

Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

Case No: W. P. 31925/2012.

M/s Nishat Dairy (Pvt.) Ltd. **Versus** Commissioner Inland Revenue etc.

JUDGMENT

Date of hearing:	25.03.2013.
Petitioner by:	Mr. Mansoor Usman Awan, Advocate alongwith Mr. Asim Zulfiqar, Chartered Accountant A.F. Ferguson.
Respondents by:	Mr. Imran Rasool, Advocate.

Syed Mansoor Ali Shah, J:- Petitioner, a newly established industrial undertaking, was incorporated as a Private Company under the laws of Pakistan on 28.10.2011 and is engaged in the business of *corporate dairy farming*. Section 65D of the Income Tax Ordinance, 2001 (“Ordinance”), inserted through Finance Act, 2011 provides 100% “**tax credit**” on tax payable on the taxable income arising from newly established industrial undertaking including corporate dairy farming. The benefit under Section 65D of the Ordinance is admittedly available to the petitioner company.

2. The claim of the petitioner is that it has imported and will be importing livestock i.e., cows from Australia, etc. besides cattle feed, calf milk replacer, etc. and is entitled to an “Exemption Certificate” under Section 159 of the Ordinance against the *advance income tax* charged from the petitioner under Section 148(1) of the Ordinance at the import stage.

3. It is submitted that the request of the petitioner was turned down by the respondent Commissioner vide impugned letters, both dated 17.12.2012, on the ground that SRO 947(I)/2008 dated 5.9.2008 issued under Section 159(3)(b) of the Ordinance by the Federal Board of Revenue (“FBR”) specifies a certain class of persons to whom the

provisions of sub-section (1) of Section 148 shall not apply and does not include livestock and cattle feed, etc. The relevant extract of the Notification relied upon by the Commissioner is:

“(v) a person who imports plant, machinery, fixtures, fittings or its allied equipments for the purposes of setting up an industrial undertaking....” (*emphasis supplied*)

4. Learned Counsel for the petitioner submits that the above referred Notification was issued in the year 2008, while Section 65D was introduced in the Ordinance vide Finance Act, 2011.¹ He submits that irrespective of the power of the FBR under Section 159(3), the Commissioner enjoys an independent power under Section 159(1) to issue an exemption or a low rate certificate if he is satisfied that the taxpayer is exempt from tax under the Ordinance or subject to tax at a rate lower than that specified in the First Schedule. He argued that “tax credit” equal to 100% of tax payable on the taxable income arising from the industrial undertaking is available to the petitioner, which is akin to tax exemption, as the tax liability of the petitioner has been reduced to nil. The exercise of paying advance tax at the import stage and thereafter applying for refund is an exercise in futility and also burdens the State with providing the requisite administrative machinery which can be dispensed with if an Exemption Certificate is issued at the initial stage. He prayed that the petitioner is entitled to be issued an Exemption Certificate under Section 159(1) of the Ordinance.

5. Learned counsel for the respondents-department, on the other hand, submitted that “tax credit” provided under Section 65D is not equivalent to “tax exemption” under Section 53 of the Ordinance and, therefore, the petitioner/taxpayer has to pay the tax at the outset and thereafter apply for its refund. It is further submitted that the tax credit available to the petitioner under Section 65D relates to the taxable income arising from the said industrial undertaking and does not

¹ Act XVI of 2011 dated 29-6-2011.

extend to taxable income arising from other sources. Therefore, the taxpayer can only be given the benefit of the tax credit at the end of the year when his tax liability is assessed.

6. In response to the above submission, learned counsel for the petitioner admitted that the 100% tax credit is to be adjusted against the tax payable on the taxable income arising from the industrial undertaking and from no other source. He elaborated by submitting that this aspect of the matter can easily be assessed and considered by the Commissioner under Section 159(1) before issuing an Exemption Certificate.

7. I have considered the arguments of the learned counsel for the parties. Admitted facts of the case have already been narrated above. The question that requires determination by this Court is whether the petitioner, who enjoys a Tax Credit equal to 100% of the tax payable under Section 65D, is entitled to an Exemption Certificate under Section 159(1) of the Ordinance?

8. Section 159(1) provides that where the Commissioner is satisfied that an amount to which Division II or III of Part-V² or Chapter XII apply and is exempt from tax under this Ordinance or is subject to tax at a rate lower than that specified in the First Schedule an exemption certificate or lower rate certificate shall be issued. Section 159(1) of the Ordinance is reproduced hereunder for ready reference:-

<p>“Section 159 (1): Exemption or lower rate certificate.--- Where the Commissioner is satisfied that an amount to which Division II or III of this Part or Chapter XII applies is---</p> <p>(a) exempt from tax under this Ordinance; or</p> <p>(b) subject to tax at a rate lower than that specified in the First Schedule,</p> <p>the Commissioner shall, upon application in writing by the person, issue the person with an exemption or lower rate certificate.”</p>
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² Admittedly this is applicable to the case of the petitioner.

Section 65D provides as follows:-

Tax credit for newly established industrial undertaking.—(1)

Where a taxpayer being a company formed for establishing and operating a new industrial undertaking including corporate dairy farming sets up a new industrial undertaking including a corporate dairy farm, it shall be given a tax credit equal to hundred per cent of the tax payable, including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance, on the taxable income arising from such industrial undertaking for a period of five years beginning from the date of setting up or commencement of commercial production, whichever is later.

(2) Tax credit under this section shall be admissible where--

- (a) the company is incorporated and industrial undertaking is setup between the first day of July, 2011 and 30th day of June, 2016;
- (b) industrial undertaking is managed by a company formed for operating the said industrial undertaking and registered under the Companies Ordinance, 1984 (XLVII of 1984) and having its registered office in Pakistan;
- (c) the industrial undertaking is not established by the splitting up or reconstruction or reconstitution of an undertaking already in existence or by transfer of machinery or plant from an industrial undertaking established in Pakistan at any time before 1st July 2011; and
- (d) the industrial undertaking is set up with hundred per cent equity raised through issuance of new shares for cash consideration:

Provided that short term loans and finances obtained from banking companies or non-banking financial institutions for the purposes of meeting working capital requirements shall not disqualify the taxpayer from claiming tax credit under this section.

(3) ***

(4) Where any credit is allowed under this section and subsequently it is discovered, on the basis of documents or otherwise, by the Commissioner Inland Revenue that any of the conditions specified in this section were not fulfilled, the credit originally allowed shall be deemed to have been wrongly allowed and the Commissioner Inland Revenue may, notwithstanding anything contained in this Ordinance, recompute the tax payable by the taxpayer for the relevant year and the provisions of this Ordinance shall, so far as may be, apply accordingly.

(5) For the purposes of this section and sections 65B and 65E, an industrial undertaking shall be treated to have been setup on the date on which the industrial undertaking is ready to go into production, whether trial production or commercial production.

9. In order to resolve the question of law posed before this Court, it is important to understand if there is a difference between “tax credit” and “tax exemption” generally and in the context of Section 159(1)(a) of the Ordinance in particular. According to *International Dictionary of Finance*³ “Tax Credit” means “an amount of tax deemed to have been paid that may be offset against a tax liability or reclaimed by the taxpayer if they have no liability”. *Black’s Law Dictionary*⁴ defines it as “an amount subtracted directly from one’s total tax liability, dollar for dollar, as opposed to a deduction from gross income.” According to *Dictionary of Finance and Investment Terms*⁵ “tax credit” means “direct, dollar-for-dollar reduction in tax liability.... In the case of a tax credit, a taxpayer owing \$10,000 in tax would owe \$9,000 if he took advantage of a \$1,000 tax credit.”

10. Explaining the difference between the two, *Investopedia*⁶ states that “Tax Credit is defined as an amount of money that a taxpayer is able to subtract from the amount of tax that they owe to the government...Unlike deductions and exemptions, which reduce the amount of your income that is taxable, tax credits reduce the actual amount of tax owed...How much income is considered taxable depends on how much money a person or household makes, less any deductions and exemptions. Once the amount owed, based on taxable income, is determined, tax credits can be applied to reduce the actual percentage of that amount an individual or household must pay back.” The primary difference between tax credit and tax exemption is that tax credit reduces the amount of tax to be paid by the taxpayer, while tax exemption reduces the amount of annual income that can be taxed. Hence, while tax credit reduces the payability of tax due, tax exemption first reduces the quantum of total income and as a consequence reduces the payability of tax due, both leading to the same result of reducing the tax liability of the taxpayer. Therefore, tax

³ The Economist- 4th Edition. p-261

⁴ Seventh Edition. p/1473

⁵ Barron’s Financial Guides- Seventh Edition. P-711.

⁶ www.investopedia.com

credit and tax exemption work on opposite sides of the same equation. At the end of day, both the incentives/methodologies reduce and “exempt” the tax liability of the taxpayer.

11. According to the *Tax Reductions, Rebates and Credits (Taxpayer’s Facilitation Guide)*⁷ issued by the Federal Board of Revenue, September 2011, the working of *tax credit* with equity investment in a newly established industrial undertaking is as follows:-

Tax credit for equity investment in newly established industrial undertaking

Tax credit is admissible to a *company* formed for establishing and operating a new *industrial undertaking* for manufacturing in Pakistan, subject to the following conditions:

- The *company*:
 - .. Is registered/incorporated under the Companies Ordinance, 1984;
 - .. Has its registered office in Pakistan; and
 - .. Is incorporated between July 01, 2011 and June 30, 2016;
- The *industrial undertaking*:
 - .. Is setup between July 01, 2011 and June 30, 2016;
 - .. Is managed by a company formed for operating such *industrial undertaking*;
 - .. Is not established by splitting up or reconstruction or reconstitution of an undertaking already in existence or by transfer of machinery or plant from an industrial undertaking established in Pakistan at any time before July 01, 2011; and
 - .. Is setup with 100% equity owned by the company.

This tax credit is admissible in the *tax year* in which such industrial undertaking is setup or commercial production is commenced, which ever is later, and the following four years.

The amount of tax credit is equal to 100% of the *Income Tax Payable* on income arising from such *industrial undertaking*.

Example

1.	<i>Tax Year</i>	2012
2.	Equity investment in establishing and operating an industrial undertaking.	Rs.100,000,000
3.	Tax year of setup or commencement of commercial production which ever is later.	2012
4.	<i>Taxable income</i>	Rs.10,000,000

⁷ Brochure -IR-IT-03

5.	Income tax payable @ 35%	Rs. 3,500,000
6.	Tax credit for equity investment in newly established industrial undertaking [100% of 5]	Rs. 3,500,000
8.	<u>Balance Income tax payable</u>	<u>Rs. Nil</u>
[Section 65D of the Income Tax Ordinance 2001]		

The above shows that in case of 100% tax credit, the tax liability of the taxpayer is reduced to NIL, hence the petitioner is “exempt” from tax payable on the income arising from the newly established industrial undertaking.

12. It is necessary to explore the object, scope and purpose of Section 159 of the Ordinance because “Every statute has a purpose, without which it is meaningless. This purpose, or *ratio legis*, is made up of the objectives, the goals, the interests, the values, the policy and the function that the statute is designed to actualize. The judge must give the statute’s language the meaning that best realizes its purpose.”⁸ What then is the scope and purpose of Section 159(1) of the Ordinance? In case a taxpayer is exempt from tax or enjoys a low rate tax on the taxable income, the taxpayer may not be unnecessarily burdened to pay advance tax or be subjected to deduction of tax at source during the currency of the said tax year when the taxpayer is not likely to pay tax at the end of the tax year. Section 65D on the other hand provides incentive of tax credit to newly established industrial undertaking including corporate farming. In the present case the exercise of charging advance tax at the import stage appears to be unnecessary as the petitioner enjoys 100% tax credit against its tax liability arising from the concerned industrial undertaking. The wisdom behind Section 159 is to avoid burdening the taxpayer and the tax administration with the calculations, refunds and adjustment of amounts, which in the end are not required to be credited to the State exchequer.

⁸ Purposive Interpretation of Statutes- from *The Judge in a Democracy*- Aharon Barak. P-136.

13. It is clarified that Section 159 does not totally absolve the taxpayer of its tax liability which is to be finally assessed at the end of the tax year. The relief under Section 159 is at the initial stage and is based on the assumption that the amount of tax covered under the Exemption Certificate is not payable by the taxpayer at the end of the tax year. However, nothing is final till the assessment takes place at the end of the year and even thereafter the department enjoys the power to amend the assessment order under Section 122 of the Ordinance and take penal action if a case of evasion of tax is made out. It is in this background that the word “exempt” used in Section 159(1)(a) is to be considered. If the word “exempt” is to be given its literal, generic meaning, it means:- “to release, discharge, waive relieve from liability”⁹ or “if somebody is exempt from something, they are not affected by it, do not have to do it, pay it.”¹⁰ This literal and generic meaning of the word “exempt” meets the purpose of Section 159 and creates the legislative space to easily accommodate both tax exemption and tax credit into its fold. There is no denying the fact that in pith and substance both tax credit and tax exemption reduce the tax liability of the taxpayer in varying degrees and, therefore, fall within the scope of the said provision. The nuance between the two terms (discussed above) is immaterial, because the taxpayer stands *exempt* from the payment of tax at the end of the day in both the cases. Therefore, the phrase “exempt from tax” in Section 159(1)(a) of the Ordinance not only takes under its fold “tax exemption” under the Ordinance but also “tax credit” under the Ordinance. Further, tax exemption can be absolute or partial, such is the case with tax credit and can be easily verified by the Commissioner before granting the Exemption Certificate. In case of the taxpayer drawing income from other sources other than from the income arising from the newly established industrial undertaking, the said tax shall be duly paid by the taxpayer at the end of the income year. As explained earlier, if there is an error or miscalculation or the

⁹ Black’s Law Dictionary, Sixth Edition. P-571.

¹⁰ Oxford Advanced Learner’s Dictionary Eighth Edition. P-529.

Exemption Certificate is wrongly issued beyond the limit of tax credit available to the taxpayer, the matter can be rectified under Section 122 of the Ordinance, hence the apprehension of the department that the issuance of Exemption Certificate will impinge upon the tax payable by the taxpayer from the other sources is unfounded and premature.

14. It is important to give support to the legislative desire behind Sections 65D and 159 of the Ordinance. These provisions extend fiscal incentives for boosting our economy and must receive progressive interpretation advancing the legislature intent.

15. Reference to SRO 947(1)/2008 dated 05.09.2008 by the Commissioner in the impugned order is out of context. First, the notification pre-dates Section 65D which was introduced in the year 2011. Second, the Commissioner enjoys an independent, substantive and statutory power under Section 159(1) of the Ordinance to issue an exemption certificate or lower rate certificate simply on an application made to him in wiring. Third, for the sake of argument, even Clause (v) (a) of the said Notification supports the case of the petitioner and brings into sharp focus the understanding of the FBR regarding the scope of Section 159(1). It states:

(v) The Commissioner, however, shall issue exemption certificate subject to the following conditions, namely:

(a) in the case of new industrial undertaking, the taxpayer is not likely to pay any tax on his income from the business under the Ordinance, in the tax year in which import is made.”

A taxpayer enjoying 100% tax credit ‘is not likely to pay any tax on his income from the business’ and can be considered under Section 159(1) of the Ordinance.

16. From the above discussion it is now clear that *tax exemption* and *tax credit* are two sides of the same coin, at least when it comes to Section 159(1) of the Ordinance. Both these taxation tools reduce the tax liability of the taxpayer. The facility under Section 159(1) is to

relieve the taxpayer from the burden of paying advance tax or withholding tax when at the end of the tax year the taxpayer is not likely to pay tax to this extent.

17. The above interpretation also passes the test of constitutionality. If, Exemption Certificate is allowed in cases of *tax exemption* but declined in cases of *tax credit*, when both the facilities exempt the taxpayer from tax under the Ordinance, such an application of Section 159(1) will amount to *ex-facie* discrimination and will offend article 25 of the Constitution of the Islamic Republic of Pakistan, 1973, which cannot be permitted. It is also settled law that any statutory ambivalence or ambiguity must be resolved in favour of the taxpayer.

18. The submission of the learned counsel for the respondent-department that tax credit is restricted to the taxable income arising from the industrial undertaking only and does not cover any other source of income is correct. This issue can be easily addressed by the Commissioner while considering to issue the Exemption Certificate under Section 159(1)(a) of the Ordinance as the same can be issued once the Commissioner is satisfied that the amount in question arises from the industrial undertaking and is “exempt” from tax. In any case the entire taxability of the taxpayer is to be reviewed at the time of assessment and the department is equipped with the power to amend the assessment, if required.

19. For the above reasons, the case of the petitioner falls under Section 65D and is entitled to an Exemption Certificate, subject to the *satisfaction* of the Commissioner concerned. The petitioner is directed to approach the concerned Commissioner with a written request for the issuance of Exemption Certificate, which shall be issued to the petitioner, in accordance with law after the satisfaction of Commissioner concerned in terms of Section 159 of the Ordinance. Exemption Certificates issued by the Commissioner on the basis of the interim order passed by this Court will also be reconsidered in the light of this judgment.

20. This writ petition is allowed in the above terms with no orders as to costs.

(Syed Mansoor Ali Shah)
Judge

A.W.

APPROVED FOR REPORTING.