THE HIGH COURT OF SINDH AT KARACHI

I.T.R.A. No.537 of 2010

Date | Order with Signature(s) of Judge(s)

Present:

AQEEL AHMED ABBASI, J.
ABDUL MAALIK GADDI, J.

1. For orders on CMA No.590/2010
2. For hearing of Main Case.

Date of Hearing : 04.10.2016

Date of Order : 04.10.2016

Mr. Muhammad Aqeel Qureshi Advocate for Applicant.

O R D E R

Aqeel Ahmed Abbasi, J. **–** Through instant reference application, the applicant has proposed the following questions, which according to learned counsel, are questions of law arising from the impugned order dated 17.04.2010 passed by the learned Appellate Tribunal Inland Revenue (Pakistan), Karachi, in Income Tax Appeal No.868/KB of 2010 (tax year 2008):-

> "(1) Whether the learned Appellate Tribunal Inland Revenue was justified to confirm the order of learned Commissioner Inland Revenue (Appeals) who ignored the provisions of section 128(5) of the Income Tax Ordinance, 2001?
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> (2) Whether the learned Appellate Tribunal Inland Revenue was justified to ignore the provisions of section 128(5) of the Income Tax Ordinance, 2001?
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> (3) Whether the learned Appellate Tribunal Inland Revenue was justified to confirm order of learned Commissioner Inland Revenue (Appeals) who had accepted the documentary evidences which were not

produced before the Officer as per section 128(5) of the Income Tax Ordinance, 2001?

(4) Whether the learned Appellate Tribunal Inland Revenue was justified to confirm that no notice u/s 122(9) of the Income Tax Ordinance, 2001 was issued when the fact is discussed in detail at page-03 of the order of the officer?"

2. Learned counsel for the applicant has read out the proposed questions, impugned order passed by the Appellate Tribunal Inland Revenue in the instant case as well as the orders of the two authorities below and submits that Appellate Tribunal Inland Revenue was not justified to confirm the order of Commissioner Income Tax (Appeals) while confirming deletion of addition made under Section 111(1)(b) of the Income Tax Ordinance, 2001 by accepting the balance sheet, which was not produced by the respondent before Taxation Authority, therefore, it has been prayed that the impugned order may be set-aside and the questions proposed may be answered in favour of the applicant and against the respondent.

3. We have heard learned counsel for the applicant, perused the impugned order passed by the Appellate Tribunal Inland Revenue as well as the orders of two authorities below. It has been observed that addition made by the Taxation Officer has been deleted by the Commissioner Income Tax (Appeals) vide order dated 31.08.2009 after detail scrutiny of the facts and on the basis of material available on record of the Taxation Officer, whereas, it has been categorically held that the balance sheet was available on record towards certain contentions of the respondent. The Appellate Tribunal Inland Revenue has also examined such facts in detail in concurred with the view of Commissioner Income Tax

(Appeals) while confirming deletion of the addition made under Section 111(1)(b) of the Income Tax Ordinance, 2001, however, all legal grounds which have been detailed in the impugned order in Para Nos.6 to 8, which are reproduced hereunder for the sake of brevity:-

> "6. As already mentioned the claim of the department is that the balance sheet was never supplied at the time of assessment hence its entertainment at the stage of the CIT (A) is not valid. On the other hand the findings of the CIT (A) is clear and while deleting the addition the CIT (A) has mentioned clearly that the balance sheet is on record. The argument that CIT (A) should not have entertained it as an additional evidence, therefore, cannot help. Similarly, if the accounts clearly indicate that the receipt in bank dated 10-07 and 23-07-2007 respectively for the two deposits of Rs.14,00,000/- and Rs.11,00,000/- stand reported in the previous year's sale, there is no reason for its addition during this year on its realization in bank. The same is the position of the contra entry in the bank. Amount was deposited and the bank gave its credit. It was than reserved for some technical reason and was later again credited after final clearance. This obviously could not be added twice while totaling the deposit. The facts are so obvious and clear that the department's point of view appears to be as an un-necessary effort.
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> (7) Even otherwise the simple issuance of notice u/s 129 (9) after doing audit of the assessee was not enough to further proceed in the matter under law. Before invoking the provisions of Section 111(1) the revenue department was required to acquire jurisdiction under the provisions of section 122 (5). There is no other provisions in law which permits assessing officer to modify or reassess the already assessed return of income before establishing that his income is either under assessed or assessed at to low

rate etc: as is provided in 122 (5). The addition u/s 111 is a subsequent stage on which the assessing officer should not directly reach before crossing the barrier and fulfilling the requirements for cancelling the deemed assessment order u/s 120 in terms of section 122 (5). The assessing officer, therefore, was required to first determine through audit that the deemed assessment is under assessed etc. in terms of section 122 (5) or otherwise erroneous and prejudicial to the interest of revenue as provided u/s 122 (5A). There is no other method to modify or reassess a deemed assessment under the provisions of section 122 before exercising jurisdiction provided u/s 122 (5) and 122 (5A) on the basis and circumstances mentioned in these provisions separately. The matter has already been discussed in a number of cases including ITA No.346/LB/2010 (Tax year 2008) re: CIR Vs. Dr. Yasmin Rashid in which further reliance has been placed on the judgment of (2006) 94-Tax-84 (H.C. Kar.) Fauji Oil Terminal & Distribution Co. Ltd. Karachi vs. Additional Commissioner/Taxation Officer-A, Audit Division Karachi and 2 others. The relevant para of the same is as follows:-

> "Thus, an assessment order or revised assessment order issued or taken/treated as issued can be amended by invoking original jurisdiction under sub-section (5) of section 122, on fulfillment of conditions specified therein, and on no other ground. Such assessment orders can be revised by invoking original jurisdiction u/s 122(5A). There is no other ground or method for amendment of an assessment order issued."

(8) This legal flaw in the assessment is in addition to the facts mentioned in the order of CIT (A) which is clear and unequivocal. The assessee has explained all the deposits and the so-called discrepancies in its accounts to the satisfaction of the CIT (A) against which no mentionable argument has been advanced before us. In addition thereof the assessment is not in strict compliance of the provision and the procedure

> provided in law which has already been explained by us in a number of our judgments as well as the superior courts. The deletion, therefore, is unexceptionable and the departmental appeal is considered of no merit."

4. From the perusal of above findings of the Appellate Tribunal Inland Revenue, it is clear that the averments made by the learned counsel for the applicant before us regarding entertaining documents at appellate stage i.e. balance sheet of the respondent in violation of Section 128(5) stands falsified. It has been further noted that two forums below have deleted addition made under Section 111(1)(b) of the Income Tax Ordinance, 2001 after discussing merits of the case by invoking correct legal provisions of Income Tax Ordinance, 2001 i.e. Section 122(5) read with Section 122(9), however, the applicant department has not proposed any questions relating to the merits of the case. Accordingly, we are of the view that instant reference application filed by the applicant department is misconceived in facts and law, whereas, the questions proposed under the facts and circumstances of the case are questions of fact and which there is concurrent findings of the two forums below, which does not suffer from any error or perversity, therefore, cannot be disturbed by this Court while exercising its jurisdiction in terms of Section 133(1) of the Income Tax Ordinance, 2001. Accordingly, we do not found any substance in the instant reference application, which is devoid of any merits, whereas, the questions proposed are question of facts, therefore, instant reference application is hereby dismissed in limine alongwith listed application.

JUDGE

JUDGE