

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
ITRA No. 210 of 2024

Date	Order with signature of Judge
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- 1) For orders on office objection Nos.10, 26 & 27.
- 2) For hearing of Misc. No. 1695/2024.
- 3) For regular hearing.

29.10.2024.

Mr. Ijaz Ahmed Zahid, Advocate for the Applicant.
Dr. Huma Sodhar, Advocate for the Respondent.

On the last date of hearing following order was passed;

Both learned Counsel are directed to go through the judgment passed by this Court in the case of COMMISSIONER INLAND REVENUE, ZONE-IV, vs. S. M/S. KIRTHEER PAKISTAN B.V. (ITRA No.2019 of 2011) in respect of proposed question (A), as to whether the impugned notice under Section 221 of the Income Tax Ordinance, 2001 is in accordance with law or not?

To come up on 29.10.2024

2. In response learned counsel appearing on behalf of the Department submits that the facts in the case **KIRTHEER PAKISTAN B.V.**¹ were somewhat different and specially Question (A) in the instant matter is not covered by that judgment, and therefore, the matter must be decided on its own merits by the Court.

3. The Applicant through this Reference Application has impugned order dated 14.06.2024 passed under Section 129(1) of the Income Tax Ordinance, 2001 (“Ordinance”) by the Commissioner (Appeals) proposing various Questions of law; however, for the present purposes Question Nos. (A) & (B) are relevant, which reads as under:

¹ **COMMISSIONER INLAND REVENUE, ZONE-IV, vs. S. M/S. KIRTHEER PAKISTAN B.V.** (order dated 29.3.2014 in ITRA No.219 of 2011 against which leave refused by the Supreme Court in CP NO 190-K/2014 Dated ON 22.7.2014)

- “(A) Whether in the facts and circumstances of the case, the assessment order (deemed to have been passed under Section 120 of the Income Tax Ordinance, 2001 upon filing of the return) can be amended in the exercise of powers of rectification under Section 221 of the Income Tax Ordinance, 2001?”
- (B) Whether in the facts and circumstances of the case, issues involving interpretation of the law and the relevant documents including Implementation Agreement, Master Agreement and Power Purchase Agreement as amended from time to time can be dealt with in the limited scope of Section 221 of the Income Tax Ordinance, 2001?”

4. Heard learned counsel for the parties and perused the record. It appears that Respondent had issued a notice under Section 221(2) of the Ordinance to the Applicant and the precise allegations read as under:

“Respected Taxpayer,

In my opinion the assessment framed for the said year requires rectification u/s 221(1) due to the following reasons:

You have claimed adjustable tax u/s 151 of Rs.102,921,960 but the corresponding worked track income of Rs.686,146,400 has not been offered to normal tax.

Whereas the tax deducted u/s 151 of the Ordinance is adjustable tax against the normal income tax liability arising out of corresponding receipts u/s 151 of the Ordinance. Therefore, an explanation is warranted to explain you position, else the normal tax liability shall be determined as under.”

5. The above allegations / opinion of the concerned Commissioner does not appear to be a case falling within the contemplation of Section 221(2) *ibid* inasmuch it does not appear to be a case of any mistake apparent on record; hence could not have been rectified. In somewhat identical facts and law (though disputed by the Respondents Counsel) Section 221 of the Ordinance was interpreted by a Division Bench of this Court comprising one of us (Muhammad Junaid Ghaffar, J.) in **KIRTHEER PAKISTAN B.V. (Supra)** and the relevant question of law and the finding of the Court in that case was as under:

- “2. Whether on the facts and circumstances of the case the learned Appellate Tribunal Inland Revenue was justified in holding that the WWF cannot be levied through an order passed under Section 221 of the Income Tax Ordinance, 2001 without there being any mistake apparent on record?”

“7. As would be seen from the above provision that in this case the Commissioner may by an order in writing amend any order passed by him to rectify any mistake apparent from the record on his or its own motion or any mistake brought to his or its notice by a taxpayer. In the instant matter the return of income filed by the respondent is deemed to be an assessment order under Section 120 of the Ordinance and by virtue of this deeming provision the assessment order is an order passed by the Commissioner. In the instant matter the jurisdiction has been exercised by the Commissioner or the taxation officer in terms by Section 221 of the Ordinance for rectification of mistake on the basis of such powers conferred under Section 221 of the Ordinance; **but it must be kept in mind that for such rectification, the condition precedent is, that there must be a mistake apparent from the record. Whereas, what the taxation officer has done in the instant matter is, perhaps an issue which required interpretation of the relevant law as well as PCA entered upon by the respondent with the Government of Pakistan. It neither pertains, either to a calculation mistake or of a wrong application of the tax rate, which perhaps could be termed as a mistake apparent from the record while arriving at the taxable income of the respondent, while filing the return/deemed assessment order. The jurisdiction which is allowed to be exercised in terms of Section 221 of the Ordinance is very limited, restricted and could not be stretched or extended by the taxation officer to adjudicate the same to the detriment of the party having substantial effect on the liability of the tax or otherwise.** In our view, if this is permitted and the taxation officer is allowed to rectify assessment order under Section 221 of the Ordinance in such manner, then **the provisions of Section 122 of the Ordinance would be redundant which caters to, and has an inbuilt mechanism for amendment of assessment orders under various different situations.** After examining the entire record placed before us we are of the view that the issues so raised by the taxation officer, could not be said to be a mistake apparent on record, and therefore, in the given facts and circumstances of the instant case, the taxation officer had no jurisdiction in the matter to exercise the powers under Section 221 of the Ordinance for rectification of the deemed assessment order. For this reason we had answered the reframed question No.2 in the affirmative against the applicant and in favour of the respondent as aforesaid.”

6. From perusal of the above observations it is clear that for a case to be covered in terms of Section 221 of the Ordinance, there has to be a mistake apparent on the record, whereas in this case, the notice by itself clearly shows that it is not so; rather an attempt has been made to interpret a provision of law (in this case claim of exemption by the Applicant in terms of clause 132 of Part-I of the Second Schedule of the Ordinance), and therefore, at best, it could have been a case of making amendment in the deemed assessment order under Section 12 of the Ordinance and not rectification of the same. In the cited case an attempt was made by the department to add the amount of Worker Welfare Fund on the Income of the taxpayer, and it was held by the Court that it cannot be done under Section 221 of the Ordinance. We are of the considered view that the issue in hand, is in fact even on a lower pedestal as compared to the issue in the cited case, inasmuch as here it appears to be a question of interpretation and denial of some exemption so claimed by the Applicant; hence the same will not fall within the contemplation of Section 221 of the Ordinance. The above observations and the interpretation of Section 221 *ibid*, fully applies in this case and despite best efforts, no case for having any contrary view has been made out. Accordingly, Question (A) & (B) are answered in favour of the Applicant and against the Respondent, whereas the other questions need not be answered. Consequently, the orders passed by the forums below are hereby set aside. The Reference Application stands allowed in these terms. Let copy of this order be issued to the Commissioner (Appeals) Inland Revenue in terms of Section 133(8) of the Ordinance.

J U D G E

J U D G E

Nasir/