption certificate. Petitioners cannot, at the same time avail an exemption from deduction of tax at import stage under clause 72B for which they are required to be mandatorily audited; and then also claim exemption / protection under clause 105 ibid from being selected for audit. Their selection for audit is mandatory and inbuilt within clause 72B; hence, they have no protection or exemption from being audited pursuant to clause 105 ibid. In fact, their audit in one of the three preceding tax years has got nothing to do with the protection from audit as specified in clause 105 as they are otherwise required to be audited for availing an exemption certificate from deduction of advance tax at import stage. If the contention of the Petitioners is accepted, then conduct of audit in terms of clause 72B would amount to redundancy which per settled law cannot be attributed to the legislature.

6. As to reconciling a special and general provision of law, it would suffice to observe that in the present case apparently there is no such need; however, for the sake of clarity we may observe that insofar as the Petitioners are concerned, it is clause 72B

which will have an overriding effect by virtue of Petitioners request and issuance of an exemption certificate in respect of advance tax at import stage. Lastly, we need not attend to the argument of the Respondents Counsel that vide Finance Act, 2019, clause 105 stands omitted and impugned notices have been issued thereafter, hence, no vested has accrued, as in the instant matter, even if this clause had not been omitted, for the above reasons it is not applicable to the Petitioners.

7. In view of hereinabove facts and circumstances of these cases, no case for indulgence is made out; hence both the petitions are hereby ***dismissed*** along with pending application(s).

Dated: 03.10.2024

J U D G E

J U D G E

Farhan/PS