

**JUDGMENT SHEET**  
**IN THE LAHORE HIGH COURT, LAHORE**  
**JUDICIAL DEPARTMENT**

**W.P No.32241 of 2015**

**Usman Hassan & another**

Versus

**Federation of Pakistan & others**

**J U D G M E N T**

Date of Hearing.	20-09-2017
PETITIONERS BY:	M/s Mansoor Usman Awan, Shahzeen Abdullah, Hussain Ibrahim and Muhammad Abubakar, Advocates.
RESPONDENTS BY:	M/s Syed Naveed A. Andrabi, Ashiq Hussain Hanjra, Barrister Saad Ehsan Warraich, Muhammad Azam Zia, Abbas Haider Hashmi, Sarfraz Ahmad Cheema and Dr. Ishtiaq Ahmad Khan, Director Law, FBR.

**Shahid Karim, J:-** This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 seeks the following prayer:-

- I. *Declare that Impugned Circulars/ Clarifications issued by the Respondent Nos.2 &3 are ultra vires the Ordinance and the Constitution, mala fide and have been issued without lawful authority and are of no legal effect.*
- II. *Declare that the Funds in the title of this Petition do not require an Exemption Certificate under Section 159 of the Ordinance to enjoy the exemption granted under Clause 47B of the Ordinance.*
- III. *Declare that the Funds in the title of the Petition are not liable to collection/deduction of tax by the Respondent No.10 under Section 37A of the Ordinance.*
- IV. *Declare that Section 236P, Section 2(23A) and 2(35C) of the Ordinance insofar as they treat the Funds listed in the title of the Petition that are exempt from payment of income tax under the Ordinance in the same manner as persons who are liable to pay income tax but do not file returns and/or pay tax as irrational, illogical, unreasonable, disproportionate and consequently ultra vires the Constitution.*

*In the alternative; Declare that Section 236P of the Ordinance does not apply to the Funds listed in the title of the Petition as they are exempt from payment of income tax and it is not the purpose of the said section to collect advance income tax from such Funds.*

V. *Direct the Respondent Nos.4 to 12 not to withhold/deduct advance income tax under Section 37A, 150, 151, 233 and 236P of the Ordinance from the Funds in the title of this Petition.*

VI. *Any other relief to which the Petitioner is found entitled under the circumstances may also very kindly be granted.”*

2. This judgment will also decide constitutional petitions W.P No.22545 of 2016, W.P No.5505 of 2016, W.P No.20056 of 2016, W.P No.5507 of 2016, W.P No.20057 of 2016, W.P No.20055 of 2016, W.P No.5506 of 2016, W.P No.7358 of 2017 and W.P No.39003 of 2015 (the petitions), which give rise to common questions of law.

3. The petitions involve a vexed question of law and it is common ground between the parties that at least three High Courts i.e. Sindh High Court, Islamabad High Court and Peshawar High Court have rendered judgments which upheld the validating and competence of the circular / clarification dated 12.05.2015 (“**the circular**”) issued by the Federal Board of Revenue (**FBR**). It is in this background that the learned counsel for the petitioners invited this Court to take a different view and diverge from the opinions rendered by the three High Courts in their judgments.

***Relevant Facts:***

4. The facts are refreshingly simple and the parties are on common ground with regard to the most of these facts. The petitioners in these cases are trustees of approved recognized Provident Fund, Approved Gratuity Funds or Provident Pension Funds (**“the Funds”**). The income of each of these Funds is exempt from tax under Section 53 (1)(a) read with clause 57, Part I of the Second Schedule of the Income Tax Ordinance, 2001 (**“the Ordinance, 2001”**). It is not in dispute that to avail exemption from advance tax by virtue of clause 57 of the Part I of the Second Schedule, a fund would ordinarily be required to submit an application under Section 159(1)(a) of the Ordinance to the relevant Commissioner Inland Revenue for issuance of an exemption certificate. This is the mandate of law and is not merely applicable to the Funds but across the board to all classes of income or classes of persons who claim an exemption from tax in terms of section 53 (1)(a) read with clause 57 of Part I of the Second Schedule of the Ordinance, 2001. The question in these petitions and which engages this Court is not relating to the exemption covered by section 53 (1)(a) of the Ordinance but the one in clause 47B of Part IV of the Second Schedule (**“clause 47B”**) which relates to a different kind of

exemption. It is the case of the petitioners that in all cases covered under clause 47B of Part IV of the Second Schedule, they are not obliged to apply for and take out an exemption certificate. The provisions of section 53(1)(d) will come into play as Part IV of the Second Schedule is relatable to section 53 (1)(d) of the Ordinance, 2001. The Funds do not apply for and are not granted exemption certificate by the Commissioner Inland Revenue. However, the impugned circular has put a different construction on the relevant provisions of the Ordinance, 2001 and the FBR has directed the Commissioners of Inland Revenue to require the production of the exemption certificate in order to entitle the withholding to claim an exemption under the provisions covered by clause 47B. The construction on these provisions of law by the petitioners runs counter to the clarification in the circular, which has been called in question in these petitions and it falls upon this Court to determine as to what is the proper and true construction in respect of the issuance or otherwise of an exemption certificate in cases covered by clause 47B.

***ISSUE:***

5. As explicated, the question which begs an answer is as to whether the petitioners are constrained to apply for the issuance of an

exemption certificate in terms of section 159 of the Ordinance, 2001 in cases covered by the clause 47B.

***Relevant Law:***

6. The provisions which will require an interpretation in order to resolve the controversy in hand will be sections 53, 159, clause 57 of Part I of the Second Schedule and clause 47B. They are reproduced for facility as under:-

*53. Exemptions and tax concessions in the Second Schedule.—(1) The income or classes of 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 conditions and to the extent specified therein.*

*(2) The Board with the approval of Federal Minister-in-charge may, from time to time pursuant to the approval of the Economic Coordination Committee of Cabinet, whenever circumstances exist to take immediate action for the purposes of national security, natural disaster, national food security in emergency situations, protection of national economic interests in situations arising out of abnormal fluctuation in international commodity prices, removal of anomalies in taxes, development of backward areas implementation of bilateral and multilateral agreements or granting an exemption from any tax imposed under this Ordinance including a reduction in the rate of tax imposed under this Ordinance or a reduction in tax liability under this Ordinance or an exemption from the operation of any provision of this*

*Ordinance to any international financial institution or foreign Government owned financial institution operating under an agreement, memorandum of understanding or any other arrangement with the Government of Pakistan, by notification in the official Gazette, make such amendment in the Second Schedule by*

—

*(a) adding any clause or condition therein*

*(b) omitting any clause or condition therein; or*

*(c) making any change in any clause or condition therein;*

*as the Government may think fit, and all such amendments shall have effect in respect of any tax year beginning on any date before or after the commencement of the financial year in which the notification is issued.*

*3) The Federal Government shall place before the National Assembly all amendments made by it to the Second Schedule in a financial year.*

*(4) Any notification issued under sub-section (2) after the commencement of the Finance Act, 2015, shall, if not earlier rescinded, stand rescinded on the expiry of the financial year in which it was issued:*

*Provided that all such notifications, except those earlier rescinded, shall be deemed to have been in force with effect from the first day of July, 2016 and shall continue to be in force till the thirtieth day of June, 2018, if not earlier rescinded*

*Provided further that all notifications issued on or after the first day of July, 2016 and placed before the National Assembly as required under sub-section (3) shall continue to remain in force till the thirtieth day of June, 2018, if not earlier rescinded by the Federal Government or the National Assembly.”*

**“159. Exemption or lower rate certificate.—** (1) *Where the Commissioner is satisfied that an amount to which Division II or III of this Part or Chapter XII applies is –*

*(a) exempt from tax under this Ordinance; or*

*(b) subject to tax at a rate lower than that specified in the First Schedule; or*

*(c) is subject to hundred percent tax credit under section 100C, the Commissioner shall, upon*

*application in writing by the person, issue the person with an exemption or lower rate certificate.*

*[(1A) The Commissioner shall, upon application from a person whose income is not likely to be chargeable to tax under this Ordinance, issue exemption certificate for the profit on debt referred to in clause (c) of sub-section (1) of section 151.*

*(2) A person required to collect advance tax under Division II of this Part or deduct tax from a payment under Division III of this Part or deduct or collect tax under Chapter XII] shall collect or deduct the full amount of tax specified in Division II or III 7 or Chapter XII, as the case may be, unless there is in force a certificate issued under sub-section (1) relating to the collection or deduction of such tax, in which case the person shall comply with the certificate.*

*(3) \*\*\*\*\**

*(4) \*\*\*\*\**

*(5) \*\*\*\*\**

*(6) Notwithstanding omission of sub-sections (3), (4) and (5), any notification issued under the said sub-sections and for the time being in force, shall continue to remain in force, unless rescinded by the Board through notification in the official Gazette.”*

**“Clause 57 (3) Any income of the following funds and institution, namely:-**

*(i) a provident fund to which the Provident Funds Act, 1925 (XIX of 1925), applies;*

*(ii) trustees on behalf of a recognized provident fund or an approved superannuation fund or an approved gratuity fund;*

*(iii) a benevolent fund or group insurance scheme approved by the Board for the purposes of this clause;*

*(iv) Service Fund;*

*(v) Employees Old Age Benefits Institution established under the Employees Old Age Benefit Act, 1976 (XIV of 1976);*

*(vi) any Unit, Station or Regimental Institute; and*

*(vii) any recognized Regimental Thrift and Savings Fund, the assets of which consist solely*

*of deposits made by members and profits earned by investment thereof*

*(viii) a Pension Fund approved by the Securities and Exchange Commission of Pakistan under the Voluntary Pension System Rules, 2005;*

*(ix) any profit or gain or benefit derived by a pension fund manager from a pension Fund approved under the Voluntary Pension System Rules, 2005, on redemption of the seed capital invested in pension fund as specified in the Voluntary Pension System Rules, 2005.*

[ ]

*(xi) International Irrigation Management Institute.*

*xii. Punjab Pension Fund established under the Punjab Pension Fund Act, 2007 (I of 2007) and the trust established thereunder.*

*xiii. Sindh Province Pension Fund established under the Sindh Province Pension Fund Ordinance, 2002.*

*(xiv) Punjab General Provident Investment Fund established under the Punjab General Provident Investment Fund Act, 2009 (V of 2009) and the trust established thereunder.*

*Explanation.—For the purpose of this clause, "Service Fund" means a fund which is established under the authority, or with the approval of the Federal Government for the purpose of —*

*(a) securing deferred annuities to the subscribers of payment to them in the event of their leaving the service in which they are employed; or*

*(b) making provision for their wives or children after their death; or (c) making payment to their estate or their nominees upon their death."*

**Clause (47B)** *The provisions of sections 150, 151, 233 and Part I, Division VII of the First Schedule] shall not apply to any person making payment to National Investment Unit Trust or a collective investment scheme or a modaraba or Approved Pension Fund or an Approved Income Payment Plan or a REIT Scheme or a Private Equity and Venture Capital Fund or a recognized provident fund or an approved superannuation fund or an approved gratuity fund."*

7. It can be seen that by virtue of section 53 (1)(d) read with clause 47B, the Funds are exempt from deduction of tax at source on their dividends under Section 150, profit of debt under Section 151, brokerage and commission under Section 233 and capital gain tax under Section 37A and this is because of the unique species of exemptions granted by the legislature by section 53 (1)(d) and by which persons acting as withholding agents are exempt from the operation of the provisions of the Ordinance and those provisions have been spelt out in clause 47B. Thus, the legislature may exempt any persons specified in the Second Schedule from the operation of any provision of the Ordinance, 2001. In this case, the exemption from the operation in respect of Sections 150, 151, 233 and Part 1, Division VII of the First Schedule of the Ordinance has been made which directly impacts the petitioners and they seek the benefit accruing from the exemption granted by clause 47B. The learned counsel for the petitioners do not quarrel with the proposition that generally in all other matters the petitioners are required to apply for the issuance of an exemption certificate in terms of section 159. However, in cases covered by clause 47B on the other hand, the case of the petitioners is that since

the legislature itself exempts the operation of certain provisions of the Ordinance, there is no further requirement for seeking the issuance of an exemption certificate and not only that it will be a duplication but also a negation of the legislative intent.

***Parties' contentions and determination:***

8. It is clear by now that the parties are at variance on the issue whether the petitioners are under a bounden duty to comply with the provisions of section 159 even in the cases to which clause 47B applies. The arguments addressed by the learned counsels for the parties shall be referred to and dealt with in the course of the opinion that follows. Suffice to say that the learned counsel for the petitioners takes an exception to the application of section 159 in the peculiar case of the petitioners and the misreading of these provisions by the FBR has reflected itself in the impugned circular and contends that the legislative intent will be frustrated if the petitioners were required to apply for an exemption certificate as also that the provisions of section 53 (1)(d) will be rendered nugatory and without any purpose. According to the learned counsel, the recognition granted by the Commissioner Inland Revenue to these Funds is

regulated by the procedure prescribed in the Sixth Schedule and it is sufficient to exercise overriding regulatory powers without any further regulation by compelling the petitioners to apply for an exemption certificate.

9. Dr. Ishtiaq Ahmad Khan, Director Law led the arguments on behalf of FBR and the respondents and alluded to the practical efficacy of applying for an exemption. The main plank of his arguments was that it would be *well nigh* impossible for a withholder of advance tax etc to conclude in a given case whether the petitioners are in fact entitled to exemption and it is precisely to unburden the withholder of taxes from resolving the said controversy that the FBR has deemed it necessary that an exemption certificate be issued in these cases. According to him, the Commissioner Inland Revenue has the necessary expertise to determine these questions and will necessarily issue an exemption certificate if a person applying for it is entitled to it. He contends that it is only in those cases where withholding agents are involved that the requirement of an exemption certificate has been made and which prevents the process from falling into chaos and uncertainty. The exemption certificate issued by the Commissioner Inland

Revenue is a conclusive and determinative factor and so the withholding agent is relieved of his duty to determine whether an exemption ought to be granted or not. Lastly, Dr. Ishtiaq Ahmad Khan argued that an exemption certificate was being issued in all similar cases and heavily relied on the judgments passed by the three High Courts in their adjudication of a similar controversy.

***Opinion:***

10. I have given my scrupulous attention to the able arguments addressed by the learned counsels for the parties. The power to grant exemptions and tax concessions are provided in section 53 of the Ordinance, 2001 read with the Second Schedule. It can be seen from a reading of section 53 that the said provision delineates different categories of exemptions that can be granted and have been divided into four parts:-

- I. Exemptions from tax;
- II. Reduced rate of tax;
- III. Reduction in tax liability; and
- IV. Exemptions from operation of provisions of the Ordinance.

11. We are here concerned with the exemption at I and IV above and these cases involve an interplay of these two kind of exemptions. The question is: Whether the provisions of section 159 applies to

both kinds of exemptions i.e. exemptions from tax and exemptions from operation of provisions of the Ordinance? The petitioners' case is that it applies to the former and not to the latter exemptions. The Second Schedule is to be read in tandem with section 53 and is accordingly divided into four parts, each dealing with the four categories of exemptions mentioned in section 53. In short, there are four parts of Second Schedule and each part co-relates with the corresponding part of section 53. The circular which has been issued by the FBR and which has triggered the controversy is to the following effect:-

*“Subject: - REQUIREMENT OF VALID TAX EXEMPTION CERTIFICATE FOR CLAIM OF EXEMPTION U/S 150, 151 AND 233 OF THE INCOME TAX ORDINANCE, 2001 IN THE CASES WHETHER STATUTORY EXEMPTION UNDER CLAUSE 47B OF PART – IV OF SECOND SCHEDULE IS AVAILABLE.*

*Please refer to the subject.*

2. *It has been learnt by this office that some of the field offices are not issuing specific exemptions in the cases falling within the ambit of subject mentioned provisions on the pretext that statutory exemption under clause (47B) of part IV of the second schedule is already available to them. Legal position in this case is that any person required to withhold Income Tax may only allow exemption if a valid exemption certificate under Section 159(1) of the Income Tax Ordinance, 2001 issued by the concerned Commissioner of Inland Revenue is produced before him by the withholdee.*

3. *The matter has already been clarified by the Board also vide C.No. 1(29) WHT/2006 dated 30.06.2010 upon the request of Central Directorate of National Savings (CDNS) (copy enclosed).*

4. *In view thereof, it is re-iterated that exemption certificate in such cases may be issued in the light of Board's above clarification."*

12. From the contents, reproduced above, it can be seen that FBR felt it necessary to issue a clarification, for it came to its knowledge that field offices were not issuing specific exemptions in the cases falling within the ambit of the provisions mentioned in the title of the circular and covered by clause 47B. The circular then went on to provide that the legal position was that any person required to withhold income tax may only allow exemption if a valid exemption certificate under Section 159 of the Ordinance, 2001 was issued by the concerned Commissioner of Inland Revenue. No further elaboration was made for the basis of this opinion formed by the FBR.

13. Clause 47B was inserted vide Finance Act, 2008 to specifically provide exemptions from deductions under Section 150, 151 and 233 of the Ordinance, 2001 to *inter alia* recognize Provident Funds, Approved Gratuity Funds and Provident Pension Funds (petitioners in these cases). There is, therefore, a purpose to the enactment of section 53 (1)(d) of the Ordinance read with 47B.

14. It can be seen from a cumulative reading of the provisions of the Ordinance which necessarily

impact the outcome of the question involved in these petitions that there is undoubtedly a purpose to the various exemptions which has been granted by the legislature and their categorization into different forms. The legislature could well have merely provided in section 53 that the income or classes of income or persons or classes of persons specified in the Second Schedule shall be exempted from tax under this Ordinance. Why did the need arise for the legislature to further provide three other exemptions including the one in clause (d) of subsection (1) of section 53 which provides for exemption from the operation of any provision of the Ordinance. To put it differently, what is the distinction between an exemption from tax under the Ordinance and an exemption from the operation of any provision of the Ordinance. Truly, they are not used interchangeably and are particular species of the genus of exemptions. Therefore, it would be unreasonable and incredulous to treat the two exemptions as of the same kind and subject to the same limitations. Part IV of Second Schedule gives effect to the exemption covered by section 53 (1)(d) of the Ordinance, 2001. Once again, there is a purpose as to why the legislature specified different

parts of the Second Schedule to give effect to each of the exemption provided by section 53.

15. Clause 47B says that the provisions of sections 150, 151 and 233 and Part I, Division VII of the First Schedule shall not apply to any person making payment of *inter alia* the Funds. For instance, section 150 obliges every such person paying a dividend to deduct tax from the gross amount of the dividend paid. Clause 47B is not directed towards the Funds in its application but addresses the persons who have been required to deduct tax as withholding agents. Therefore, in fact, what clause 47B intends is that the provisions mentioned in the said clause shall not apply to the withholding agents who are the persons making the payment to the Funds. It is as if the provisions do not exist and are erased from the statute book in respect of the persons who are making the payments to the Funds. Therefore, clearly there is a distinction; exemption from tax of an amount is different from an exemption of the operation of the provision. In case of the first exemption, the benefit is being derived by a person who says that his income is exempt from tax but the latter kind of exemptions is directed towards a person who is making the payment to that person and acts as a

withholding agent. In fact, what section 53 (1)(d) provides is that in case of any person who makes the payment to certain entities, the operation of the provisions of the Ordinance mentioned in the Second Schedule shall cease to have effect. This is by legislative command and so there is an important distinction in the nature of the exemption granted and the persons to whom it is directed. This is of the essence of the controversy in these petitions.

16. The exemption is for the consumption of the person making the payment and is addressed to him. As if saying “the provisions of section 150 etc. do not apply to you if you are making payment, inter alia, to a recognized provident fund or an approved superannuation fund or an approved gratuity fund” and this takes care of the argument of Dr. Ishtiaq Ahmad Khan that there is no manner of knowing for a withholding agent if a person is exempt or not. Clause 47B is a matter between the withholding agent and the legislature and so the withholding agent is supposed to know the law. For the withholding agent, the provisions mentioned in clause 47B do not exist and consequently any liability arising thereunder, does not arise. It does not chime with the scheme of the law to demand the petitions to seek an exemption certificate over and

above the exemption visualized by clause 47B. That exemption certificate has already been conferred by clause 47B and is a statutory exemption certificate in the presence of which no further certificate is required to be issued. This would be tantamount to saying that the legislative will was not enough and the FBR seeks to upend that will by superimposing its opinion upon the will of the legislature.

17. It is a fallacy to say that the petitioners are obliged to apply for the exemption certificate under section 159 of the Ordinance for the exemption mentioned in section 159 is already covered by clause 47B and exempts the withholding agent from its duty under those provisions. It must be borne in mind that the duties spelt out in section 150 etc. are duties cast on the persons making the payment as withholding agent and but for the mandate of these provisions, the persons will not have withheld or deducted tax on those payments. Had clause 47B not been enacted, the petitioners would certainly have been driven to comply with the terms of section 159. But now, from the standpoint of the withholding agent, an exemption certificate is not required to be produced as for him, these provisions do not operate.

18. In my opinion, the petitioners have the better reading of the provisions at the centre of the controversy. The exemption contemplated by section 53 (1)(a) and (d) operate within their own spheres. Section 159 has a direct relation with clause (a) of sub-section (1) of section 53 and is triggered when a person claims exemption from tax on an amount. This will ordinarily be resorted to by all such persons including the petitioners. Let us now turn our attention to the essential features of section 159. Before we do that, it will bear repetition that the petitioners claim an exemption from tax but do not feel the necessity for applying for exemption certificate in view of the exemption granted by clause 47B.

19. The first of the features of section 159 which engages the reader are the words “upon application in writing by the person”. When such an application is made, the Commissioner shall issue an exemption certificate if the pre-conditions are fulfilled. Thus the Commissioner will not be called upon to exercise his discretion unless an application is made by the taxpayer. In my opinion, the Commissioner or any other officer need not be overly bothered by the failure to file an application since the withholding agent is under a bounden duty to

withhold tax and will essentially do so without fail. Therefore, it taxes the credulity of the credulous as to why FBR took pains to issue a circular which is irrational to say the least. No one can compel the petitioners to make an application if they chose not to. Let the consequences follow and action be set in motion under the Ordinance. But action against whom? Surely the withholding agents have an exemption from operation of these provisions by clause 47B and the petitioners also have an exemption from tax, not by virtue of section 159 but by section 53(1)(a) read with the Second Schedule. It follows ineluctably that neither the person making the payment nor the persons claiming exemption are liable for any violation under the Ordinance.

20. The question that arises is; what is the consequence of not applying by an assessee? Obviously he will not be able to seek an exemption he is entitled to because a withholding agent will not extend an exemption from advance tax unless an exemption certificate is produced. But, quite interestingly, in this peculiar case, the person shall get an exemption from deduction of tax in any case and despite the fact that he chose not to apply because on the other end of the spectrum, the withholding agent himself has been exempted from

application of certain provisions also included in Division II or III of Part V and Chapter XII (mentioned in section 159). Thus it is otiose to compel a person to apply for an exemption certificate.

21. This brings us to the question of redundancy and quite clearly if the exemption certificate is held as a *sine quo non*, not only clause 47B but also section 53(1) (d) will be rendered non-existent and superfluous. It cannot be said that the legislature intended this to be the result and the FBR cannot be permitted to place a construction on the whole scheme of law which runs counter to that of the intent of law, expressed clearly and without equivocation. The circular under challenge merely takes a pedantic and narrow view of the issue sought to be dealt with in that circular. It seems that while issuing the letter, only sub-section (2) of section 159 was considered and the *raison d'être* of clause 47B and section 53(1)(d) was entirely ignored. At first blush, the provisions of section 159(1) & (2) and clause 47B seem to overlap but, on the contrary, they operate in different spheres and upon a holistic reading, each must be given the full effect that it deserves. For, one may envisage a situation where clause 47B grants exemption in respect of provisions

of the Ordinance not covered by section 159. Can it be said that the intent of legislature will suddenly come alive then while it remains dormant at present? The legislature does not intend the provisions of law to alternate between sleep and live modes. Nor is it the case of the FBR that section 159 impliedly repeals the clause 47B.

22. Dr. Ishtiaq Ahmad Khan, Director Law, FBR, contended that there is a purpose and a background to the circular. According to him, the withholding agents and their officers could not be trusted to determine whether a person was entitled to an exemption or not. The short and simple answer to this query is that if the legislature trusted the withholding agent by granting the exemption it does not lie within the power of FBR to undo that trust.

23. A reference to the Sixth Schedule of the Ordinance 2001 may also be made in order to bring home the fact that the legislature has provided Regulations for dealing with the recognition of provident funds and approval of superannuation funds as well as gratuity funds. Certain rights and duties flow out of the recognition and approval granted by the Commissioner in accordance with the Sixth Schedule of the Ordinance, 2001. Part I of the Sixth Schedule deals with the recognition of

provident funds. The Commissioner may accord recognition to any provident fund which complies with the requirement of rule 2 and may at any time withdraw such recognition if in his opinion the circumstances of the fund cease to warrant the continuance of the recognition. The Commissioner may not refuse or withdraw recognition of any provident fund unless he has given to the trustees of the fund a reasonable opportunity of being heard. Rule 2 of Part I of Sixth Schedule prescribes the condition for approval which need to be specified by the provident fund seeking recognition. By rule 8, the recognized provident fund is obliged to maintain accounts by the trustees of the fund and the accounts shall be open to inspection by income tax authorities at all reasonable times. Also rule 10 requires particulars to be furnished in respect of recognized provident fund within such period of the service of a notice as may be specified in that notice. It is clear thus that the grant of recognition or its withdrawal is within the power of the Commissioner as also that elaborate conditions have been laid down for the recognition of a provident fund. Further, the accounts of the recognized provident fund are open to inspection by the Commissioner at all times. The rules regarding the approved superannuation funds

and gratuity funds are also similar in nature and prescribe conditions of a like nature which give power to the Commissioner to approve the funds as also to withdraw that approval. There is thus a complete oversight of the affairs of the funds by the income tax authorities and the recognition of the approval shall remain in place unless it is withdrawn by the Commissioner in accordance with law. Therefore, if there is a withdrawal by the Commissioner, the necessary information can be conveyed to all concerned including the withholding agents so that the withholding agents will know that the fund in question is not a recognized fund and, therefore, is not entitled to an exemption. Clearly, if the approval or recognition of the funds has not been withdrawn, there is no reason for the withholding agent not to comply with the statutory provisions which entitle the funds to an exemption from tax on their income.

***Case Law:***

24. As adumbrated, the entire reliance of the respondents was on the judgments of the three High Courts whose mention has been made above. The Sindh High Court in *Meezan Islamic Fund and others v. D.G. (WHT) FBR and others* (2016 PTD 1204) dealt with the issue in the following terms:-

“6. From the above, it is evident that in view of the provisions of Section 159(2), it is not left to the withholder to decide not to make advance tax deductions even when a person to whom he has to make payment claims that he is entitled to the exemption under Clause 47B of Part IV to the second Schedule of the Income Tax Ordinance, 2001. The withholder is not to form his own opinion that a person's case falls within the ambit of Clause 47B unless a valid exemption certificate issued under Section 159(1) is presented. Even the person whose payments are otherwise liable for advance tax deduction under Section 150, 151 & 233 cannot insist that he be extended the benefit of Clause 47B in absence of, exemption certificate in the face of the provisions of Section 159(2). The entitlement of, concession under Section 4713 can therefore be availed only when exemption certificate is presented to the withholder and upon such presentation the obligation of the withholder to deduct advance tax as provided under Section 159(2) stand discharged. This was exactly the reason for issuing the impugned Circular doted 12.5.2015 which slates "Legal position in this case is that any person required to withhold Income Tax may only allow exemption if a valid exemption certificate under section 159(1) of the Income Tax Ordinance, 2001 issued by the concerned Commissioner of Inland /Revenue is produced before him by the withholdee. Thus the impugned circular refers to the provisions of Section 159 of the Income Tax Ordinance which creates statutory obligation upon withholder to deduct advance tax from the payments falling under sections 150, 151 and 233 unless the requisite exemption certificate is presented to it. It is only upon such presentation, the mandate of the certificate is to be complied with.

7. From the above discussion, it is evident that the concession granted under Clause 47B of Part IV to the second Schedule of the Income Tax Ordinance, 2001 cannot be out-rightly availed by the withholdee from the withholder on account

*of the bar contained in Section 159(2) unless the withholdor presents a valid exemption certificate issued to him under Section 159(1) of Income Tax Ordinance, 2001. There appears to be a sound logic behind this procedural requirement as the person who want to seek benefit under Clause 47B may be such person who is not entitled to the benefit or in the past may have been so entitled but for some reason had lost his entitlement. Therefore, it has been made mandatory for him under Section 159(2) to first demonstrate to the withholdor that he holds a valid exemption certificate. In Clause 47B of Part IV to the second Schedule of the Income Tax Ordinance, 2001 mere mention that the provisions of Sections 150, 151 and 233 shall not apply to certain category of persons does not mean that to avail such concession the provisions of Section 159 have been made inapplicable. On the contrary requirement of obtaining exemption certificate has been made mandatory under Section 159(2) for all payments that fall within the ambit of Division III of Part V of Chapter X or under Chapter XII of the Income Tax Ordinance and Sections 150, 151 and 233 are part of said Chapters. In the circumstances, the challenge to the impugned Circular dated 12.05.2015 fails. All these 280 petitions are dismissed.”*

25. It can be seen that the learned Judges of the Sindh High Court proceeded on the premise that it would not be possible for a withholding agent to form an opinion whether a person's case falls within the ambit of the clause 47B or not unless a valid exemption certificate is issued. However, the entire reliance was on the provisions of section 159(2) of the Ordinance, 2001 whereas the position of clause 47B in juxtaposition to section 159 (2) was not considered by the learned Judges as also it was not

considered as to what would be the approach of a withholding agent if a case was not covered by section 159. Secondly, the learned Judges based their decision “on the sound logic” behind the procedural requirement as according to them the persons claiming the exemption may have lost his entitlement and this was the reason why it was mandatory for him under Section 159(2) to demonstrate to the withholder that he holds a valid exemption certificate. A reference to the Sixth Schedule has been made precisely to counter this argument and in case the approval or the recognition of the funds has been withdrawn, no further steps are required to be taken and the Sixth Schedule provides a complete mechanism by which approval and recognition are granted and are sustained. In my opinion, no further proof is required to be furnished by the fund which claims an exemption.

26. The judgments of the Islamabad High Court as well as Peshawar High Court follow the judgment of the Sindh High Court. Since the Islamabad High Court and the Peshawar High Court have proceeded on the same basis as the Sindh High Court, it is not necessary to discuss those judgments separately.

27. In view of the above, these petitions are **allowed**. The impugned circular issued by the

respondent No.2 and 3 is held *ultra vires* the provisions of the Ordinance, 2001 and has been issued without lawful authority and is of no legal effect. Consequently, it is held that the funds / petitioners are not required to apply for an exemption certificate under Section 159 of the Ordinance, 2001 if the other requirements of the Ordinance are fulfilled and as long as they continue to be exempted from tax.

(*SHAHID KARIM*)  
JUDGE

Announced in open Court on 10.10.2017.

*Approved for reporting.*

JUDGE

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*Rafaqat Ali*