IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, **J**.
Agha Faisal, **J**.

ITR 211 of 1991	:	Trading Corporation of Pakistan vs. Commissioner of Income Tax Karachi
ITR 219 of 1991	:	Trading Corporation of Pakistan vs. Commissioner of Income Tax Karachi
ITR 26 of 1992	:	Trading Corporation of Pakistan vs. Commissioner of Income Tax Karachi
For the Applicant	:	Mr. Haider Naqi, Advocate Mr. Iqbal Salman Pasha, Advocate
For the Respondent	:	Mr. Ameer Bakhsh Metlo, Advocate Mr. Muhammad Taseer Khan, Advocate
Date/s of hearing	:	10.03.2023
Date of announcement	:	10.03.2023

ORDER

Agha Faisal, **J**. The applicant, set up as a private limited company in July 1967 and registered under the Companies Act, 1913, being aggrieved with the orders dated 15.9.1987 and 5.3.1986 of the then Income Tax Tribunal had approached the Tribunal by way of Reference(s) proposing the following common question of law :

> "*Whether, on the facts and circumstances of the case, the learned Income Tax Appellate Tribunal was justified in holding that the Commissioner of Income Tax (Appeals) is justified in confirming the disallowance of payment made to Federal Government by the Trading Corporation of Pakistan Limited?*"

2. Briefly stated, the applicant was aggrieved vide respective assessment orders disallowing treatment as expense of payments made to the Federal Government. In appeal, the learned Income Tax Appellate Tribunal at Karachi, while hearing R.A. No.76 KB of 1987-88 (Assessment Year 1968-69), R.A. No.77 KB of 1987-88 (Assessment Year 1969-70), R.A. No.78 KB of 1987-88 (Assessment Year 1970-71), R.A. No.79 KB of 1987-88 (Assessment Year 1971-72), R.A. No.80 KB of 1987-88 (Assessment Year 1973-74), R.A. No.81 KB of 1987-88 (Assessment Year 1974-75), R.A. No.82 KB of 1987-88 (Assessment Year 1975-76), R.A. No.83 KB of 1987-88 (Assessment Year 1976-77) and R.A. No.84

KB of 1987-88 (Assessment Year 1978-79), decided the appeals against the applicant, and being aggrieved, filed Reference Applications as above.

3. It was crux of the applicant's arguments that since the shareholding of the applicant is owned by the Federal Government, therefore, the profits transferred to the Federal Government may be treated as expenses in computation to taxable income. Learned counsel insisted that this court pierce the corporate veil and give a finding of fact that equates the applicant with the Federal Government itself.

4. On the contrary, learned counsel for the respondents argued that the applicant is a corporate legal entity, with identity distinct from any shareholder(s). It was thus argued that profits transferred to the Federal Government was rightly disallowed as expense.

5. Heard and perused. It is noted that the matter pertains to assessment years starting from 1968-69 and has remained pending without much progress till date. Since the question for determination is common with respect of all the assessment orders / references, therefore, the same shall be determined vide this common order.

6. The assessment order bolstered its conclusion by recourse to authority of the superior courts and observed as follows:

> "The relevant case in this respect is of M/s. Andhra Pardesh State Road Transport Corporation v/s. I.T.O. B Ward, Hyderabad, and other Original Judgment in this case was decided by the Andhra Pardesh High Court cited as (1963) 47 I.T.R. 101 which case the Supreme Court of India confirmed. The facts of the case are that the Andhra Pardesh State Road Transport Corporation was constituted under the R.T.C. Act by a notification issued by the Andhra Pardesh, Provincial Government and they had claimed immunity from taxes. The Supreme Court that it is not immune from tax on income derived from its trading activities under article 289 of the Indian constitution on the ground that its trading activities were carried on by or on behalf of the Government of the State. The Supreme Court held that inspite of the fact that majority of the shares are owned by Andhra Pardesh Government and its activities are controlled by the State, nevertheless the Corporation has a separate personality of its own. The trading activities of the Corporation and the P&L arising therefrom is the profit and Loss of the Corporation. The income derived by the Corporation. The income derived by the Corporation on such trading activities can not be said to be the income of the State Govt. under article 289 of the Indian Constitution. The Supreme Court of India also held that there is no repugnancy whatsoever between the provision also of the Income tax Act and the R.T.C. Act so as to matsk the provisions of Income-tax inapplicable to the Corporation. They also held that a corporation constituted under the State Act though statutory was a personality of its own distinct from the State or other shareholders. It can not be said that a shareholder owned the Property of the Corporation or carries on the business with which the corporation is concerned. The State itself is one of the shareholder of the Corporation and the State can not claim that the income derived by such a Corporation from its trading activities is the State's income.

> The Supreme Court while delivering the judgment, discussed number of cases decided by the Supreme court of India on the relevant points as well as the Supreme Court of America. The Supreme Court of India Observed that if the trading activities carried on by the State corporation is sought to be brought into Article 289(1) of the Indian constitution solely as a result of the construction of article 289(2) the test on which the validity of the advocate General's must necessarily be judged is whether or not the requirements of article 289(1) is satisfied and that requirement clearly is that the income like the Property for re-exemption from Union Taxation is claimed must be the income or Property of a State. The Supreme Court further observed that the Advocate General can not derive any assistance from the American Doctrine of the exemption from taxation in regard to State instrumentalities."

The assessment order went on to refer to a myriad of authority, *para materia* to the judgment discussed above and concluded in view thereof that the relevant deduction claimed be disallowed.

7. The learned Income Tax Tribunal upheld the relevant assessment orders and observed as follows:

> "3. Now as far as the question regarding payment to the Federal Government is concerned, a Full Bench of this Tribunal has held that it was not permissible deduction. For the reasons given in the order of this Tribunal dated 5th March, 1986, and recorded in ITA 123, 124, 125/KB 1978-79 we hold that the payment made to the Federal Government in the assessment years as reproduced above was not an admissible deduction. The order of learned Commissioner of Income-Tax (Appeals) is therefore, confirmed on this issue."

8. The reliance was placed on another judgment, as referred to supra, and pertinent constituents thereof are reproduced herein below:

> "When judged in the light of this decision and two other decision and two other decisions of the Supreme Court of India, Commissioners of Income Tax, Vs. Travancore Sugar & Chemicals Ltd. (1973) 88-ITR and Poona Electic Supply Co. Vs. Commissioner of Income Tax (1965) 57-ITR 521 Annexures A & B, the facts as they emerge from the submissions made by the parties & the material available on record, are these. The appellant is a company registered under the Companies Act and like any other company it is governed by the Companies Act and its Memorandum of Association etc. The mere fact that it is a Government controlled Corporation and has to carry out the directions of the Federal Government cannot have the effect of changing its character as an independent juristic person. In the absence of any Articles of Association etc indicative of an over riding charge of the Federal Government on the Income of the appellant or any statutory obligation or agreement between the Federal Government and the corporation, it functioned as any other company, under the policy directives of the Government. It important and sold some essential goods and earned income. This income, in the absence of contractual obligations, appears to be free from any over riding charge of the Federal Government. The profits earned, or losses incurred in its business operations, although conducted under the directives of the Government, will be considered to be on its own account. The Government, in the case of this company, by virtue of holding the entire share capital, was entitled to appropriate some or all of its profits but the basic fact would remain that it first earns income and there parts with it as per

> the directives of the Government. It appears that since the very inception of the company there does not appears to be any obligation created either by statute or through as agreement so as to entitle the Federal Government to have an over riding title on the corporations income. The simple fact that now then the Corporation acts on the directives of the Government to make imports of specified items does not benefit it from earning profit. If at a later date certain payments on some basis are to be made to the Government, then, in the circumstances mentioned above, the payments will be out of the profits made by it and it will be in the nature of an application of income but it cannot be said that such portion of the income belonged to the Government before it secured to the Corporation. The income Tax Officer, in fact, before finalizing the action under 34A, gave a specific opportunity to the Corporation to show cause as to why the payments made to the Government should not be treated as its own income and subjected to tax. The relevant portion of the corporations reply is incorporated in the Inspecting Assistant Commissioners order. The whole explanation of the corporation revolves around the fact that it was a Corporation owned and controlled by the Government and that under Article 138 of the Articles of Association, it was bound to carry out the directions of the Government. In support of its contention that by acting as an agent of the Government the corporation was entitled to receive a specified amount of commission or service charges and the balance surplus belonged to the Federal Government, the appellant corporation has filed copies of 4 or 5 letters from the Ministries of Commerce and Finance directing the Corporation to deduct commission etc., and deposit the difference in the Government account. The payments so made to the Government in compliance, with the directions cannot tantamount to saying that the income belonged to the Government by virtue of a legal or contractual obligation creating an over-riding title."

9. It is noted that Section 10(2) of the Income Tax Act, 1922, provide for deductions for computation of gains and/or profits. Despite repeated queries, applicant's counsel remained unable to demonstrate as to why deduction being claimed fell within the ambit thereof. The reference to the Income Tax Act, 1922, is pertinent since the Judgment relied upon by the learned Tribunal was rendered there under.

10. The applicant was also queried whether the *para materia* provisions of the Income Tax Ordinance, 1979 provided any sanction to the contention of the applicant, however, no such provision could be identified.

11. In essence, the applicant claims an exemption, on the premise of being a Government owned company, and admits that whilst such exemption is not available thereto under any statute, however, the same may be prescribed by this Court. Needless to state that we have not been assisted with any law that empowers us to grant such an exemption and that also in our reference jurisdiction. Article 156A of the Constitution is very clear and its provisions for taxability of Government owned corporations and there is plethora of case law[1] that follows in such regard. The applicant's counsel has failed to create any exception for the

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[1] *2019 PTD 1734; 2019 PTD 587.*

applicant to be treated otherwise, in conformity with the law that has been placed before us.

12. In view hereof, the question submitted for determination is answered in the *affirmative*, in favour of the respondent department and against the applicant.

13. The paper book makes reference to another question of law being:

> "Whether the Income-Tax Appellate Tribunal was justified on the facts and circumstances to hold that the order passed by the Inspecting Assistant Commissioner under section 34A for assessment year 1972-73 was without jurisdiction and, therefore, of no effect?"

Apparently this question was prepared by the department in respect of the assessment year 1972-73.

14. A perusal of paper book demonstrates that no appeal with respect to the assessment year 1972-73 has been submitted before us in our reference jurisdiction. The title page of the reference makes reference to assessment years 1968-69 till 1978-79, however, the assessment order/appeal in respect of assessment year 1972-73 is absent there from. Paragraph 15 of the reference application states that the documents submitted are as listed in the relevant appendix and perusal thereof demonstrates that relevant assessment year is not included therein either. We had asked respective learned counsel to assist us as to whether relevant appeal for the assessment year had been placed before us and they also concurred with our observation that the same was conspicuously absent.

15. In such regard there appears no reason to answer the said question.

16. Office is instructed to send a copy of this order to the learned Appellate Tribunal in terms of Section 133(5) of the Income Tax Ordinance, 2001.

JUDGE

JUDGE

Khuhro/PA