

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Income Tax Reference Application ("ITRA") No. 493 / 2009

Date _____ Order with signature of Judge _____

FRESH CASE

For hearing of main case.

14.02.2023.

Mr. Muhammad Aqeel Qureshi, Advocate for Applicant.

Through this Reference Application, the Applicant has impugned order dated 14.01.2009 passed in ITA No. 438/KB/2008 for Assessment Year 1993-94 by the then Income Tax Appellate Tribunal at Karachi proposing the following question of law:-

"Whether on the facts and under the circumstances of the case, the learned ITAT was justified in upholding the decision of CIT(A) to delete the penalty levied under Section 111(2)(b) of the Repealed Income Tax Ordinance, 1979".

Learned Counsel for Applicant submits that expenses claimed by the Respondents were disallowed; hence, proceedings were initiated under Section 111(2)(b)¹ of the Income Tax Ordinance, 1979 (since repealed) and an order was passed for imposition of penalty and therefore, the Commissioner Appeals as well as the Tribunal were misdirected in deleting the penalty so imposed by the Taxation Officer.

We have heard the Applicant's Counsel and perused the record. As per record available it appears that during the course of assessment proceedings it was alleged that the respondent had claimed certain expenses which according to the taxation officer were false and inaccurate; hence, the same were added into the total income as concealed income of the Respondent and an order was passed under Section 62 of the Ordinance. From perusal of the record and the order passed by the Tribunal as well as the Commissioner Appeals in the instant matter, it appears that the original order under Section 62 of the Ordinance was subsequently amended and part of the alleged addition was deleted and some of it was set aside; hence, as a consequence

¹ 111. **Penalty for concealment of income, etc:-**

(2) For the purposes of sub-section (1) and Section 119, concealment of income or the furnishing of inaccurate particulars of income shall include-

(a) -----
(b) claiming any deduction for, or showing, any expenditure not actually incurred [; and]
(c) -----

thereof, the original order never remained in field nor was confirmed in its entirety. Before us, it is not the case of the Applicant that such original order remained in field; rather it stood amended, whereas, no record of such original proceedings have been placed on record to rebut such factual determination recorded against the Applicant by the two forums below. Insofar as the proceedings under section 111(2) (b) of the Ordinance are concerned, it is noted that the taxation officer did not took pains to first determine the actual guilt warranting a penal action; and secondly, also failed to take note of the provisions of Sub-Section 2(A)² of Section 111 of the Ordinance, which creates an exception that mere disallowance of any expenditure shall not constitute concealment of income or furnishing of inaccurate particulars of income, unless it is proved that the assessee deliberately claimed deduction in respect of such expenditure not actually incurred by him. This aspect of the matter was never attended to by the Taxation Officer while finalising the proceedings under Section 111(2)(b) *ibid*.

It is settled law that existence of *mens-rea* was a mandatory condition for levying any penalty under Section 111 of the 1979 Ordinance, whereas, department must establish the same before levying any penalty³. It is also settled that burden to prove such act of an assessee is also on the department⁴. Mere failure to determine correct income and pay tax accordingly, until it is a result of fraud or wilful gross neglect, would not *ipso-facto* warrant imposition of penalty⁵. It is also settled that falsity of an explanation by the taxpayer is not in and of itself a cause to mandatorily impose penalty under the Ordinance. It is hardly necessary to emphasise that the assessee is not called upon to prove his innocence; it is for the Department to establish his guilt⁶. Penalty can be imposed only when the revenue establishes a case indicating dishonest motive of an assessee in filing a return⁷. It is further settled that for the purposes of imposition of penalty, the assessee must be conscious of having concealed the particulars of his income⁸. Lastly we may observe, that the two forums below have also recorded a finding of fact in favour of

² [(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), where any item of receipt declared by the assessee is claimed by him as exempt from tax, or where any deduction in respect of any expenditure is claimed by him, mere disallowance of such claim shall not constitute concealment of income or the furnishing of inaccurate particulars of income, unless it is proved that he assessee deliberately claimed exemption from tax in respect of the aforesaid item of receipt or claimed deduction in respect of such expenditure not actually incurred by him.]

³ 2007 PTD 901 (Commissioner of Income Tax v Habib Bank Limited)

⁴ 2002 PTD 388 (Commissioner of Income Tax v Civil Aviation Authority)

⁵ 1994 PTD (Syed Akhtar Ali v Commissioner of Income Tax)

⁶ Per C.J.Chagla in Commissioner of Income Tax v Gokuldas Harivallabhdas (1958) 34 ITR 98

⁷ Muhammad Muslim v Commissioner of Income Tax [(1980) 42 Tax 129 (H.C. Karachi)]

⁸ Anantharam Veerasinghaiah & Co v CIT [1980] 123 ITR 457 (SC)

the Respondent, which otherwise does not warrant any interference in this advisory jurisdiction so as to upset such finding and come to the conclusion that penalty ought to have been sustained. It is also settled that for imposition of penalty it is not sufficient that the assessee's explanation was not satisfactory or was even false and that an evidence independent of assessee's explanation should be on record before penalty could be imposed⁹. Even if an assessee agrees to a higher assessment than the returned income, it is not sufficient to levy penalty, whereas, the position may be different if the assessee admits that the addition may be treated as its concealed income, in which case the department need not establish anything more to levy penalty¹⁰. Before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars¹¹.

In view of hereinabove facts and circumstances of the case and the law settled, and on perusal of the order passed by the learned Tribunal as well as Commissioner Appeals, we are of the considered view that the deletion of the penalty was fully justified in the facts and circumstances of the case and therefore, while answering the question against the Applicant and in favour of the Respondent, this Reference Application is dismissed in *limine*. Let copy of this order be issued to the Income Tax Appellate Tribunal (now Inland Revenue Tribunal) as required under the Ordinance.

J U D G E

J U D G E

Arshad/

⁹ Commissioner of Income Tax v Kamran Steel Re Rolling Mills [1989] 60 Tax 13 (H.C. Lahore)]

¹⁰ (1976) 102 ITR 830 Commissioner of Income Tax, Andhra Pradesh v. C.V.C. Mining Company, Gudur

¹¹ Commissioner of Income Tax v Anwar Ali (AIR 1970 SC 1782)